

THE HONOURABLE SMT. JUSTICE P.SREE SUDHA

APPEAL SUIT No.701 & 443 of 2013

JUDGMENT:

A.S.No.701 of 2013 is filed against the order of the trial Court in I.A.No.157 of 2011 in O.S.No.39 of 2010 dated 17.07.2013.

2. In pursuance of Preliminary Decree the Final Decree was allowed. The Court allotted shares to the plaintiff and second defendant by way of lottery dated 05.06.2013. The items No.1 to 4 of the suit schedule property shown as A, C, E, G and I was allotted to plaintiff towards half share and property shown as B, D, F, H and J was allotted to defendant No.2 towards half share. It was held that plaintiff is entitled to recover the net income over the suit schedule property from the defendant No.2 in pursuance of the preliminary decree from the date of suit till date of possession (towards half share). In fact, plaintiff is at liberty to ascertain the income over the properties by filing the separate application for execution of the decree.

3. A.S.No.443 of 2013 is filed against the order of the trial Court in I.A.No.109 of 2012 in O.S.No.39 of 2010 dated

07.02.2013. The petitioner in I.A.No.109 of 2012 is the daughter of the first respondent and second respondent is her brother. In fact, she filed suit for partition and preliminary decree was passed on 19.11.2010 in which the property was divided into 1/3rd share to each of them. Later the Commissioner was appointed for division of property and demarcation, accordingly he submitted his report, basing on the report final decree was also passed. Then the first respondent/father died, as such she filed I.A.No.109 of 2012 to “substitute two instead of three after the word dividing and before the word equal in the first sentence of the second Para of preliminary decree (i.e, last Para of first page).”

4. The trial Court after hearing arguments of both sides and also considering the other factors allowed the amendment. Aggrieved by the said order A.S.No.443 of 2013 is preferred by the brother of the plaintiff and mainly contended that Court cannot modify the trial Court decree by way amendment. He also stated that there was partition on 15.06.1989, it was reduced into writing and it was acted upon as such present amendment is not maintainable. In the event of death of respondent No.1 shares cannot be decided by way of

amendment without independent adjudication. He intended to prefer an appeal against the dismissal of C.M.A.No.7 of 2012 in I.A.No.634 of 2011 filed under Order 9 rule 13 of C.P.C and thus the changes in the preliminary decree will create multiplicity of litigation. He also stated that he is entitled for his father share as per Will deed dated 29.10.2010. Therefore, requested the Court to set aside the order of the trial Court. He also preferred A.S.No.701 of 2013 against the order of the trial Court in I.A.No.157 of 2011 in O.S.No.39 of 2010 on the same ground.

5. Heard arguments of both sides. Admittedly, the parties herein are sister, father and brother. After passing of the final decree father expired, sister requested the Court to amend the shares as $1/2$ to each of them (Brother and Sister) instead of $1/3$ to each of them. The trial Court observed that after passing of the preliminary decree no appeal was preferred. Though respondent filed an application in I.A.No.634 of 2011 to condone the delay of 363 days it was dismissed for default on 09.02.2012 against which filed another petition under Order 9 rule 9 of C.P.C and the same was also dismissed. Against the orders in I.A.No.634 of 2011, C.M.A.No.7 of 2012 was preferred and it

was also dismissed. The respondent filed an application to file additional counter along with Will deed dated 29.10.2010 but it was dismissed, against which he preferred C.M.A and the same was also dismissed as such the argument of the appellant herein that there was prior partition and Will deed was executed by his father cannot be accepted at this stage. He might have filed the said documents during pendency of the suit for partition but he failed to do so. A final decree was passed as per the report of the Commissioner, the father of the appellant died on 04.02.2012. In the application filed for an amendment the appellant also contested the matter and raised above objection in the trial Court, considering the same allowed the application as the parties herein are brother and sister and they are also entitled for half share to each of them in the share of their father, hence this Court finds no reason to interfere with the amendment application allowed by the trial Court.

Hence both the appeals are dismissed confirming the order of the trial Court in I.A.No.157 of 2011 dated 17.07.2013 & I.A.No.109 of 2012 dated 07.02.2013 in O.S.No.39 of 2010.

Miscellaneous petitions pending, if any, shall stand closed.

JUSTICE P.SREE SUDHA

DATED: 15.12.2022

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