



S.A.No.867 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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DATED : 29.11.2023

CORAM

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A.No.867 of 2017

1.A.Murugesan

2.M.Arun Arumugham

... Appellants

vs.

1.S.Vijayakumari

2.S.Sivasankaran

3.A.Angamuthu

4.A.Senthil

5.A.Ravichandran

6.Pankajam

7.Hemalatha

8.Sasikala

... Respondents

PRAYER: Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the Judgment and Decree dated 31.07.2017 made in



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A.S.No.8 of 2016 on the file of First Additional District Court, Erode by upholding the Judgment and Decree dated 12.10.2015 made in O.S.No.431 of 2012 on the file of Principal Sub-Ordinate Court, Erode.

For Appellants : Mr.V.P.Sengottuvel
Senior Advocate
M/s.K.Indu Priya

For R1 and R2 : Mr.N.Manokaran

For R3 to R8 : Given up

J U D G E M E N T

The plaintiffs are the appellants. They filed a suit for partition claiming 1/4th share in the suit property. The Trial Court decreed the suit as prayed for. Aggrieved by the same, the respondents 1 and 2/defendants 6 and 7 preferred an appeal. The First Appellate Court reversed the findings of the Trial Court and dismissed the suit. Aggrieved by the same, the appellants/plaintiffs are before this Court.

2. According to the appellants/plaintiffs, the suit properties are family properties of appellants and respondents. One Arumugam Pillai was



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the common ancestor of the parties. He had four sons by name Angamuthu, late Krishnan, late Shanmugasundaram and 1st appellant-A.Murugesan. The 2nd appellant is the son of 1st appellant. The appellants herein earlier filed a suit for partition in O.S.No.67 of 1982 on the file of Principal Subordinate Court, Erode against the respondents 3 to 5 herein, late Krishnan and Shanmugasundaram. In the said suit, a compromise decree was passed and the same was marked as Ex.A1. As per the compromise decree, 'A' schedule to the compromise decree was allotted to the share of 1st appellant-A.Murugesan. 'B' schedule to the said decree was allotted to the share of Krishnan, father of defendants 4 and 5. 'C' schedule to the said decree was allotted to the share of Shanmugasundaram, father of defendants 6 to 8. 'D' schedule to the said decree was allotted to the share of 1st defendant-Angamuthu. The schedule 'E' to the said decree was retained as a common property of all the four brothers namely A.Murugesan, Krishnan, Shanmugasundaram and Angamuthu. It was the specific case of the appellants that they were entitled to 1/4th share in 'E' schedule to the compromise decree along with pathway right to reach the said property shown as 'F' schedule to the said decree. The present suit has been filed in respect of property in 'E' schedule to the compromise decree. While giving



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description of the present suit property, the appellants also included easementary right to reach the above said 'E' schedule property from above said 'F' schedule pathway through fifteen feet pathway over the land allotted to Shanmugasundaram.

3. The suit was resisted by the respondents by denying pathway rights claimed by the appellants to reach above said 'E'schedule property from F-schedule property through the land allotted to Shanmugasundaram. It was averred that suit was filed with intention to usurp the property allotted to Shanmugasundaram, which was in existence after end of common road marked as 'F' schedule in the compromise decree plan. It was specifically claimed by the respondents that appellants were not entitled to claim any pathway right over the properties of defendants 6 to 8. However, the respondents admitted 1/4th share of the appellants over 'E' schedule to the compromise decree.

4. On these pleadings, the parties went to trial. The 1st plaintiff was examined as PW.1 and two other witnesses were examined as PW.2 and PW.3. On behalf of appellants, 5 documents were marked as Exs.A1 to A5.



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The 6th defendant was examined as DW.1 and one Dharmalingam was examined as DW.2. On behalf of the respondents, no documentary evidence was let in. The Trial Court appointed an Advocate Commissioner. His report and plan were marked as Exs.C1 and C2. The photographs and CD submitted by the Advocate Commissioner were marked as Exs.C3 and C4.

5. The Trial Court on appreciation of evidence available on record, came to the conclusion that the appellants were entitled to preliminary decree for partition of 1/4th share and accordingly, decreed the suit. Aggrieved by the same, the respondents 1 and 2/defendants 6 and 7 preferred an appeal in A.S.No.8 of 2016 on the file of I Additional District Court, Erode. The First Appellate Court found that though appellants entitled to 1/4th share in suit property, the pathway right claimed by them in the property of Shanmugasundaram 'C' schedule property allotted to the share of Shanmugasundaram, father of defendants 6 to 8, in the compromise decree, to reach 'E' schedule property was not available for the appellants. The First Appellate Court observed that instead of seeking declaration of pathway right over the land allotted to Shanmugasundaram, the appellants cleverly sought for partition of 1/4th share by including alleged pathway



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right over the property allotted to Shanmugasundaram in the description of the property. The First Appellate Court also observed that appellants are claiming easementary right over the land allotted to the share of Shanmugasundaram without necessary pleadings and prayer for declaration of alleged pathway. It further held that the suit for partition filed by the appellants over the property described in 'E' schedule to the compromise decree including pathway right over 'C' schedule property allotted to Shanmugasundaram was not maintainable. The First Appellate Court found that description of the property in the schedule to the plaint was not properly given as pathway right over the Shanmugasundaram property was also included in the schedule. Hence, dismissed the suit in *toto*. Aggrieved by the same, the plaintiffs have come by way of this second appeal.

6. Mr.V.P.Sengottuvel, learned Senior Counsel appearing for the appellants/plaintiffs submitted that as far as 1/4th share of the appellants over the 'E' schedule to the compromise decree concerned, the same was not disputed by the respondents. However, what was disputed by the respondents was only easementary right to reach suit property ('E' schedule in compromise decree) from 'F' schedule to the compromise decree through



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'C' schedule to the compromise decree, which was allotted to the share of Shanmugasundaram. The learned Senior Counsel by taking this Court to the plan appended to the compromise decree, submitted that unless the appellants are given pathway right to reach 'E' schedule property from 'F' schedule property through "C" schedule allotted to the share of Shanmugasundaram under compromise decree, the appellants/plaintiffs cannot reach 'E' schedule property, therefore, the said pathway right is a necessity to enjoy his share in E-schedule property.

7. On the basis of the submission made by the learned Senior Counsel appearing for the appellants, the following substantial question of law is formulated for consideration in this second appeal,

“Whether the First Appellate Court is justified in dismissing the suit in toto including the claim of 1/4th share by the appellants over the E-schedule property described under compromise decree Ex.A1 overlooking the admissions of contesting respondent admitting the right of the appellants to 1/4th share in the said E-schedule property?”



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8. Mr.N.Manokaran, the learned counsel appearing for the respondents 1 and 2 was heard on the said substantial question of law. The learned counsel by taking this Court to the pleadings of respondents 1 and 2, submitted that respondents even in their pleadings made it clear that appellants and respondents 1 and 2 along with other sharers were entitled to 1/4th share each in the property described as 'E' schedule to Ex.A1-compromise decree. However, the learned counsel submitted that the claim of the appellants seeking right of pathway over the land allotted to share of Shanmugasundaram, father of respondents 1 and 2 under 'C' schedule to Ex.A1 is untenable in law, when no such right was conferred under compromise decree. The learned counsel also submitted that appellants did not plead any easement right by necessity and simply inserted the right of pathway in the schedule to the plaint and therefore, the First Appellate Court is justified in negating the appellants' claim of pathway over the land allotted to share of Shanmugasundaram.

9. The appellants have not pleaded easement of necessity over the land allotted to the share of Shanmugasundaram. They also failed to seek declaration of their alleged easementary right over the land allotted to share



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of Shanmugasundaram. In such circumstances, the appellants are not justified in simply including the easementary right of pathway in the description to the suit schedule. As far as 1/4th share of the appellants over the suit properties ('E' schedule to the compromise decree) is concerned, the same is undisputed. The respondents have no objection for granting a preliminary decree for partition in respect of 'E' schedule to the compromise decree. They said so even in their written statement. However, they are only objecting to the pathway right claimed by the appellants over the land allotted to Shanmugasundaram under 'C' schedule to the compromise decree.

10. In such circumstances, in the absence of specific plea regarding easement of necessity and prayer for declaration of said easementary right, the appellants are not entitled to claim pathway right over the property allotted to the share of Shanmugasundaram by including the said pathway in the schedule to the present plaint. Therefore, the judgement and decree passed by the First Appellate Court to the extent of negating the appellants claim of pathway right over the 'C' schedule property allotted to the share of Shanmugasundaram under Ex.A1 is confirmed. Since the



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respondents 1 and 2/defendants 6 and 7 said no objection, even in their pleadings for granting a decree for partition in respect of 'E' schedule to Ex.A1, the appellants are entitled to decree for partition in respect of 'E' schedule alone. To that extent, the judgement and decree passed by the First Appellate Court is set aside and second appeal is partly allowed.

In Nutshell:-

- (a) The Second Appeal is partly allowed by setting aside the judgement and decree passed by the First Appellate Court in so far as it negated the claim for partition in 'E' schedule to the compromise decree marked as Ex.A1.
- (b) The appellants/plaintiffs are entitled to 1/4th share in the suit property (described as 'E' schedule under Ex.A1-compromise decree), excluding right of pathway claimed over property allotted to Shanmugasundaram under 'C' schedule to Ex.A1 compromise decree.



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(c) The Second Appeal is dismissed by confirming the findings of the First Appellate Court that the appellants/plaintiffs are not entitled to claim any pathway right over the property allotted to Shanmugasundaram (father of respondents 1 and 2) under 'C' schedule to Ex.A1-compromise decree without prayer for declaration of alleged easementary right.

(d) In the facts and circumstances of the case, there shall be no order as to costs.

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Index : Yes/No
Speaking order : Yes/No
Neutral Citation : Yes/No
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To

1.The First Additional District Court,
Erode.

2.The Principal Sub-Ordinate Court,
Erode.



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S.SOUNTHAR, J.

dm

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