



S.A.(MD) No.465 of 2005

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 25.01.2023

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.(MD) No.465 of 2005

1.K.Balasubramanian
2.Thamizharasi
3.Vanathi

... Appellants/Respondents 1 to 3/
Respondents 1 to 3

Vs

1.Angayarkanni
2.Velusamy
3.K.Palanisamy
4.Murugesan

... 1st Respondent/Appellant/
Petitioner – Plaintiff

... Respondents 2 to 4/
Respondents 4 to 6/Respondents

Prayer:- Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 11.03.2005 made in A.S.No.64 of 2003 on the file of the District Court, Karur reversing the decree and order dated 28.02.2002 made in I.A.No.63 of 2000 in O.S.No.232 of 1991 on the file of the Sub Court, Karur.



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For Appellants : Mrs.N.Krishnaveni
Senior Counsel
assisted by Mr.T.R.Rajaraman

For R1 : Mr.P.Paranthaman

RR2 to 4 : Dispensed with

J U D G M E N T

1.1. Defendants 1 to 3 in the suit are the appellants. The 1st respondent herein filed a suit in O.S.No.232 of 1991 on the file of the Sub Court, Karur seeking partition of her half share. The said suit was decreed in favour of the 1st respondent passing a preliminary decree for half share. The appellants herein filed an appeal before the District Court, Trichirappalli challenging the preliminary decree in A.S.No.276 of 1997 and the same was dismissed. Therefore, final decree petition was filed by the 1st respondent in I.A.No.63 of 2000 for allotment of her half share. The trial Court passed an order for division of the house in the suit property by allotting first floor portion to the 1st respondent and the ground floor portion to the appellants. As far as the two shops lying on the southern corner of the suit property are concerned, the shop on the southern side was allotted to the 1st respondent and the another shop lying on the immediate north was



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allotted to the share of the appellants. The bathroom and rest room facilities available in the ground floor were allotted to the appellants. The other vacant area surrounding the building and compound wall were allotted for the common enjoyment of both the parties.

1.2. Aggrieved by the said final decree, the 1st respondent filed an appeal in A.S.No.64 of 2003 on the file of the District Court, Karur. The final decree was challenged by the 1st respondent mainly on the ground that the Commissioner had filed a report stating that the property was indivisible and hence, the trial Court ought not to have passed a final decree dividing the property as stated above. The said appeal was allowed and the learned District Judge, passed an order of remand with a direction to the trial Court to divide the property by casting lots, if parties were not agreeable to proceed under Section 4 of the Partition Act. The said order of remand was challenged by the appellants before this Court in C.M.A.No.1 of 2004. This Court, after setting aside the order of remand passed by the District Court, directed the learned District Judge to effect division by taking into consideration the convenience of the parties and if necessary, by casting lots



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and if either of the party was not amenable due to the alleged inconvenience, the property can be sold only among the parties, who is willing to pay the higher value. Thereafter, the matter was taken up for consideration by the learned District Judge afresh. The appellants herein filed a memo expressing readiness to go for lot and the 1st respondent filed a memo expressing her unwillingness to go for lot. Since there was no consensus among the parties with regard to the division by lots, the first appellate Court decided to go for auction and the 1st respondent being the only person who offered to purchase the suit property for a value of Rs.14,01,000/-, passed final decree allotting the entire property to the 1st respondent.

1.3. The learned District Judge passed a final decree allotting the entire property to the 1st respondent and also observed that the appellants can withdraw half of the value of the property as per the auction sale price viz., Rs.7,00,500/-, which was already deposited by the 1st respondent. Aggrieved by the said final decree, the appellants have come up with this second appeal.



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2. The second appeal was admitted by this Court by formulating the following substantial question of law:

“When the property is capable of division, is the lower Appellate Court correct in ordering sale of the property in auction?”

3.1. The learned Senior Counsel appearing for the appellants elaborated the questions of law formulated at the time of admission by submitting that the procedure adopted by the learned District Judge was not in consonance with the directions issued by this Court in C.M.A.No.1 of 2004. The learned Senior Counsel, by taking this Court to the judgment passed by the Division Bench of this Court in C.M.A.No.1 of 2004, submitted that the learned District Judge ought to have seen that the property is divisible and as per the directions issued in the judgment of this Court, the learned District Judge ought to have endeavoured to divide the property and go for allotment of shares by draw of lot.



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3.2. The learned Senior Counsel further submitted that the learned District Judge while going for the next option suggested by the Division Bench erred in fixing the sale price at Rs.14,01,000/- and the fixation of sale price at Rs.14,01,000/- by the learned District Judge was without any basis. Therefore, the final decree passed by the trial Court, based on erroneous approach which was not in tune with the directions given by this Court in C.M.A.No.1 of 2004, is liable to be set aside.

4.1. The learned counsel appearing for the 1st respondent submitted that the Division Bench of this Court in C.M.A.No.1 of 2004 only directed the first appellate Court to go for allotment of shares by lot, in case both the parties agreed for that auction. In the case on hand, admittedly, the 1st respondent filed a memo expressing her unwillingness to go for allotment of shares by draw of lot. In these circumstances, as per the directions given by this Court in C.M.A.No.1 of 2004, the learned District Judge decided to go for the second option suggested by this Court viz., sale of property by auction among the parties to the litigation. In the case on hand, the 1st respondent offered a sale price of Rs.14,01,000/-. The appellants did not



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offer to purchase the suit property. In these circumstances, the learned District Judge rightly confirmed the auction sale for the higher price of Rs.14,01,000/- offered by the 1st respondent and passed final decree allotting the entire property to the 1st respondent.

4.2. As far as the contention raised by the learned Senior Counsel that there was no basis for fixing the base price of Rs.14,01,000/- is concerned, the learned counsel for the 1st respondent submitted that when the base price was fixed at Rs.14,01,000/- by the Court below while going for auction, the appellants did not raise any objection regarding the value fixed and it is too late for them to raise the question of valuation before the second appellate Court. The learned counsel also had drawn the attention of this Court to the revision in C.R.P.(PD)No.141 of 2005 filed by the appellants questioning the non-disposal of the memo filed by them expressing their desire to partition the suit property by lot. The learned counsel submitted that the said revision was dismissed by this Court by observing that the procedure adopted for sale by the learned Judge was in consonance with the judgment of the Division Bench and the same could not be faulted. Therefore, it is the



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submission of the learned counsel for the 1st respondent that when this Court in its order passed in C.R.P.(PD)No.141 of 2005 found that the procedure adopted by the learned District Judge in conducting auction for sale of the property was correct and in consonance with the earlier order passed by the Division Bench, the second appeal filed by the appellants does not involve any merit and liable to be dismissed.

5. Heard the arguments of the learned Senior Counsel for the appellants and the learned counsel for the 1st respondent. Perused the typed set of papers and the other relevant records.

6. The main contention raised by the learned Senior Counsel is that the learned District Judge did not follow the directions issued by this Court in C.M.A.No.1 of 2004 while exploring the last option of auction sale. It would be appropriate to refer to the relevant portion of the judgment passed by the Division Bench of this Court in C.M.A.No.1 of 2004 which reads as follows:

“7. At this juncture, a perusal of the order of the first appellate Court making a remand would clearly reveal that



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the first appellate Court has directed again the lower court to value the property and divide the same between the parties by casting lots, to which course, now the appellants are ready. It is pertinent to point out that the respondents are not ready for taking the property by way of casting lots, but would add that it would cause inconvenience for the respondents to occupy, but the property should be sold and the sale proceeds have got to be divided according to the convenience of the parties. Under the stated circumstances, this Court is of the opinion that the order of remand made by the learned District Judge has got to be set aside with a direction to effect division by taking into consideration the convenience of the parties and if necessary, by casting lots and if either of the party is not amenable due to the alleged inconvenience, the property can be sold only among the party, who is willing to pay the higher value. It is further directed that if the property has got to be sold, the same can be done by the learned District Judge himself only among the parties. Either of the party, who is successful in the said sale, has to be directed to pay half of the sale price to the other party. With the above observations, the learned District Judge is directed to take up the matter and decide the same within a period of two months herefrom. The parties are directed to appear before the District Judge on 7.1.2005. This appeal is allowed. No costs. Consequently, connected CMP is closed.”



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7. A close reading of the directions issued by this Court would make it clear that firstly the Court below has to explore the possibility of dividing the property and allotting the shares to the parties by lots. If either of the party is not amenable to the said course, then the property shall be sold in auction sale only among the parties to the litigation, who is willing to purchase the property for higher value.

8. In pursuance to the directions issued by this Court, both the parties appeared before the Court and the appellants filed a memo expressing desire to go for lot for allotment of shares. The 1st respondent filed a memo expressing her unwillingness to go for lot for allotment of shares. Therefore, there was no consensus among the parties regarding division of property and allotment of shares by lot. Therefore, there was no possibility for the learned District Judge to explore the first option suggested by the Division Bench. Therefore, the learned District Judge appeared to have gone for the second option of sale by auction and allotment of entire property to the successive bidder and payment of half of the sale price to the



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other party. When the learned District Judge decided to go for the second option, the appellants aggrieved by the same, moved this Court in C.R.P.(PD)No.141 of 2005. The said revision was filed questioning the non-disposal of the memo filed by the appellants in USSR No.655 of 2005 dated 19.01.2005 expressing their desire to go for partition of the property by lots. This Court, after considering the earlier order passed by the Division Bench, came to the conclusion that when the first option suggested by the Division Bench is not exploratory due to divergence of opinion by the parties, there was nothing wrong in going for the second option of auction sale. Ultimately, the revision filed by the appellants was dismissed by this Court. This Court while dismissing the revision filed by the appellants observed as follows:

“3. The decree of partition became final in view of the judgment in C.M.A.1 of 2004 on the file of this Court dated 20.12.2004. In paragraph 7 of the said judgment, the Division bench has observed that the property is divisible and in the event of both the petitioners and the respondents agreed for division of the property by casting lots, it can be partitioned by way of lots. The Division Bench has further directed that in the event of either of the party is not willing



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to take respective shares due to inconvenience, the property can be sold only among the parties who are willing to pay a higher value. When the property is sought to be divided on the basis of the judgment of the Division Bench, though the petitioners have filed a memo expressing their desire to divide the property by way of lot, the respondents have also filed a memo expressing their unwillingness for the same.

4. In view of the above stand of the parties, the court below should resort the second direction given by the Division Bench namely, the sale of the property among the parties and it should be in favour of the party who is willing to pay the higher value. There is no dispute that in so far as the above direction of the Division Bench is concerned as there was no agreement between the petitioners and the respondents for division of the property by way of lot, the learned judge has rightly brought the property for sale and that too only among the petitioners and the respondents.

5. It is now submitted that the respondents are the higher offerers and the said offer has been accepted. The procedure adopted for sale by the learned Judge is inconsonance with the order of the Division bench and the same cannot be faulted.



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6. In view of the same, the question for consideration of memo filed by the petitioners expressing their desire to go for lot does not survive. With the above observation, the Civil Revision Petition is disposed of. No cost. Consequently, the connected C.M.P.Nos.1315 and 1990 of 2005 are also closed.”

9. Therefore, the procedure adopted by the first appellate Court in going for second option of auction sale was already impugned by the appellants in the earlier revision filed by them and their contention was negated by this Court. While that being the position, it is not open to the appellants to say that the first appellate Court erred in not exploring the possibility of dividing the property by lots when the 1st respondent expressed her unwillingness for division of the properties by lots. The Court below had no other option except to go for the second option suggested by the Division Bench viz., sale of property by auction. In these circumstances, I do not find any reason to interfere with the decision of the first appellate Court to go for auction sale.



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10. As far as the contention raised by the learned Senior Counsel that the base price of Rs.14,01,000/- fixed by the first appellate Court while going for auction was without any basis is concerned, the said point was not at all raised by the appellants in the memorandum of grounds of second appeal. Only when the matter was taken up for argument, a memo dated 06.01.2023 was filed by the learned counsel for the appellants raising the said point. It is pertinent to note that when upset price was fixed by the Court below at Rs.14,01,000/- while going for auction, the appellants who were present before the Court did not make any objection. In fact, the appellants aggrieved by the decision of the first appellate Court in going for auction of the property filed a revision before this Court in C.R.P.(PD)No. 141 of 2005. Even in the said revision, the appellants did not raise the correctness or otherwise of the upset price fixed by the Court below. When the upset price was fixed by the Court below, the appellant did not make any objection with regard to the valuation before the Court below. Even in the revision filed before this Court in C.R.P.(PD) No.141 of 2005, the appellants did not complain about the valuation and the upset price fixed by



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the Court while going for auction. Further, at the time of auction, the 1st respondent alone offered the sale price of Rs.14,01,000/-. The appellants failed to make any offer. The appellants at least could have raised an objection with regard to the valuation and sale price before the Court below. Having failed to raise the question of valuation and fixation of upset price before the Court below and also in the revision filed before this Court, it is not open to the appellants to raise these issues belatedly in second appellate state that too at the time of arguments.

11. In view of the discussions made above, the substantial question of law framed at the time of admission is answered against the appellants and the second appeal is dismissed.

12. In fine,

(i) the Second Appeal is dismissed by confirming the judgment and decree dated 11.03.2005 made in A.S.No.64 of 2003 on the file of the District Court, Karur;



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(ii) it is made clear that the appellants are entitled to withdraw half of the sale price said to have been deposited by the 1st respondent before the Court below with accrued interest, if any; and

(iii) in the facts and circumstances of the case, there will be no order as to costs.

25.01.2023

NCC : Yes/No
Index: Yes/No
Internet: Yes

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To

- 1.The District Judge,
Karur.
- 2.The Sub Judge,
Karur.
- 3.The Section Officer, VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

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