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S.A.No.939 of 2016

IN THE HIGH Court OF JUDICATURE AT MADRAS

Dated : 29.11.2024

CORAM :

THE HON'BLE MR. JUSTICE SATHI KUMAR SUKUMARA KURUP

Second Appeal No. 939 of 2016
and
C.M.P. No. 18998 of 2016
C.M.P. Nos.1564 and 9981 of 2017
&
C.M.P. No. 20891 of 2023
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G.Subramanian

.. Appellant

Versus

1. Navaneetham
2. G. Bhoobalan

.. Respondents

Second Appeal filed under Section 100 of Code of Civil Procedure against the Judgment and Decree dated 03.09.2015 passed in A.S.No.59 of 2013 on the file of the Subordinate Court, Poonamallee confirming the Fair and Decreetal Order dated 05.04.2013 passed in I.A.No.1537 of 2008 in O.S.No.173 of 1998 on the file of the District Munsif Court, Ambattur.

For Appellant : Mrs.Chitra Sampath, Senior Counsel
for Mr. T.S. Baskaran

For Respondents : Mr. D. Ashok Kumar for R-1

Dr.A.E.Chelliah, Senior Counsel
for Mr. C. Saifullah for R-2



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This Second Appeal arises out of the judgment and decree dated 03.09.2015 passed in A.S. No. 59 of 2013 on the file of the learned Subordinate Judge, Poonamallee, confirming the fair and decreetal order dated 05.04.2013 passed in I.A. No. 1537 of 2008 in O.S. No. 173 of 1998 on the file of the learned District Munsif, Ambattur.

2. For the sake of convenience the parties to this Appeal shall be referred to as “Plaintiff” and 'Defendants' as has been arrayed in the suit.

3. The Plaintiff/first Respondent in this Appeal is the sister of the Defendants 1 and 2. The Plaintiff has filed the Suit in O.S. No. 173 of 1998 before the learned District Munsif, Ambattur seeking the relief of partition and separate possession of 1/3rd share in Item 1 to 3 of the suit scheduled properties.

4. The Defendants filed their written statements denying the Plaintiff's contentions in the suit stating that the suit scheduled properties were the ancestral property of late Govindarajulu and the properties standing in the name of the mother of the Plaintiff were purchased from the funds of ancestral nucleus. As the Plaintiff had already been allotted a property, she is not entitled to any share in the suit scheduled property.



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5. The trial Court framed issues for consideration and the parties went for trial. During trial, the Plaintiff examined herself as P.W-1 and marked Ex.A-1 to Ex.A-4. On behalf of the Defendants, the second Defendant examined himself as D.W-1 and marked Ex.B-1 to Ex.B-4. After trial, on appreciation of oral and documentary evidence, the learned District Munsif, Ambattur, by Judgment dated 20.09.2007, granted preliminary decree for partition and separate possession of 1/3rd share in Item Nos. 1 to 3 of the suit scheduled property in favour of the Plaintiff. No appeal was preferred by the Defendants in the suit against the grant of preliminary decree.

6. On the basis of the preliminary decree passed in the suit, the Plaintiff filed I.A. No. 1537 of 2008 in O.S.No.173 of 1998 for final decree in terms of preliminary decree by appointing an Advocate Commissioner to divide the property by metes and bounds and for allotment of 1/3rd share to the Plaintiff. Accordingly, the trial Court appointed a Advocate Commissioner. The Advocate Commissioner, after measuring the property by metes and bounds, with the help of a Taluk Surveyor, filed the report in which it was stated that as the Plaintiff was not interested in getting a share in the dwelling house (Item No.1 of the suit schedule) measuring about 5 grounds as it was under the occupation of the Defendants and in Item No.3 as it was already sold



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by the Defendants pending suit and wanted her 1/3rd share of Item Nos. 1 to 3 to be given in Item No.2. The Advocate Commissioner thus allotted 89.8 cents in Item No.2 out of the total extent of 2 Acres and 28 Cents, to the Plaintiff.

7. The report of the Advocate Commissioner was objected to by the Defendants on the ground that the Advocate Commissioner was appointed only to ensure division of the suit scheduled properties by metes and bounds. While so, the suggestion given by the Advocate Commissioner to grant larger extent of land to the Plaintiff in Item No.2 in view of the fact that she was not interested in item Nos. 1 and 3 is *per se* liable to be discarded and consequently, the report of the Advocate Commissioner must not be taken on record.

8. After due enquiry, the learned District Munsif, by Order dated 05.04.2013 in I.A. No. 1537 of 2008 in O.S. No. 173 of 1998 passed final decree in favour of the Plaintiff thereby granting larger extent of land in Item No.2 measuring an extent of 89.8 cents out of the total extent of 2 Acres 28 Cents. Aggrieved by the said order dated 05.04.2013 of the trial Court, the first Defendant alone has preferred A.S. No. 59 of 2013 before the learned Subordinate Judge, Poonamallee.



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9. In the Appeal in A.S. No. 59 of 2013 before the first appellate Court, it was mainly contended that the share allotted to the Plaintiff in item No.2 of the suit scheduled property by the trial Court is not proper. In other words, the division of share in item No.2 of the suit scheduled property is unequal and it is contrary to the principle of partition of the properties by metes and bounds.

10. After hearing both sides, the learned Subordinate Judge, Poonamallee by Judgment dated 03.09.2015 dismissed the Appeal and confirmed the fair and decretal Order dated 05.04.2013 passed in I.A.No.1537 of 2008 in O.S.No.173 of 1998. Aggrieved by the same, the first Defendant alone has preferred this Second Appeal.

11. At the time of admission of this Second Appeal, the following substantial questions of law was framed for determination by this Court and they are:-

(i) Whether the Courts below committed a grave error in accepting the Advocate Commissioner's report which is prepared without following the due procedures laid under the law and without adopting the valuation of the Suit properties to equalize the shares of the respective parties?

(ii) Whether the Courts below failed to divide the Suit property by metes and bounds taking into account good and bad soil?



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12. Mrs. Chitra Sampath, learned Senior Counsel appearing for the first

Defendant would vehemently contend that the Courts below erred in observing that the relinquishing of right by the Plaintiff over item Nos. 1 and 3 is an advantage to the Defendants who are residing in the said property. When the Defendants are residing in the Item No.1 of the suit scheduled property even prior to the suit, the Item No.1 of the property ought not to have been included in the plaint filed for partition. The learned Appellate Judge simply brushed aside the plea of the Appellant that while passing the final decree, the trial Court exceeded the jurisdiction and granted larger share to the Plaintiff. The Appellate Court erred in holding that out of the total extent of all the three items of suit property being 282.74 Cents, the Plaintiff is entitled to 94.24 cents as per preliminary decree and hence a single lot of 89.8 cents from item No.2 of the suit schedule property is to be allotted to the Plaintiff. Having allotted such a share, the courts below observed that what was allotted to the Plaintiff is only a minuscule share. Such an observation is erroneous and not consistent with the share allotted to the Plaintiff. The land allotted to the Plaintiff has got higher market value than the property allotted to the Defendants, which resulted in unequal division of the properties.

13. The learned Senior Counsel for the first Defendant further contended that the report of the Advocate Commissioner suggesting a larger



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extent of land for the Plaintiff/Navaneetham without dividing Item No.2 of the property equally into 3 equal shares for the Plaintiff and Defendants 1 and 2, is arbitrary and unreasonable. The suggestion given by the Advocate Commissioner that since the Plaintiff had relinquished her claim to Item Nos.1 and Item No.3 the Plaintiff must be given a larger share in the properties is beyond the scope of the warrant issued to him. The Advocate Commissioner was appointed to note down the physical features and to suggest as to how the item No.2 of the suit scheduled properties could be divided among the Plaintiff and Defendants. While so, it is not open to the Advocate Commissioner to suggest that since Plaintiff had given up her share in item Nos. 1 and 3 of the suit scheduled properties, she must be given a larger share. When such a suggestion was unceremoniously given by the Advocate Commissioner, his report ought to have been discarded by the trial Court, instead of placing reliance on it and allotting a larger share to the Plaintiff. Even though objection had been raised by the Defendants for such a report of the Advocate Commissioner, it was simply discarded by the trial Court while passing the final decree in the suit.

14. Mrs. Chitra Sampath, learned Senior Counsel for the Appellant further submitted that pending Second Appeal, the Appellant filed C.M.P.No.12597 of 2024 seeking cancellation of the Advocate Commissioner's



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report before the learned District Munsif, Ambattur on the ground that the report of the Advocate Commissioner, suggesting a larger extent of land to Plaintiff, is uncalled for and it is beyond the scope of warrant issued to him. The Advocate Commissioner has no right or has *locus standi* to suggest division of the properties in such a manner where large extent of share to be given to the Plaintiff. Therefore, the learned Senior Counsel for the first Defendant submitted that an Advocate practising before this Honourable Court and who is well versed in Civil Court proceedings may be appointed as Advocate Commissioner after scrapping the report submitted by the Advocate Commissioner appointed by the trial Court.

15. The learned Senior Counsel for the first Defendant also submitted that after final decree proceedings were issued, the Plaintiff had entered into sale agreement with a third party for sale of her share of the property for consideration of Rs.5.55 Crores. If the Plaintiff sells the property, the sale proceeds, to be realised thereof, has to be equally apportioned by the Defendants.

16. The learned Senior Counsel for the first Defendant also submitted that the first Defendant had filed CMP. No. 20891 of 2023 under Section 22 of Hindu Succession Act read with Section 151 of Civil Procedure Code seeking



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purchase of the property. It is also submitted that on behalf of the Appellant, Contempt Petition was filed in Cont. P. No. 2123 of 2024 to initiate contempt proceedings against the Plaintiff-first Respondent herein for having entered into an agreement of sale with third parties for the sale of her share of the property after an order of interim stay was granted by this Court.

17. The learned Senior Counsel also submitted that as per Section 22 of the Hindu Succession Act, a co-parcener who intends to sell the property may sell the property to another co-parcener before looking out for a third party purchaser. The co-parcener who intends to purchase the property shall be given the priority to purchase the property and only in the event of the co-parcener's reluctance or refusal to purchase the property, resort can be made to sell the property to a third party. It is the contention of the learned Senior Counsel for the first Defendant that the Plaintiff had entered into a sale agreement for sale of her property for a value of Rs.5,55,00,000/- and if she sells the property, there will be no ingress or egress to their property from the main road. Therefore, the learned Senior Counsel for the Appellant seeks to permit the Appellant and the second Defendant to purchase the property allotted towards the share of the Plaintiff by scrapping the agreement of sale she had entered into with a third party purchaser. Accordingly, the learned Senior Counsel for the first Defendant-Appellant prayed for allowing this



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Appeal.

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18. In support of her contention the learned Senior Counsel appearing for the first Defendant relied on the following citations:-

(i) In the case of **P.Srinivasamurthy vs. P.Leelavathy** reported in **(2000) 2 CTC 159** wherein the Hon'ble Supreme Court has held as follows:-

“Hindu Succession Act, 1956, Section 22 - Right of pre-emption Hindu dying intestate leaving behind him his first wife's son, second wife and her children – First wife's son filed suit for partition claiming th share and preliminary decree was passed and he filed application for final decree – First wife's son and second wife and her son except one son joined together and sold their 6/7th share to stranger – Dissenting son born to second wife filing suit for declaration that he is entitled to preferential right to acquire 6/7th share and for declaration that sale deed in favour of stranger is void and not binding – Defendants in such suit filing application to dismiss suit on grounds that preferential right ought to be exercised before contemplated transfer and that offer was first made to plaintiff – Single Judge allowed application and dismissed suit – When Hindu dies intestate leaving more than one heir specified in class I of schedule and if one such heir wants to transfer or proposes to transfer his interest in property then other legal heirs shall have preferential right to acquire interest which is proposed to be transferred – Letter sent by defendants making offer to plaintiff returned unserved – Plaintiff had written letter suggesting mode of partition and not to sell property – Plaintiff had thus expressed his desire to purchase portion of property – Defendants who are co-heirs have not taken into consideration said option before executing sale deed in favour of stranger in respect of their 6/7th share – Section 22 (1) confers incidental right on heirs other than one who is proposed to transfer his interest – Where transfer is made in violation of provisions of section aggrieved co-sharers cannot be without remedy because every legal right must necessarily carry with it remedy for enforcing same – Section 22 does not provide for special procedure for enforcement of such right and regular civil suit before competent court is appropriate remedy – Validity or invalidity of transfer effected by co-heirs would be relevant in such action – Order of Single Judge dismissing suit as not maintainable without trial is incorrect – Suit remanded.”



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(ii) In the case of *N.Manickam vs. Kanagaraj* reported in **2012 (3) CTC 495** wherein the Hon'ble Supreme Court has held as follows:-

“Hindu Succession Act, 1956 (30 of 1956), Section 22 – Right of Pre-emption – Preferential right to acquire property in certain cases – Invocation thereof – Essential conditions: (1) interest in any immovable property of intestate or in any business devolves upon two or more heirs specified in Class I of Schedule (2) any one of such heirs proposes to transfer his or her interest in property or business (3) in that case, other heirs shall have preferential right to acquire interest proposed to be transferred.

Hindu Succession Act, 1956 (30 of 1956), Section 22 – Right of Pre-emption – When co-sharer should exercise right of pre-emption – Whether right of pre-emption can be exercised by co-sharer after sale of undivided share by other co-sharer in favour of third party – Held, right of pre-emption can be exercised even after sale made by co-sharer and sale is only voidable at instance of other co-sharer, who has denied preferential right – Right of pre-emption does not depend upon divisibility of property and even if property is capable of division, co-sharer, who has not sold his share, can exercise his right of pre-emption.

Hindu Succession Act, 1956 (30 of 1956), Section 22 – Limitation Act, 1963 (36 of 1963), Article 97- Right of Pre-emption Separate Suit Co-sharer filed an Application to exercise right of pre-emption in Suit for Partition at Final Decree proceeding stage – One co-sharer sold undivided share in favour of third party pending - Final Decree proceedings – Whether co- sharer should file separate Suit for Partition to exercise his right of pre-emption or can he maintain Application in Partition Suit itself - When third party purchaser also joined in Final Decree proceedings and prayed for partition of his share, co-sharer can maintain Application to exercise his right of pre-emption – Co-sharer need not file separate Suit for enforcement of his right of pre-emption.”

(iii) In the case of *Ghantesher Gosh vs. Madan Mohan Ghosh* reported in **(1996) 11 SCC 446** wherein the Hon'ble Supreme Court has held as follows:-



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“A. Partition Act, 1893 S.4 – Applicability of at different stages of litigation between co-owners and stranger transferee suing for partition Transfer of share of a dwelling house belonging to an undivided family to a stranger Purchase of the stranger transferee's share by a co-owner family member Condition for When "such transferee sues for partition" "Sues for partition" Connotation of - Wider in scope than expression "filing suit for partition" Held, suit for partition in the context includes initiation of proceedings for execution of partition decree S. 4 operates at all stages of litigation in a partition suit from its inception till its termination not only by the final decree for partition but also by its complete satisfaction and discharge in execution proceedings Where pursuant to a final decree for partition a co-owner transferred his share in the house to a stranger and the stranger transferee thereafter files petition for execution of the decree, S. 4 can be invoked by any other co-owner family member for purchasing the stranger's share - But once the final decree for partition is completely satisfied and discharged in execution proceedings, S. 4 cannot be invoked Civil Procedure Code, 1908, S. 11 Expln. VII, Or. 22 Rr. 10, 12- Transfer of Property Act, 1882, Ss. 44, second para and 52-Words & phrases - 'Sue', 'sues for partition - Pre-emption”

19. Per contra, the learned Counsel appearing for the Plaintiff-first Respondent submitted that as against the final decree passed in the suit, the Appeal as well as the Second Appeal are not maintainable. If at all, an Appeal or Second Appeal can be entertained only as against the preliminary decree passed in the suit and not as against the final decree proceedings. In order to buttress such submission, the learned Counsel for the Plaintiff-first Respondent placed reliance on the reported ruling in **2022 (4) CTC 149 in the case of Kattukandi Edathil Krishnan and another Vs. Kattukandi Edathil Valsan and others**. By placing reliance on the aforesaid decision, at the outset, it is submitted that there cannot be an Appeal or Second Appeal as against the final



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decreed passed in the Suit. After passing of preliminary decree, a final decree will be passed by following certain procedure. The parties to the final decree proceedings are therefore estopped from filing an Appeal or Second Appeal as against the final decree in the suit.

20. The learned Counsel for the Plaintiff also relied on the decision of the Hon'ble Supreme Court in the case of ***Mool Chand and others vs. Deputy Director Consolidation and others*** reported in ***(1995) 5 SCC 631*** wherein it has been held as follows:-

“B. Civil Procedure Code, 1908 - S. 2(2) and Or. 20 R. 18(2) & Or. 26 R. 14 Preliminary and final decrees in partition suit - Preliminary decree finalises matters relating to declaration of rights and interests – Final decree works out those rights – Partition.

C. Civil Procedure Code, 1908 – S. 97 – Failure to appeal against preliminary decree would operate as a bar to raising any objection to it in appeal filed against final decree.”

21. The earlier learned Counsel for the Plaintiff Mr.T.S.N.Prabhakaran also relied on the reported ruling of this Court in the case of ***P.Lakshmanian and another vs. P.Jeyalakshmi and others*** [2014 ***SCC OnLine Mad 672***] wherein it is held as follows:-

“Code of Civil Procedure, 1908 (5 of 1908), Section 11 – Partition Suit – Final Decree proceedings – Once Preliminary Decree is passed and it has become final, parties are estopped from raising any new contention at stage of Final Decree, which was not raised in Suit – Court cannot go beyond Preliminary Decree – Principle of *res judicate* attracted – Defendants



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are estopped from raising issue decided against them as it had become final
– Second Appeal dismissed.

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Therefore, the Court cannot go beyond the Preliminary Decree and no interference can be done in the Appeal.”

The above decision is based on the ruling of the Hon'ble Supreme Court in the cases of ***Prahlad Singh v. Col. Sukhdev Singh [(1987) 1 SCC 727]*** and ***Satyadhyan Ghosal vs. Deorajin Debi [AIR 1960 SC 941]***.

22. As per the above rulings, when the parties to the suit in this case had not preferred any appeal against the preliminary decree granted in the suit for partition, after grant of final decree, the parties cannot agitate their right by way of filing appeal as it is barred under the principle of *res judicata* and substantial question of law does not arise in final decree proceedings and this Second Appeal is not maintainable against the final decree proceedings.

23. The learned Counsel for the contesting first Respondent-Plaintiff also submitted that there is no substantial question of law involved in this Appeal for determination. The questions of law framed are only questions of facts. In exercise of power under Section 100 of Code of Civil Procedure, this Court cannot entertain the Second Appeal when there is no substantial question of law arisen for consideration. It is the submission of the learned Counsel for the Plaintiff that the Second Appeal had been filed with an ulterior motive to delay the execution of final decree proceedings. The Plaintiff had already



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battled out the litigation for more than 2 decades. The Defendants did not accede to the Plaintiff's request for effecting partition of the family properties amicably and therefore, she was constrained to file the Suit in the year 1998 before the trial Court. During trial, D.W-1 in his cross-examination had clearly stated that he does not have any objection in giving 1/3rd share of the suit properties to the Plaintiff. However, the Defendants have unceremoniously sold the property described as item No.3 of the plaint, whereby, the Plaintiff was deprived of her share. In respect of item No.1, being a house, the Plaintiff had magnanimously given up her share taking note of the fact that the Defendants are her brothers are residing in the said house. However, the Defendants have resorted to all attempts to ensure that the fruits of the final decree are not enjoyed by the Plaintiff. The Plaintiff was therefore constrained to seek share only in Item 2 alone. Item 2 of the plaint is a vacant land in S.Nos. 45/1, 45/2A, 46, 47/2, 57/1 and 60/2 measuring a total extent of 2 Acres and 28 Cents. Since the Plaintiff was not interested to take her share in Item Nos.1 and 3, the learned Advocate Commissioner made a passive suggestion that she should be compensated by allotting additional extent when the property is divided among the parties. In any event, even in the absence of the suggestion by the Advocate Commissioner, the trial Court as well as the appellate Court, on the basis of the fact that the Plaintiff had given up her claim in respect of properties described as item Nos. 1 and 3 of the plaint, can



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suggest or even direct division of larger extent of land to the Plaintiff.

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24. The learned Counsel for the Plaintiff/first Respondent further submitted that the Appellant contends that the Plaintiff had entered into an agreement of sale during the pendency of the present Second Appeal. On the other hand, the Defendants, during the pendency of the suit, have even sold the property described as item No.3 of the plaint. While so, they have no *locus standi* or moral right to contend that the agreement of sale entered into by the Plaintiff, in respect of the share allotted to her, is improper.

25. The learned Counsel for the first Respondent-Plaintiff submitted that when the preliminary decree is not challenged, the Defendants does not have a right to file the Appeal or the Second Appeal against the order passed in the final decree proceedings as per the reported ruling of the Hon'ble Supreme Court in **(1995) 5 SCC 631** in the case of ***Mool Chand and others vs. Deputy Director Consolidation and others.*** When the Second Appeal itself is not maintainable, appointing another Advocate Commissioner would not arise. In any event, at this stage, appointing another Advocate Commissioner, as contended by the learned Senior Counsel for the Plaintiff, would only prolong the agony of the Plaintiff. Accordingly, the learned Counsel for the Plaintiff-first Respondent prayed for dismissal of the Second Appeal.



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26. On the above contentions, this Court heard the learned Senior Counsel appearing for the second Defendant. It is needless to mention that this Appeal has been filed only by the first Defendant in the suit and therefore, the second Defendant is only a formal party to this Appeal. However, the learned Senior Counsel submitted the written arguments and it was considered by this Court before proceeding with this Appeal. In effect, it is the submission of Mr. A.E. Chelliah, learned Senior Counsel for the second Respondent that the Second Appeal is maintainable.

27. Heard the learned Senior Counsel for the Appellant-first Defendant, the learned Counsel for the first Respondent-Plaintiff and the learned Counsel for the second Defendant-second Respondent. The written arguments submitted by the learned Senior Counsel for the Appellant-first Defendant, the learned Counsel for the first Respondent-Plaintiff and the learned Counsel for the second Defendant-second Respondent have been considered along with the materials placed on record.

28. Admittedly, the present Second Appeal has been filed as against the order passed in the final decree proceedings. Admittedly, none of the Defendants have filed an Appeal assailing the preliminary decree passed in the suit and it has become final. Though the first Defendant states that he



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preferred Appeal Suit challenging the preliminary decree, no records produced before this Court to show the number of the Appeal and its status. When the preliminary decree proceedings has become final, then the trial Court would only find out ways and means to partition the suit properties as per the apportionment of share in the preliminary decree proceedings. In other words, a final decree is only a procedure or formality to be adhered to by the trial Court to give effect to the preliminary decree passed in the suit.

29. As far as the substantial questions of law framed in this Appeal, this Court finds that they are only questions of facts. In exercise of power under Section 100 of Code of Civil Procedure, this Court is legally estopped from re-appreciating the facts of the case. As far as question of law No.1 is concerned, admittedly, with regard to the Advocate Commissioner's report, the first and second Defendants have filed their objections and taking note of those objections, final decree was passed. As far as the larger extent of share allotted to the Plaintiff in Item No.2 of the suit property, it must be stated that the Plaintiff is legally entitled to a share in the properties described as item Nos. 1 to 3. However, the Plaintiff in order to avoid multiplicity of proceedings did not opt for a share in Item Nos.1 and 3 of the suit properties on two grounds. The first is that item No.3 of the suit property had been unceremoniously sold by the Defendants pending suit to third parties and the sale proceeds utilised to



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themselves thereby depriving the Plaintiff to get her due share. The second is that item No.1 of the suit property is a dwelling house where the Defendants are residing. Therefore, the Plaintiff did not opt for her 1/3rd share in the said items of suit properties. However, it cannot be said that the Plaintiff has no right to claim a share in the properties in item Nos. 1 and 3. Taking note of the relationship with the Defendants, being her brothers, the Plaintiff had not sought for her share in Item Nos.1 and 3 being dwelling house and to avoid multiplicity of proceedings. It is on this background, the trial Court had granted somewhat excess extent of land to the Plaintiff in respect of Item No.2 of the suit schedule property. Item No.2 consists of 2 Acres 28 Cents of vacant lands. If it is divided into three, each one would be entitled to 76 cents. However, in lieu of Item No.1 and 3 the Plaintiff had been allotted 13 cents extra in Item No.2 which on the face of it does not appear to be unequal and unjust division. The Advocate Commissioner ought to have given the market value of all the 3 items of suit properties and then ought to have given the Plaintiff her due shares in terms of market value of the property. However, failure to resort to such method by the Advocate Commissioner is less advantageous to the Plaintiff and not to the Defendants. The Defendants failed to raise their objection to the Advocate Commissioner report on the said aspect and now the Defendants have no right to question it, legally or morally given the above facts. When admittedly the Defendants have been benefited out of



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the properties described as item Nos. 1 and 3, it is illogical to still harp upon technicalities in respect of the share allotted to the Plaintiff in item No.2 and file the Appeal as well as the present Second Appeal. Therefore, no question of law involved in the present case, much less substantial question of law. In such circumstances the question of law No.1 is not a substantial question of law for consideration. Even otherwise, such a question has to be answered against the Appellant/first Defendant and in favour of the Plaintiff-first Respondent. Similarly, the second question of law as to whether good and bad soil has been divided by metes and bounds, it is a procedure which has to be followed by the trial Court at the time of final decree proceedings and it cannot be subjected to challenge by the first Defendant by filing an Appeal or Second Appeal particularly when they have not raised such objections to the Advocate Commissioner's report at the earliest point of time. Therefore, the second question of law also has to be answered in favour of Plaintiff-first Respondent.

30. This Court also takes note of the fact that final decree was passed finally in the suit on 05.04.2013. As against the same, an Appeal was filed and it was dismissed on 03.05.2015. Now, we are in the year 2024. In other words, the fruits of the decree passed on 05.04.2013 could not be enjoyed by the Plaintiff and it was successfully prevented by the Defendants. This Court, therefore, only observes that it is a ploy on the part of the Appellant to delay



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the execution of the final decree and to deprive the Plaintiff to enjoy the fruits of the final decree.

31. Even though the Appellant filed the Second Appeal on various grounds, it is seen from the records that the first Defendant/Appellant filed proof affidavit before the trial Court and it was taken as his examination-in-chief. He remained absent and did not subject himself to cross-examination by the Plaintiff. However, during trial, the Defendants filed an affidavit stating that the first Defendant suffered heart attack and thus could not be present for cross-examination. Subsequently, a Petition was filed before the trial Court stating that the first Defendant met with an accident and he is unable to attend the Court. Therefore, he sought to eschew evidence of D.W-1 submitted by way of affidavit. Accordingly, the trial Court permitted to eschew the evidence of D.W-1 and second Defendant was examined as D.W-1. The second Defendant, as D.W-1 was cross-examined during which, he fairly conceded that the Plaintiff is entitled to 1/3rd share in the family properties. It is also an admitted fact that the Defendants did not assail the grant of preliminary decree. When preliminary decree was not agitated, it operates as a bar to raising any objection to it in appeal filed against final decree. In such circumstances, this Court rejects the plea of the learned Senior Counsel for the Appellant to reject the report of the Advocate Commissioner and to appoint a new Advocate



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Commissioner for inspecting the property in question.

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32. With respect to the submission of the learned Senior Counsel for the Appellant-first Defendant that the Appellant and the second Respondent herein are ready and willing to purchase the share of the Plaintiff, this Court heard the learned Counsel for the Plaintiff. This was opposed by the learned Counsel for the Plaintiff-first Respondent on the ground that such a permission can only be granted before the trial Court at the time of execution proceedings and not before this Court after a period of 11 years. It is also submitted that such a plea is raised at this stage only to delay the sale of the property by the Plaintiff. It is further stated that the Plaintiff is already aged 84 years and she is suffering from age related health issues. It is also stated that the son of the Plaintiff is battling Cancer. It is therefore submitted that the Plaintiff is in urgent need of money to protect her son's life. If the sale of the property is further delayed, it will be a loss to her and to her son. Therefore, the learned Counsel for the Plaintiff-first Respondent prayed this Court not to grant any permission for the Defendants to purchase her share of the property as it would further delay the sale of the property.

33. It is seen that the Defendants own large extent of lands, apart from the suit scheduled properties, around the Plaintiff's allotted share of the suit



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properties. Therefore, the Defendants request for right of preemption to purchase the Plaintiff's allotted share of the suit appears to be a dilatory tactics to prevent the Plaintiff from enjoying the fruits of the decree. After having not raised such a plea during the final decree proceedings and now coming up with a plea of preemptory right appears to be with *mala fide* intention just to deprive their sister of her due share. Further, the properties allotted to the Plaintiff is not a dwelling house in order to attract the provisions of Section 4 of Partition Act or under Section 22 of Hindu Succession Act. Therefore, the rulings cited by the Defendants do not apply to the present case. Even regarding ingress and egress, as the Defendants own large extent of lands around the suit property such a plea has been taken by the Defendants in order to prevent the Plaintiff from getting her due share. Filing applications after applications at this stage only shows their desperation not for want of any reliefs from this Court but to deny any reliefs to the Plaintiff.

34. Regarding the contempt petition it is seen that the Plaintiff had entered into a registered sale agreement dated 24.11.2016 with one G.Murugesan to sell her allotted portion of suit property after the passing of the final decree dated 05.04.2013 for valuable sale consideration. However, an order of status quo was passed by this Court on 18.01.2017 which was subsequently made absolute on 02.08.2017. It is seen from the additional



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typed set of papers filed by the second Defendant that the Plaintiff in furtherance to the sale agreement appeared to have received part sale considerations periodically on various points of time amounting to Rs.3,75,86,500/-. Now at this point of time, if the Defendants are allowed the right to exercise preemptory right, it might lead to multiplicity of proceedings. Therefore, considering the plea of the Plaintiff that she is suffering from age related issues and her son suffering from cancer and in need of money, this Court do not intend to initiate any contempt against the Plaintiff.

35. One of the grounds of Second Appeal *inter alia* is that the suit properties were not valued by the Advocate Commissioner resulting in unequal and unjust division of shares done only based upon extent without considering its value. As already stated supra, if the value of all the suit properties are taken into account, invariably the Plaintiff would have got more than her present allotment. However, the Plaintiff in order to avoid multiplicity of proceedings magnanimously did not opt for any share in Items 1 and 3 of suit schedule. Even in Item No.2 out of 2 Acres 28 Cents, the Plaintiff instead of her 1/3rd share of 76 cents has been allotted 89.8 cents, in lieu of her share in Item No.1 and 3 of the suit scheduled properties. The said allotment is not unequal or unjust so as to consider it as perverse. The final decree based on the said allotment is not perverse.



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36. In the light of the reported ruling relied by the earlier learned Counsel for the Plaintiff Mr.T.S.N.Prabhakaran in the case of *Mool Chand and others vs. Deputy Director Consolidation and others* reported in (1995) 5 SCC 631 and *P.Lakshmanian and another vs. P.Jeyalakshmi and others* [2014 SCC OnLine Mad 672] where preliminary decree was not agitated in Appeal and only against the final decree, the Second Appeal was filed. Therefore, the learned Single Judge of this Court held that substantial questions of law does not arise in final decree proceedings. The same ratio applies to the facts and circumstances of this case also. Therefore, this Second Appeal is not maintainable. As no question of law much less substantial questions of law is involved in the present case, the Second Appeal is to be dismissed.

In the result, **the Second Appeal is dismissed.** The Judgment and Decree dated 03.09.2015 passed in A.S.No.59 of 2013 on the file of the Subordinate Court, Poonamallee confirming the fair and decreetal order dated 05.04.2013 passed in I.A.No.1537 of 2008 in O.S.No.173 of 1998 on the file of the District Munsif Court, Ambattur are confirmed. No costs. Consequently, connected Civil Miscellaneous Petitions are closed.



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Index: Yes/No

Internet: Yes/No

Speaking Order/Non-speaking Order
dh

To

1. The District Munsif Court,
Ambattur.
2. The Subordinate Court,
Poonamallee.
3. The Section Officer,
V.R.Section,
High Court, Madras.



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SATHI KUMAR SUKUMARA KURUP, J

dh

Judgment made in
S.A.No.939 of 2016

29.11.2024