



S.A.No.693 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.02.2024

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THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.693 of 2023

and

C.M.P.No.22048 of 2023

1.M.Papitha Sulthana
2.M.A.Shajahan

... Appellants

Vs.

1.M.Praveen Sulthana
2.M.Mallika

. . . Respondents

Prayer:- Second Appeal is filed under Section 100 of C.P.C to set aside the decree and judgement dated 10.03.2023 passed in AS No.82 of 2017 on the file of the I Additional Subordinate Judge, Salem confirming the Fair and decretal order dated 27.04.2017 passed in IA No.294 of 2009 in OS No.106/2007 by the I Additional District Munsif Court, Salem by allowing this Second Appeal.

For Appellant : M/s.R.Nalliyappan

For Respondents : M/s.A.E.Ravichandran



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JUDGEMENT

The plaintiffs in a suit for partition has filed this appeal challenging the final decree passed in I.A.No.294 of 2009 in O.S.No.106 of 2007 on the file of the I Additional District Munsif, Salem. The facts are briefly set out herein below and the parties are referred to in the same ranking as before the Trial Court, namely, the I Additional District Munsif, Salem in O.S.No.106 of 2007.

2. The plaintiffs had filed the suit O.S.No.106 of 2007 on the file of the I Additional District Munsif, Salem for partition and permanent injunction directing the division of the suit property into 3 equal share and to allot a 1/3rd share to the 1st plaintiff. The defendants had filed a memo submitting to the decree and accordingly the suit was decreed by judgement and decree 23.02.2007.



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3. It appears that though the plaintiffs had obtained a decree for partition, they had not taken steps to file a final decree petition. Therefore, the defendants had filed I.A.No.294 of 2009 for passing of the final decree.

4. The plaintiffs had filed a counter in which they would contend that the final decree petition has been filed suppressing material facts. They would contend that the 1st plaintiff had issued a legal notice on 05.12.2008 to the defendants calling upon them to give a share of the salary benefits due to their mother. Further, the 1st plaintiff has also lodged a criminal complaint before the Ammapet Police Station and it is the case of the 1st plaintiff that the 2nd defendant had received a sum of Rs.30,000/- from the 1st plaintiff but had not repaid the same. Therefore, it is the contention of the plaintiffs that the defendants had no right to claim a share in the property and they have prayed that the final decree petition be dismissed.



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5. The Trial Court had appointed an Advocate Commissioner to measure and divide the suit property by metes and bounds. The Advocate Commissioner had visited the property and submitted his report and the same was marked as Ex.C.1 to Ex.C.5.

6. The learned I Additional District Munsif, Salem by order dated 27.04.2017 had passed the final decree in which he had allotted A and B schedule properties to the petitioners/defendants and the C schedule properties to the 1st respondent/1st plaintiff. Challenging the same the plaintiffs had filed A.S.No.82 of 2017 on the file of the I Additional Sub Court, Salem. The learned Judge on perusing the evidence confirmed the judgement and decree of the Trial Court and dismissed the appeal. Challenging the same the plaintiffs are before this Court.

7. The judgement and decree of the Trial Court passed in I.A.No.294 of 2009 in O.S.No.106 of 2007 has been challenged on



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two grounds:-

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A) The Advocate Commissioner has not properly valued the suit property.

B) The division of the suit property has not been made by metes and bounds.

8. Considering the limited grounds raised and argued, this Court with the consent of the parties had appointed an Advocate Commissioner, Mr.D.M.Senthil Kumar practising in the District Court at Salem to visit the suit property and submit his report. The Commissioner has assessed the market value of the property which measures the 2209 Sq.ft. at Rs.73,00,000/-. He has taken the assistance of the Chartered Engineer, Mr.S.Ramalingam to measure the property and the engineer has provided a digital survey plan and had also fixed the market value of the property. On the basis of the above, the Advocate Commissioner has suggested two modes of partition which



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he has titled, New Proposal - I and New Proposal - II. The learned Advocate Commissioner has also opined that the building is in a very old and bad condition and it would not be possible to enjoy the property in the present condition and the same has to be brought down.

9. An objection has been submitted by the plaintiffs/appellants wherein they had submitted that the Advocate Commissioner had not taken note of the fact that it is not possible for two families to live in the petition mentioned property and the Advocate Commissioner has not mentioned anything about the use of the well and the right to use the same as also the electricity connection. On the side of the respondents, the response submitted was that they are in agreement to the New Proposal - II as the property have been demarcated without any common enjoyment whereas the New Proposal-I had allotted one portion for common enjoyment. They had also requested that they be allotted property next to each other.



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10. This Court had on 05.02.2023 requested the learned counsel for the appellants/plaintiffs to get instructions as to whether they are willing to take the portion marked as A or C in the new proposal or whether willing to partition the property as suggested in New Proposal-I without living a common share and dividing it to the full length. The learned counsel on the next hearing i.e; on 08.02.2024 had informed this Court that the plaintiffs/appellants are not willing for any settlements. Therefore, the matter was directed to be listed under the caption for arguments.

11. As already submitted the only two grievances to the final decree passed by the lower Courts were that the value of the suit property has not been fixed properly and that the properties have not been equally divided into 3 parts. This grievance has been set right by the Advocate Commissioner who has been appointed by this Court.



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The proposal which has been given under the heading New Proposal - II appears to be the most feasible. Since the Advocate Commissioner has not left out any portion for common enjoyment and has also divided the common area which he has described in New Proposal -I, the learned counsel for the respondents is willing to take the portions marked as B and C in New Proposal -II in which the common area has also been partitioned and the portion marked 'A' will be taken by the appellant. The sketch of the Advocate Commissioner marked as New Proposal II is adopted. The portion 'A' which goes to the 1st appellant is coloured orange. The portions marked 'B' and 'C' coloured pink are allotted to the respondents.

12. Therefore, the appeal is allowed and the judgement and the final decree passed by the Courts below is modified as follows:-

i. The portion marked 'A' in the plan annexed (coloured orange) is allotted to the 1st plaintiff/1st appellant.



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ii. The portions marked 'B' and 'C' in the plan annexed (coloured pink) are allotted to the defendants/respondents.

13. The plan now drawn up shall form part of the decree. Therefore, the 1st plaintiff would get 745.32 Sq.ft. and the defendants would get a total extent of 745.32 Sq.ft. + 743.36 Sq.ft. = 1488.68 Sq.ft. as is evidenced from the Commissioner's Sketch. No costs. Consequently, the connected Miscellaneous Petition is closed.

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Index: Yes/No
Speaking order/non-speaking order
Neutral Citation: Yes/No
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To

1. The Addl. Dist. Munsif, Chidambaram.
2. The II Additional District and Sessions judge at Chidambaram.
3. The Section Officer,
V.R.Section,
High Court, Madras.

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