



S.A.No.370 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 22.01.2024

Delivered on: 16.02.2024

CORAM:

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.370 of 2017

and

C.M.P.No.785 of 2017

A.Thiagarajan

...Appellant

Vs.

G.Rajagopal

...Respondent

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the Judgment and Decree dated 21.10.2016 made in A.S.No.7 of 2016 on the file of the learned Subordinate Judge, Mannargudi, confirming the order dated 30.09.2015 passed by the learned District Munsiff Thiruthuraipoondi in E.A.No.34 of 2015 in E.P.No.6 of 2012 in O.S.No.313 of 1997.

For Appellant : Mr.K.Balasubramanian

For Respondent : No Appearance

JUDGMENT



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WEB COPY The unsuccessful petitioner in an application filed U/s. 47 and Or.21 R.97 of C.P.C, in execution proceedings arising out of a partition decree, is the appellant before me. Despite service of notice on the respondent, there is no appearance on the side of the respondent.

2. The brief facts that are necessary for deciding the above Second Appeal are as hereunder:

Originally there was a partition amongst the father of the respondent herein and his brothers. One, Mr.Thanakodi purchased 23 cents of land from the respondent's father, Govindasami Pillai. The said Thanakodi, in turn sold the 23 cents of land, in favour of the appellant's father who was the 7th defendant in the suit for partition O.S.No.313 of 1997. A preliminary decree was passed by the Trial Court on 29.04.2004, setting aside the partition deed dated 23.07.1978, between the father of the respondent and his brothers.

3. However, in view of the admission of P.W.1 in his cross



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examination, that he did not have any objection in allotting his proportionate share in the remaining property, since some item has already been sold, the Trial Court held that the equities can be worked out at the time of passing of the final decree and the purchaser's interest can be suitably protected.

4. It is the case of the appellant that since the Trial court had specifically observed that the right of the purchasers including the father of the appellant could be worked out at the time of final decree, no appeal was preferred against the preliminary decree. It is the grievance of the appellant that in the final decree proceedings though his father was rightly impleaded as a party respondent, pending the final decree application, his father passed away and the appellant was impleaded as the 37th respondent. Admittedly, the petitioner in the final decree proceedings chose to give up the appellant who was impleaded as the 37th respondent and thereafter a final decree came to be passed on 08.07.2011, in which 8 cents of land situate on the Northern side of the property purchased by the appellant's father was included in the final decree and thereafter E.P.No.6 of 2012 came to be filed for recovery of



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possession from the appellant. Delivery of possession was also ordered by the Execution Court on 12.03.2015. In such circumstances, the appellant preferred E.A.No. 34 of 2015 on the ground that the decree passed is not binding against him. The Executing Court dismissed the application and the said findings were affirmed in A.S.No.7 of 2016, as against which the present Second Appeal has been filed.

5. The following substantial questions of law are framed for a decision in the above Second Appeal:

“(i) Whether a decree passed against a party before the Court who was subsequently given up, would bind such given up party?”

“(ii) Whether the Judgment and Decree passed by the Courts below is in violation of the mandate under Order 21 Rule 97 CPC?”

6. I have heard Mr.K.Balasubramanian, learned counsel for the



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appellant. I have also perused the records. The Second Appeal has not yet been admitted. On going through the records, it is seen that admittedly, the appellant who is one of the sons of the 7th defendant and a party respondent in the final decree proceedings was given up after being impleaded as legal representative of the deceased 7th defendant. The Courts below have misdirected themselves in holding that the appellant's father having accepted the preliminary decree, stood in the way of the son of such a defendant to take out an application to thwart the final decree proceedings.

7. The First Appellate Court has infact also taken into consideration irrelevant factors like steps being taken to serve the appellant after his being impleaded and only because of several unsuccessful attempts to serve the appellant, the respondent proceeded to give up the appellant before the Executing Court. Admittedly, when the Trial Court had found that the purchasers interest could be taken into account while passing the final decree, it is absolutely necessary to hear the purchaser, when it came to the question of allotting separate properties to the parties to the *lis*. Once the appellant has



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been consciously given up by the respondent in the final decree proceedings, thereafter no adverse orders could be passed against the appellant. If the final decree had allotted the lands purchased by the appellant's father to the legal representatives of the said deceased 7th defendant i.e., the father of the appellant, then may be it can be said that no prejudice would be caused to the appellant. Courts below have also found that the other legal representatives have not contested the proceedings and therefore, the appellant would also have to suffer and cannot be permitted to challenge the final decree proceedings. The said finding is unsustainable for the simple reason that the appellant has a definite share in the suit items and the same was undivided. Thus, the appellant ought to have been given an opportunity to advance his objections. Unfortunately, the respondents have given up the appellant in the final decree proceedings. Once the appellant was given up, thereupon the Court ought not to have passed any order that was adverse to the interest of the appellant. Here, admittedly, the Executing Court has passed an order, which resulted in the appellant being liable to handover possession of a portion of the property which was purchased by his father. The procedure



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adopted by the Courts below is wholly erroneous and did not advance the cause of substantial justice. I am conscious of the fact that suit was filed of the year 1997 and there has been considerable delay in the plaintiff enjoying the fruits and benefits of the decree. However, this alone cannot be a factor to override the irregular procedure which has resulted in serious hardship to the appellant and the Executing Court ought to have taken into consideration the fact that the respondent had chosen to give up the appellant. In other words, the respondent did not want any decree to be passed against the appellant. That being the position, the impugned order, which is clearly infringing into the rights of the appellant, ought not to have been passed.

8. In fine, the substantial questions of law are answered in favour of the appellant and I am inclined to set aside the findings of the Courts below in A.S.No.7 of 2016, confirming the decretal order in E.A.No.34 of 2015 in E.P.No.6 of 2012 in O.S.No.313 of 1997 and I am remitting the matter to the First Appellate Court to decide the appeal afresh after hearing the parties, including the appellant and the respondent/decreed holder.



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9. Considering that the suit is of the year 1997, I direct the First Appellate Court to hear the parties and dispose of the appeal expeditiously and at any rate not later than three months from the date of receipt of a copy of this judgment. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

16.02.2024.

Internet:Yes
Index:Yes/No
Neutral Citation:Yes/No
Speaking/Non-speaking order

To
1. The Subordinate Judge, Mannargudi
2. The District Munsiff, Thiruthuraipoondi

P.B.BALAJI, J.,
kpr



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Pre-delivery Judgment in
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