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S.A.No.128 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.06.2024

CORAM

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

S.A.No.128 of 2019

and

C.M.P.No.2606 of 2019

1.Muthu @ Muthammal (Died)

2.Sasikala

3.Priyanka

4.Gopinath

5.Nandhamoses

.. Appellants

(A1 Died, A2 to A5 are brought on record as LRs of the deceased A1 vide Court Order dated 06.06.2024 made in C.M.P.Nos.2480, 2487 and 2490 of 2024 in S.A.No.128 of 2019 by VLNJ)

Vs.

1.Amaravathi (Died)

2.Sundarambal

3.Annapoorani

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<https://www.mhc.tn.gov.in/judis>



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4.Nagaraj

5.Madeswaran

6.Vasudevan

7.Thiagavathi

8.Meenatchi Chellamuthu

9.Muthukumar

.. Respondents

(R1 died, RR1 to 9 are brought on record as LR's of the deceased R1 vide Court order dated 26.06.2024 made in C.M.P.Nos.2486, 2492 and 2493 of 2024 in S.A.No.128 of 2019 by VLNJ)

Prayer : This Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree, dated 05.01.2017, passed in A.S.No.9 of 2016 on the file of the Principal Subordinate Court at Erode confirming the final decree and judgment, dated 13.02.2015, passed in I.A.No.44 of 2011 in O.S.No.62 of 2008 on the file of the II Additional District Munsif Court at Erode.

For Appellants : Mr.J.Titus Enock
for Mr.I.C.Vasudevan

For R1 : Died

For RR2, 3, 7 & 8 : Mr.V.S.Kesavan



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For R4 : Served, No Appearance

For R5 : Mr.T.Dhanasekaran

For R6 : Not Ready in Notice, No
Appearance

JUDGMENT

The present Second Appeal arises out of the final decree proceedings.

2. For the sake of convenience, the parties will be referred to as per their rank in the suit.

3. O.S.No.62 of 2008 was filed before the II Additional District Munsif Court at Erode by the 1st appellant/plaintiff. She claimed 1/3rd share in the suit schedule mentioned properties.

4. A written statement was received from the contesting defendants and a preliminary decree was passed on 30.06.2010. In terms of the preliminary decree, the suit property was divided into 20 equal shares. Out of which the plaintiffs/appellants were allotted 5/20th share, and the 2nd, 3rd and 6th defendants were allotted 8/20th share, and the remaining 7/20th share was left to the allotment of defendant Nos.1,4 and 5 subject to them



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depositing non-judicial stamp papers.

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5. Both sides agreed that as against the preliminary decree, a regular appeal was filed before the Sub Court, the same was dismissed and the Second Appeal preferred to this Court also ended in a confirmation of the preliminary decree.

6. After the preliminary decree had been passed, the defendant Nos.2,3 and 6 took out an application for the passing of a final decree in I.A.No.44 of 2011. In terms of Order XXVI Rules 13 and 14 of the Code of Civil Procedure, they sought an appointment of an Advocate Commissioner to inspect the suit property and submit a report.

7. It is on record that the Advocate Commissioner visited the suit property not once but thrice. The 1st and the 2nd Advocate Commissioner's reports were set aside by the learned District Munsif at Erode and the 3rd report was received as Ex.C4 and Ex.C5. Since there was no dispute over the plan that had been drawn by the Advocate Commissioner under Ex.C2, on the basis of Ex.C2, Ex.C4 and Ex.C5, the learned District Munsif passed a



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final decree.

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8. Aggrieved by the same, the plaintiff preferred a regular appeal in A.S.No.9 of 2016 before the learned Principal Subordinate Judge at Erode. The said appeal was dismissed on 05.01.2017. Challenging the same, the present Second Appeal has been filed before this Court.

9. The Second Appeal was admitted by this Court on 01.02.2019 on the following substantial questions of law :

“ (a) Whether the courts below is correct in passing the Final decree based the Advocate Commissioner's Report which is not in accordance with the preliminary decree especially when the Commissioner failed to value the existing superstructures in the suit property as per the preliminary decree?

(b) Whether the court below is correct in relying on the document dated 21.04.2016 which is not marked?

(c) Whether the final decree should incorporate the order for delivery of possession of their respective shares to the parties to the suit? ”

10. Notice was issued to the contesting defendants and



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Mr.V.S.Kesavan has entered appearance on their behalf.

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11. Heard Mr.J.Titus Enock, for Mr.I.C.Vasudevan, appearing on behalf of the appellants, Mr.V.S.Kesavan, appearing on behalf of the 2nd, 3rd, 7th and 8th respondents and Mr.T.Dhanasekaran, appearing on behalf of the 5th respondent.

12. Mr.J.Titus Enock would contend as follows :

(1) In the Advocate Commissioner's reports under Ex.C2, Ex.C4 and Ex.C5, the value of the building had not been taken into consideration.

(2) The 1st plaintiff was residing in the property and was also renting it out to the tenants and therefore, it is capable for generating some value.

13. He would attack the judgment of the lower Appellate Court in receiving the agreement of sale entered into between the 1st plaintiff/1st appellant and a third party on 21.04.2016 without an application under Order XLI Rule 27 of the Code of Civil Procedure. The document, dated 21.04.2016, is an agreement of sale between the plaintiff and a third party.



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The defendants/respondents had relied upon the same in order to show that pursuant to the passing of the final decree, the 1st plaintiff had accepted the same and had acted upon by entering into an agreement of sale to alienate the property allotted to her in the final decree proceedings. Lastly, he would submit that the nature of division by the Advocate Commissioner prevents beneficial enjoyment of the property and therefore, he would state that the Advocate Commissioner's report ought to have been rejected by the trial Court. Therefore, he prays for the appeal to be allowed and the decree of the Courts below to be set aside and the matter to be sent back to the trial Court for the passing of a fresh final decree.

14. Mr.V.S.Kesavan would submit that even before the appeal was filed before the lower Appellate Court, the contesting defendants had moved an application for execution in E.P.No.29 of 2015 on the file of the learned District Munsif at Erode and had taken delivery of possession of the property allotted to them on 14.03.2016. He would state that the agreement of sale, between the 1st plaintiff and the third party, is a registered document and the Court below did not place much emphasize on the same other than the purpose of showing that the 1st plaintiff had accepted the situation and



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acted upon the allotment.

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15. He would further submit that the property in which the 1st plaintiff was residing has not been allotted to the other defendants but has been allotted to the 1st plaintiff and she had been in possession and enjoyment of the same during her life time. He would state that de hors the document, dated 21.04.2016, the 1st plaintiff has not made out the case for interference. Therefore, he would seek confirmation of the order of the Court below.

16. Heard the arguments on either side and I have carefully gone through the records.

17. Since the appeal arises against the final decree proceedings and each of the questions of law which have been framed by Mr.J.Titus Enock are linked to one another, I heard the appeal on all the questions of law.

18. It is the settled position of law that the final decree Court cannot



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exceed the preliminary decree. As premised above, the 1st plaintiff had been allotted 5/20th share, whereas, the contesting defendants, namely defendant Nos.2, 3 and 6 were allotted 8/20th share. The learned trial Judge had appointed an Advocate Commissioner twice and had set aside their reports for want of proper execution of the warrant. The third time when the Advocate Commissioner was appointed and a report was received under Ex.C4 and Ex.C5, the trial Court had taken into consideration the undisputed sketch under Ex.C2 and read it along with Ex.C4 and Ex.C5. The argument of Mr.J.Titus Enock that the Advocate Commissioner did not do her job properly even while visiting the property for the third time cannot be countenanced in the Second Appeal.

19. The position of law has been settled by the Division Bench of this Court in the judgment of ***Krishna Reddiar and Others vs. Ramanuja Reddiar and Another*** [AIR 1929 Mad 492]. The Division Bench had specifically held that where a party does not object to the Advocate Commissioner's report before the trial Court, it is not open to the said party to agitate about the correctness thereof even in a regular appeal. Whereas in the situation of the present case, the 1st plaintiff had not objected to the



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report before the trial Court nor had filed an application before the lower appellate Court for the purpose of scrapping the report. It is for the first time in the Second Appeal this point has been raised. Apart from the technical position, no new point can be raised in the Second Appeal, in the light of the clear and categorical view taken by the Division Bench of this Court, I am not in a position to agree with the submission of Mr.J.Titus Enock that the report of the Advocate Commissioner is faulty.

20. In a partition suit, it is the duty of a party who is prejudiced by the Advocate Commissioner's report to take his/her objections at the appropriate stage. That stage having passed, the said party cannot be permitted to agitate the issue in the Second Appeal. This settles the objection of Mr.J.Titus Enock on the merits of the Advocate Commissioner's report.

21. Apart from that, in order to satisfy myself, I have called for the original records under Ex.C4 and Ex.C5. The Advocate Commissioner has specifically stated that the building which is the subject matter of division cannot be valued as the same is dilapidated. No Court can fix value for a dilapidated building.



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22. It is here the submission made by Mr.V.S.Kesavan as well as the finding of the lower Appellate Court become relevant. The shares of the respective parties are not in dispute. The extent, which had been divided according to the preliminary decree, is also not in dispute. Once the Commissioner is allotted to the property in terms of preliminary decree, and when the plaintiff's residence has not been allotted to the defendant but to the plaintiff herself, I am not able to see how she is prejudiced by virtue of such allotment.

23. Last point raised by Mr.J.Titus Enock that an Advocate Commissioner should have submitted a report keeping in mind the possibility of redevelopment of the dilapidated building does not appeal to law. This is for the simple reason that the Advocate Commissioner can only divide the property as it is available. In this case, she has also the responsibility of suggesting a division of the property into three parts, namely $5/20^{\text{th}}$ share to the 1st plaintiff, $7/20^{\text{th}}$ share to defendant Nos.1,4 and 5 and $8/20^{\text{th}}$ share to defendant Nos.2,3 and 6. When the extent available is not vast but limited as available in the present case, the Advocate



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Commissioner has done her best possible work. The division of the property is as per the preliminary decree and it cannot be on the basis of the building codes of the Municipal Authorities.

24. Apart from that, as it is clear that final decree has been put into execution, and the delivery has also been recorded, I am not inclined to unsettle the settled matters.

25. On the point of law, Mr.J.Titus Enock is right that the agreement of sale said to have been entered into by the 1st plaintiff with the third party on 21.04.2016 ought not to have been received without the application under Order XLI Rule 27(1)(a) of the Code of Civil Procedure. Even if I were to keep the said consideration by the lower appellate Court aside, I still feel that the appellant is not entitled to succeed.

26. In fine, the Second Appeal stands dismissed. As the parties are close relatives, I am not inclined to impose any costs. Consequently,



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connected Civil Miscellaneous Petition is closed.

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Index:Yes/No

Speaking Order :Yes/No

Neutral Citation:Yes/No

V. LAKSHMINARAYANAN, J.

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WEB COPY To

- 1.The Principal Subordinate Court,
Erode
- 2.The II Additional District Munsif Court,
Erode

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and
C.M.P.No.2606 of 2019

27.06.2024