



A.S.(MD) No.267 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Orders Reserved on	03/27/24
Orders Pronounced on	12.06.2024

CORAM:

THE HONOURABLE MR.JUSTICE P.DHANABAL

A.S.(MD) No.267 of 2022

R.Balumani ...Appellant/1st Respondent/Plaintiff
Vs.

- 1.R.Samiyathal
- 2.R.Velumani
- 3.Rajeswari ...Respondents 1 to 3/Petitioners/Defendants
- 4.The Regional Transport Officer,
Office of the Regional Transport Office,
Thanthonimalai Post,
Karur.
- 5.The South Indian Bank Ltd.,
represented by its Branch Manager,
Town-Lee-Bazaar Branch,
Salem.
- 6.The Axis Bank Ltd.,
D.No.15-B, 1-A, Ground Floor,
Serfancic Shopping Complex,
Omalur Main Road,
Salem-9.
- 7.The District Industries Center,
represented by its General Manager,
Namakkal,
Namakkal District.
- 8.The Athanur Panchayat,
represented by its Executive Officer,
Executive Authority,
Office at Athanur,
Rasipuram Taluk,
Namakkal District

...Respondents/Defendants



A.S.(MD) No.267 of 2022

PRAYER: First Appeal is filed under Order 41 Rule 1 read with section 96 of Code of Civil Procedure, to set aside the final decree (fair and decreetal order dated 30.03.2022 by the learned District Judge, Karur made in I.A.No. 206 of 2018 in O.S.No.56 of 2007.

For Appellant : Mr.L.Prabakaran
For R1 to R3 : Mr.B.Prasana Vinoth
For R4 to R8 : No appearance.

JUDGMENT

This appeal has been preferred as against the order dated 30.03.2022 passed in I.A.No.206 of 2018 in O.S.No.56 of 2007 on the file of District Judge, Karur, wherein the respondents 1 to 3 herein have filed final decree petition to divide the properties in terms of the preliminary decree passed in the main suit. The trial Court has passed final decree in terms of the preliminary decree and based on the Commissioner report filed by the Advocate Commissioner. Aggrieved by the said final decree, the first respondent therein has filed this appeal. In fact the respondents/defendants 1 to 3 herein have filed final decree petition and they are 1 to 3 defendants in the suit.

2. The appellant/plaintiff has filed a suit in O.S.No.56 of 2007 on the file of the District Judge, Karur, for partition and separate possession. Preliminary decree was passed by the trial court. Against the said preliminary decree passed in the suit, first respondent/plaintiff has preferred an appeal before this Court in A.S.No.151 of 2013.

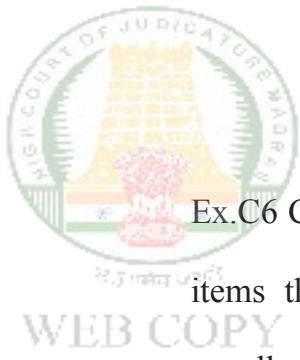


A.S.(MD) No.267 of 2022

3. This Court allowed the A.S.No.151 of 2013 by granting preliminary decree to divide the properties into 12 equal shares and to allot 5/12 shares to the plaintiff and 1/12 share to the each defendants 1 and 3 and thereafter 5/12 shares to the 2nd defendant.

4. Based on the above said decree of this Court, the defendants 1 to 3 have filed the final decree application before the trial Court. In the final decree petition, the Commissioner was appointed. The Commissioner with the help of Surveyor inspected the suit property and suggested to divide the properties into 12 shares. To that effect, he also filed report and plans. Those report and plans were marked as Ex.C1 to C6, in the final decree proceedings.

5. No witnesses were examined before the trial Court. Advocate Commissioner's report and plan alone were marked. After filing of Commissioner's report and plan, both the appellant and respondents have filed objections. After considering the objections made by the parties, the trial Court has passed the final decree. In the final decree, the properties were allotted to the parties as per the preliminary decree. 5 HP motor pumpset and pipeline in the south west corner of the first item of B schedule properties as mentioned in the Commissioner's plan Ex.C3 allotted for common enjoyment of the parties. Further, 15 feet width of pathway as shown in the Ex.C3/Commissioner's plan and W marked well and east west pathway mentioned in Ex.C5/Commissioner's plan; well and east west pathway shown in the



A.S.(MD) No.267 of 2022

Ex.C6 Commissioner's plan are allotted for common enjoyment of the parties. In all items the properties were divided into 12 shares and 5 shares allotted to the appellant. Aggrieved over the above said allotment of shares, the present appeal has been preferred by the first respondent therein and appellant herein.

6. The learned counsel appearing for the appellant would contend that he is the plaintiff in the main suit and he filed the suit for partition and separate possession. Preliminary decree was passed by the trial Court. Against the preliminary decree, appellant/first respondent/plaintiff preferred an appeal in A.S.No.151 of 2013 in respect of allotment of shares. This Court allowed the said A.S.No.151 of 2013 by judgment dated 29.08.2017 granting preliminary decree to divide the properties into 12 equal shares and to allot 5/12 shares to the plaintiff and 1/12 share to the each defendants 1 and 3 and thereafter 5/12 shares to the 2nd defendant.

6.1. The learned counsel for the appellant further contended that the defendants 1 to 3 have filed petition for passing final decree. The trial Court appointed the Advocate Commissioner. Advocate Commissioner has filed report and plans. The allotment of shares are not in consonance with the preliminary decree passed by the trial Court and the width of the pathway is not sufficient to take the vehicles for the agricultural purpose. The allotment of shares are without taking note of the parties convenience. The well and 5 HP electric pumpset and pipeline are



A.S.(MD) No.267 of 2022

found only first item of B schedule property. Whereas the Commissioner has wrongly mentioned the same as found in A schedule property. The final decree passed by the trial Court is without the convenience of the parties and without mentioning any boundaries. The allotment of shares are not proper. But the trial Court failed to consider the above said aspects and erroneously passed the final decree. Therefore, the final decree passed by the trial Court is liable to be set aside.

7. The learned counsel for the respondents/defendants 1 to 3 would contend that the Commissioner with the help of surveyor measured the property and also filed report and plans. In the report correctly suggested for the allotment of shares for the convenience of the parties. Both the parties have filed objections. The said objections were also taken into consideration by the trial Court. The trial Court extended the width of the pathway as 15 feet and all other properties were divided in terms of the preliminary decree. Therefore, the allotment of shares and passing of final decree is in order and it is more convenient to the parties. Therefore, the present appeal is liable to be dismissed.

8. This Court has heard both sides and perused the records. For the sake of convenience and brevity the parties herein after will be referred to as per their status/ranking in the trial Court.

9.The points for determination in this appeal are:

1.Whether the final decree passed by the trial Court is sustainable in law and

facts?



A.S.(MD) No.267 of 2022

2. Whether this appeal is to be allowed or not?

Points:

10. In this case, this appeal has been preferred as against the final decree passed by the trial court. According to the appellant/plaintiff, as per the preliminary decree, the properties have to be divided into 12 parts; 5 parts have to be allotted to the plaintiff; 5 parts have to be allotted to 2nd defendant. 1 and 3 defendants each are entitled to one part of the suit property. The Commissioner also divided the properties into 12 parts. But the trial Court allotted the shares on various places ie., not convenient to the parties.

11. According to the respondents/defendants 1 to 3, as per the preliminary decree passed by this Court, the final decree was passed and allotment of shares also suggested by the Commissioner. Both sides have filed objections for the Commissioner's report. After taking into consideration of the objections, the trial Court has passed final decree. The said final decree is more convenient to all the parties.

12. A perusal of the entire materials placed before this court would go to show that the suit properties are described as 5 items. A schedule contains one item. B schedule contains 4 items. The Commissioner has filed separate plans. The Commissioner filed report and plans. The said Commissioner's report has been marked as Ex.C1 and plans have been marked as Ex.C2 to C6. In the Commissioner's report, the Commissioner divided A schedule property into 12 equal



A.S.(MD) No.267 of 2022

shares. Northern side 5 shares, blue color washed portion was allotted to 2nd petitioner/2nd defendant; orange color washed portion was allotted to 1st petitioner/1st defendant; Purple color washed portion was allotted to 3rd respondent/3rd defendant. Southern side 5 shares. Red color washed portion was allotted to 1st respondent/plaintiff. The trial Court after taking into consideration of the allotment of shares, approved the same as suggested by the Commissioner. However, the width of the pathway alone is modified as 15 feet. The above said portion was referred in Ex.C2 of the Commissioner's plan. Therefore, this Court also concur with the share allotted by the Commissioner as well as the trial Court.

13. As far as the B schedule properties are concerned, the B schedule contains 4 items. The Commissioner also filed 4 plans. Ex.C3 is pertaining to B schedule first item of the property. The Commissioner has divided the properties into 12 parts and also formed the pathway. Both sides filed memo to allot their respective shares. The first respondent has filed memo to allot northern side 5 shares to the 2nd petitioner. The trial Court has allotted blue color washed portion to the 2nd petitioner; orange color washed portion to the 1st petitioner; purple color washed portion to the 3rd petitioner and red color washed portion to the 1st respondent. The well motor pumpset and pipeline shall be enjoyed by the parties in common. While so, there is no reference about the location of well and how the parties could reach the well and to take water from the well to their respective lands was omitted in the plan as well in the final decree. Further, the Commissioner as well as the surveyor have not



A.S.(MD) No.267 of 2022

mentioned about the existence of well and the pipelines and the convenient of the parties to enjoy the well. Therefore, the trial Court also failed to consider the said aspect and simply stated that the well, motor pumpset and pipeline shall be enjoyed by the parties in common. Therefore, the trial Court final decree ordered in respect of the B schedule first item is not sustainable.

14. As far as the 2nd item of B schedule property is concerned, the Commissioner has divided 12 equal shares and also formed pathway of 10 feet on the western side of the properties. The Commissioner's plan was marked as Ex.C4 in respect of the B schedule property 2nd item of the property. The trial Court allotted blue color washed portion to the 2nd petitioner; orange color washed portion to the 1st petitioner; purple color washed portion to the 3rd petitioner and red color washed portion to the 1st respondent and the well, motor pumpset and pipeline shall be enjoyed by the parties in common and all the parties are entitle to enjoy the 15 feet with cart-track in common.

15. The trial Court has directed to form common pathway with an extent of 15 feet. However stated about the well, motor pumpset and pipeline. Whereas, in the plan there is no mention about the motor pumpset and the parties also admitted that in the 2nd item of the B schedule property no motor pumpset and pipeline are available. In fact the motor pumpset and pipelines are available only in the 1st item of the B schedule property. Therefore, the final decree passed by the trial Court in



A.S.(MD) No.267 of 2022

respect of division for the enjoyment of motor pumpset, well and pipeline are not in consonance with the preliminary decree and the properties available in the suit property. Therefore, the order passed by the trial Court in respect of the item 2 B schedule is liable to be set aside.

16. As far as B schedule 3rd item of the property is concerned, the Commissioner has filed plan and the same was marked as Ex.C5. The Commissioner has divided the suit properties into 12 equal shares and common pathway was also provided. A building was also shown in brown color washed portion. The trial Court allotted blue color washed portion to the 2nd petitioner; orange color washed portion to the 1st petitioner; purple color washed portion to the 3rd petitioner and red color washed portion to the 1st respondent. The brown color washed portion and well shown as W in the plan were allotted for common enjoyment of the parties and they are also entitled to enjoy the east west pathway situated on the southern side of the property and the same has been shown in grey color in the plan. The parties have not disputed the said allotment.

17. As far as the 4th item of the B schedule property is concerned, the Commissioner has filed plan and the same was marked as Ex.C6. The trial Court has allotted blue color washed portion to the 2nd petitioner; red color washed portion to the 1st respondent; orange color washed portion to the 1st petitioner; dark blue color washed portion to the 3rd petitioner; yellow color washed well and cart-track are



A.S.(MD) No.267 of 2022

allotted for common enjoyment of the parties. In the 4th item the cart-track runs towards east west on the northern side of the properties. Whereas the well was situated on the south end, Red washed portion. There is no pathway provision for the parties to reach the well and to take water from the well and for enjoyment of the well. However, the trial Court failed to consider the aspect regarding how the parties could reach the well and to enjoy the properties. Therefore, the order passed by the trial Court is liable to be set aside.

18. The trial Court has allotted shares to the respective parties as per the preliminary decree. However as discussed above, the A schedule the properties were correctly allotted and the parties have no objection. As far as B schedule first item is concerned, it is admitted by both the parties that the Commissioner has omitted to mention about the common well, motor pumpset and pipeline situated in the 1st item of the property. The trial Court ordered to enjoy the said properties as common. While so, where the properties was allotted and how the parties could reach the said well and how can they enjoy the common properties have to be mentioned in the final decree proceedings. But there is no proper adjudication in respect of the 1st item of the B schedule property, by the trial Court.

19. As far as 2nd item of the B schedule property is concerned, the Commissioner has mentioned about the properties and divided the properties. However, the trial Court has passed final decree as if there is a common well and



A.S.(MD) No.267 of 2022

pumpset situated in 2nd item of B schedule property. Further the pathways mentioned in the Ex.C3 and C4 as 15 feet. But the petitioners have sought for 25 feet and respondent sought 20 feet. But the trial Court allotted only 15 feet. Therefore, width of the pathway also has to be increased in order to facilitate the vehicle movements for the agricultural purpose. Further the trial Court also allotted the W marked well and east west pathway and south side of Ex.C5 in the 3rd item of the property and the same in order. As far as 4th item of B schedule is concerned, the trial Court has allotted the shares and the east west pathway on the northern side in Ex.C6 and well situated on the south side, yellow washed portion Commissioner's plan were allotted for common enjoyment and the width of the common pathway is 15 feet. The Commissioner's plan did not mention about how the parties to reach the said common well and that aspect has not been considered by the trial Court.

20. Further, the learned counsel appearing for the appellant has also stated that there are coconut trees available in the common properties. Those coconut trees have not been partitioned. In this context, it is for the parties to enjoy the common place as common and also the trees and other amenities situated in the common place have to be enjoyed as common by all the parties. However, since no pathway facilities provided for the 1st and 4th item of the B schedule property to reach the common well, the final decree passed by the trial Court in respect of those properties are liable to be set aside. The parties are at liberty to approach the trial Court for allotment of share for their convenient enjoyment.



A.S.(MD) No.267 of 2022

21. In view of the above said discussion, it is appropriate to remand back the case for passing final decree for the convenient enjoyment of the parties by setting aside the final decree passed by the trial Court.

22. In the result, this Appeal suit is allowed and the final decree passed by the trial Court is set aside and the matter is remanded back for fresh consideration by the trial Court. No cost.

12.06.2024

Index : Yes/No
Internet : Yes/No
Citation : Yes/No
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To

1. The District Judge, Karur.
2. The Regional Transport Officer,
Office of the Regional Transport Office,
Thanthonimalai Post,
Karur.
3. The South Indian Bank Ltd.,
represented by its Branch Manager,
Town-Lee-Bazaar Branch,
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4. The Axis Bank Ltd.,
D.No.15-B, 1-A, Ground Floor,
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5. The District Industries Center,
represented by its General Manager,
Namakkal,
Namakkal District.



A.S.(MD) No.267 of 2022

6.The Athanur Panchayat,
represented by its Executive Officer,
Executive Authority,
Office at Athanur,
Rasipuram Taluk,
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A.S.(MD) No.267 of 2022

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A.S.(MD) No.267 of 2022

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