



S.A.No.1510 of 1998

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 18.06.2024

CORAM:

THE HONOURABLE MR.JUSTICE **S.SOUNTHAR**

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- 1.Vaithiammal
- 2.SP.Rengammal (Died)
- 3.R.Ganesan (Died)
- 4.RM.Shanmugam
- 5.Muthathal
- 6.Velayutham
- 7.Banumathi
- 8.Vallimayil
- 9.Kaliammal
- 10.Muruganantham
- 11.Karpagam
- 12.S.Saminathan

...Appellants

-Vs-

- 1.Kamalambal Achi (Died)
- 2.AL.VR.AL.Subramanian Chettiar
- 3.Kailasa Thevar (Died)
- 4.Rukmani
- 5.Muthuraman
- 6.Shanmugam Asari
- 7.Satheye Ammal
- 8.SP.Ramiah (Died)
- 9.S.Venkatachalam Pillai
- 10.Chelliah
- 11.Kalyaniammal

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- 12.Perumal Naidu
- 13.SP.Periasami
- 14.Karuppiah
- 15.AL.VR.Ramanathan Chettiar
- 16.AL.VR.AL.Veerappan Chettiar
- 17.M.Ramanathan
- 18.M.Subramanian
- 19.S.V.Krishnan
- 20.Panchavarnam
- 21.G.Alagammal
- 22.G.Muthukumar
- 23.Srikumar
- 24.G.Vasantha
- 25.Kayambu
- 26.Rajeshwari
- 27.Lalitha
- 28.P.Valliappan
- 29.P.Kamala
- 30.Kayalvizhi
- 31.Nepolian
- 32.Vasanthi
- 33.Muthulakshmi
- 34.M.Ponnathal

... Respondents

(Appellants 6 to 8 were brought on record as legal representatives of the deceased second appellant vide order of this Court, dated 11.08.2023 in C.M.P.(MD)Nos.9991 and 9992 of 2023.

Appellants 9 to 11 were brought on record as legal representatives of the deceased third appellant vide order of this Court, dated 11.08.2023 in C.M.P.(MD)Nos.9993 and 9995 of 2023.

Appellant 12 was brought on record vide order of this Court, dated 11.08.2023 in C.M.P.(MD)No.13253 of 2023.



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Respondents 28 and 29 were brought on record as legal representatives of the deceased first respondent vide order of this Court, dated 11.08.2023 in C.M.P(MD)Nos.10030 and 10032 of 2023.

Respondents 30 and 31 were brought on record as legal representatives of the deceased third respondent vide order of this Court, dated 11.08.2023 in C.M.P(MD)Nos.10033 and 10034 of 2023.

Respondents 32 to 34 were brought on record as legal representatives of the deceased eighth respondent vide order of this Court, dated 11.08.2023 in C.M.P(MD)Nos.10035 to 10037 of 2023.)

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree of the learned District Judge, Sivagangai, dated 24.12.1996 in A.S.No.15 of 1996 confirming the judgment and decree of the learned Subordinate Judge, Sivagangai, in I.A.No.256 of 1990 in O.S.No.31 of 1976, dated 07.10.1994.

For Appellants	: Mr.M.Ajmal Khan Senior Counsel for M/s.Ajmal Associates
For R28 and R29	:Mr.G.Prabhu Rajadurai
R1, R3 and R8	: Died
For R2, R4, R5 to R7	
R9 to R19, R14, R21 to R27	
For R20 and R30 to R34	:Exonerated



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JUDGMENT

The Second Appeal is arising out a final decree proceedings. The deceased first respondent herein filed a suit for partition for her 2/3 share. The preliminary decree passed in her favour had attained finality by way of a judgment passed by this Court in a Second Appeal. Thereafter, she filed an I.A.No.256 of 1990 for passing of a final decree. The trial Court appointed an Advocate Commissioner to suggest the convenient mode of division and ultimately, passed a final decree, as per Ex-C3, the plan submitted by the Advocate Commissioner. Aggrieved by the same, the appellants, namely, defendants 7, 13, 35, 37 and 38 preferred a first appeal. The first appellate Court affirmed the findings of the trial Court. Aggrieved by the concurrent findings, the appellants have come by way of this Second Appeal.

2.Pending Second Appeal, the first respondent passed away and his legal representatives were brought on record as Respondents 28 and 29. The appellants 2 and 3 were also recorded dead and their legal representatives were brought on record as appellants 6 to 12.



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WEB COPY 3. At the time of admission, this Court formulated the following substantial questions of law, by order, dated 09.10.1998:

“1. Whether the Courts below erred in going behind the direction given in the preliminary decree in O.S.No.31 of 1976 as to the adjustment of equities relating to the properties in the possession of the appellants, who are the vendees of the defendants 1 to 3?

2. Whether the report of the Commissioner without notice to the parties can be acted upon in passing a final decree?”

4. The learned Senior Counsel appearing for the appellants submitted that final decree was passed by trial Court based on the Advocate Commissioner's report, who filed his report without proper notice to all the parties to the suit. The learned Senior Counsel further submitted that the appellants are the purchasers of the suit property from some of the sharers, namely, defendants 1 to 3 and they have made improvements in the properties purchased by them by way of construction and the Courts below failed to take into consideration the equity in favour of the appellants at the time of passing final decree, in spite of a specific clause in preliminary decree in this regard.



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5. It is seen from the records that as per the preliminary decree, the first respondent/plaintiff was entitled to $\frac{2}{3}$ share and the vendors of the appellants, namely, defendants 1 to 3 were entitled to only $\frac{1}{3}$ share. The first appellate Court taking into consideration the evidence available on record observed that the vendors of the appellants sold more property than what they were really entitled to and hence, if the property in respect of the constructions made by the appellants are allotted to their share, there will be difficulty in allotting $\frac{2}{3}$ share to the first respondent/plaintiff in one block. The first appellate Court rightly pointed out that appellants had purchased portions of properties in different parts of suit property and had put up construction in different parts of the suit property. If all the constructed portions are allotted to appellants/vendors from sharers, the suit property has to be divided into small piece and plaintiff, who is entitled to $\frac{2}{3}$ share can be allotted with small pieces of property in different places and it will cause lot of inconvenience. The first appellate Court also observed that there are construction in different places of suit property and if all such portions are allotted to appellants, it will exceed the share of original sharers from whom they purchased. In such case, it may not be possible to allot $\frac{2}{3}^{\text{rd}}$ share to the



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plaintiff and further even that lesser extent will have to be splitted into pieces, so as to diminish the value of property allotted. The trial Court, by taking into consideration the convenience of all the parties and by balancing the rights of both plaintiffs and the defendants, rightly passed preliminary decree by relying on Ex-C3. Therefore, the submission made by the learned Counsel for the appellants, as if the Courts below failed to take into consideration the equity is not acceptable to this Court.

6.The learned Senior Counsel for the appellants also submitted that the report of the Advocate Commissioner was filed without proper notice to the parties and hence, the Courts below ought not to have relied on the said report. The trial Court, at the time of passing the final decree, recorded a specific finding that the learned Counsel for the appellants/respondents did not make any objection for allotment of shares, as per the report filed by the Advocate Commissioner. Therefore, it is clear that the appellants failed to file any objection to the Advocate Commissioner's report before the trial Court. In these circumstances, the submission made by the learned Counsel for the appellants that the Advocate Commissioner filed a report without



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notice to the parties is not acceptable to this Court. If the report was filed by the Advocate Commissioner without notice to the parties, the same should have been brought to the notice of the trial Court then and there. On the other hand, the appellants failed to make any objection to the Advocate Commissioner's report before the trial Court. In the preamble portion of the Advocate Commissioner's report, he mentioned that notice was issued to all the parties and the same has not been disputed before the trial Court. In such circumstances, the submission made by the learned Counsel for the appellants, as if the Advocate Commissioner filed his report without notice to the parties is not acceptable to this Court.

7.The substantial of questions of law framed at the time of admission are answered against the appellants and in favour of the respondents and as a necessary consequence, the Second Appeal stands dismissed. No costs.

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NCC : Yes / No
Index : Yes / No
Internet : Yes / No
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To

- 1.The District Judge, Sivagangai.
- 2.The Subordinate Judge, Sivagangai.
- 3.The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

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