BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 07.07.2025

CORAM :

THE HONOURABLE Mr. JUSTICE G.ARUL MURUGAN

S.A.(MD)No.539 of 2023
and
C.M.P(MD)No.12659 of 2023

Malliga Begam ... Appellant / Appellant / Respondent / Defendants

Vs

M.Sundar ... Respondent/ Respondent/ Petitioner / Plaintiff

Prayer : This Second Appeal is filed under Section 100 C.P.C., against the judgment and decree passed by the Principal Subordinate Judge, Tirunelveli, in A.S.No.17 of 2016 on 31.01.2019. The first appellate Court has confirmed the judgment and decree passed by the Court of the II Additional District Munsif, Tirunelveli in I.A.No.373 of 2004 in O.S.No.552 of 2004 on 28.02.2013.

For Appellant : Mr.M.D.Senthil for Mr.B.Gopinath

JUDGMENT

The Second Appeal is filed challenging the judgment and decree dated 31.10.2019 in A.S.No.17 of 2016 on the file of the Principal Subordinate Judge, Tirunelveli, confirming the final decree passed in I.A.No.373 of 2004 in O.S.No.552 of 2004 on the file of the II Additional District Munsif, Tirunelveli.

2. The parties are referred to as per their ranking before the trial Court.

3. Originally, the respondent herein had filed a suit in O.S.No.136 of 1990 on the file of the learned District Munsif Court, Tirunelveli, as against the appellant herein seeking for partition and separate possession of his 1/3 share in the suit property. It was the claim of the plaintiff therein that the suit property was originally the ancestral property of the plaintiff's father, Sri Muthukumaraswamy Pillai and the plaintiff along with his brother constituted a Hindu Joint Family and they were in joint possession and enjoyment. Since the plaintiff was employed in Chennai,

since 1982, he had been occasionally visiting the village. Only in June, 1989, he came to know that his father had sold the entire suit property on 16.08.1994 in favour of the appellant. The appellant who had full knowledge about the fact that the suit property is an ancestral property, had purchased the entire suit property including the share of the plaintiff and therefore that sale will not bind him, the plaintiff had come up with the suit.

4. The appellant herein had resisted the suit contending that the suit property is an absolute property of Sri. Muthukumarasamy Pillai. However, the trial Court, after elaborate trial, passed a preliminary decree on 03.10.2001, granting a preliminary decree for 1/3rd share in favour of the respondent / plaintiff. It is not known as to whether there had been any further challenge to the preliminary decree. The respondent had filed I.A.No.37 of 2014 for passing of the final decree. In the application, the appellant herein had filed a counter. Pursuant to which an advocate commissioner was appointed and the advocate commissioner, after visiting the suit property, had considered the documents and the physical features of the suit property and had filed a report along with sketch on

30.11.2009. The appellant herein had filed objections on 12.04.2010. Thereafter, considering the objections, the trial Court had passed the judgment and final decree dated 28.02.2013, based on the report filed by the advocate commissioner by allotting the respective shares to the parties. Aggrieved, the appellant filed an appeal in A.S.No.17 of 2016 and the lower appellate Court by considering the fact that the trial Court had rightly allotted the shares and passed the final decree, dismissed the appeal. Assailing the judgment and decree of the Courts below, the appellant has preferred this appeal.

5. The appeal has not been admitted and it is in the admission stage for the past three years.

6. Learned counsel appearing for the appellant had only contended by placing the plan filed by the advocate commissioner and also the valuation arrived at that when the value was fixed for the suit properties, though the appellant had constructed the house in D.Nos.26/2 and 26/3, the value amounting to a sum of Rs.6,36,061/- had been added towards the value of the property and it is his contention that this value should

not have been added since it is the money spent by the appellant for construction. It is his vehement contention that if the value of the building in D.Nos.26/2 and 26/3 which is fixed at Rs.6,36,061/- is not added to the value of the properties including the land in D.Nos.26/2 and 26/3, then the ovelty that is fixed payable by the respondent to the appellant would have been Rs.9,37,498/- and therefore there is an error or mistake that had been crept in by only calculating the ovelty at a sum of Rs.7,25,000/- to be payable by the respondent. In this regard, the learned counsel contended that though they have filed an objection to the advocate commissioner's report, the same has not been taken note of and the final decree has been passed and since only there is a limited dispute in respect of the ovelty amount, which has a difference of nearly 2,12,000/-, a short notice could be ordered to the respondent where the issue could be sorted out and submitted that the Courts below have failed to taken note of this aspect. Therefore the findings rendered are perverse.

7. Heard the learned counsel for the appellant and perused the material available on record.

8. Admittedly, the respondent had instituted a suit in O.S.No.136 of 1990 on 28.01.1990, claiming for partition of his 1/3 share in the suit property. Though the appellant herein had resisted the suit claim and filed a written statement disputing the claim made by the plaintiff, however the trial Court had passed a judgment and decree dated 03.10.2001, by granting a preliminary decree for 1/3 share in favour of the respondent in respect of the suit property. In view of the preliminary decree passed in his favour, the respondent had filed I.A.No.37 of 2014 for passing of the final decree.

9. In the final decree proceedings, the appellant had filed a counter affidavit in I.A.No.37 of 2014. Pursuant to which an advocate commissioner was appointed and the advocate commissioner, after ascertaining the details and valuation of the suit property, had filed his report on 30.11.2009 along with a copy of the sketch. The appellant herein had also filed her objections to the report on 12.04.2010.

10. Now the vital issue that is raised by the appellant in the present appeal is that though an objection was raised by the appellant for the advocate commissioner report, the same has not been taken note of and the value in respect of the building in D.Nos.26/2 and 26/3 for a sum of Rs.6,36,091/- should not have been added while calculating the valuation of the suit property and thereby the respondent who ought to have been fixed an ovelty amount of Rs.9,37,488/-, had been wrongly fixed as ovelty amount of Rs.7,25,000/- only.

11. This Court perused the report filed by the advocate commissioner and the plan and also the objections filed by the appellant. The appellant had filed the objections on 12.04.2010. The perusal of the objections filed by the appellant reveals that only he has contended that though the buildings in D.Nos.26/2 and 26/3 is having a higher value, the advocate commissioner has fixed the value of the building in D.No.26 more than the two buildings that are found in D.Nos.26/2 and 26/3. The appellant had stated that since the two buildings in D.Nos.26/2 and 26/3, is more valuable than the building in D.No.26, the Engineer had wrongly

assessed the value of the building in D.No.26 as Rs.2,48,709/- while valuing the two buildings in D.Nos.26/2 and 26/3 joined together at Rs.5,10,000/-. Therefore, it is the contention of the appellant that the Engineer had wrongly calculated the valuations in respect of the buildings in D.No.26 and other building in D.Nos.26/2 and 26/3. This objections had been considered by the trial Court and the trial Court by the judgment and decree had passed the final decree on 28.02.2013. The trial Court had considered the valuation report filed by the PWD Engineer and had calculated the value of the properties in consonance with the Engineer's report and the advocate commissioner's report filed. The trial Court by considering the fact that since D.Nos.26/2 and 26/3 had been already sold to the third parties and in view of the recommendation made by the advocate commissioner, that the property bearing D.No.26 could be allotted in favour of the respondent herein, in view of his 1/3 share, the trial Court had also specifically recorded that though in the counter it is stated that she had made an improvement but no oral or documentary evidence has been submitted by the appellant to establish the claim made by her.

12. In view of the fact that the appellant even while filing the objections to the advocate commissioner's report on 12.04.2010 except claiming that the Engineer has not valued the property properly for the buildings in D.Nos.26/2 and 26/3 or valued lesser than the building in D.No.26, there is not a single averment raised by the appellant that since the construction in D.Nos.26/2 and 26/3 had been made by the appellant, the cost fixed towards the building should not have been added while arriving at the value of the suit property in D.Nos.26/2 and 26/3. When the appellant had not made any objections in this regard and had only made an objection with respect of the valuation of the suit property, the trial Court rightly considered the Engineer's report and also the objection and the advocate commissioner's report, by taking note of the fact that D.Nos.26/2 and 26/3 had been sold by the appellant, had rightly allotted the share of the respondent in D.No.26. In the appeal, the lower appellate Court also had confirmed the final decree by particularly observing that there has been no dispute between the parties in respect the ovelty amount as fixed by the trial Court. When there has been no

objection raised and there is no dispute between the parties in respect of the ovelty amount fixed, the present appeal filed by the appellant and the argument advanced only on the ground that there has been difference in ovelty amount and a sum of Rs.2,12,000/- has been fixed lesser in value, payable by the respondent cannot be accepted.

13. It is only to be noted that when the Second Appeal was filed and the same was listed for admission in the year 2023 itself, the learned counsel who was earlier on record had sought to withdraw the vakalat even at the time of admission and thereafter the appeal has been kept pending and only now, after a period of two years, the appeal is moved for admission, in view of the fact that the final decree proceedings are completed and the appellant has to hand over the possession of D.No.26 which has been allotted to the respondent. It is to be noted that when the final decree proceedings has been passed as early as in the year 2013 on one ground or the other, the plaintiff has successfully dragged on the proceedings for all these years. After a period of 12 years, now it is submitted that there is a difference of at least Rs.2,12,000/- in payment of the ovelty amount, which has never been raised or disputed. This Court

does not find any illegality or any error in the findings and the final decree passed by the Courts below.

14. In view of the above, finding that there is no substantial question of law, this Second Appeal is dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

07.07.2025

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

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To

1. The Principal Subordinate Judge, Tirunelveli.
2. The II Additional District Munsif, Tirunelveli.
3. The Section Officer, VR Section,
   Madurai Bench of Madras High Court, Madurai.

G.ARUL MURUGAN, J.

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