

E. Saravanan and Others Vs. E. Pichandi and Another

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Court : Chennai

Decided On : Apr-20-2016

Judge : T. Mathivanan

Appeal No. : S.A. No. 89 of 2016 & C.M.P. No. 2208 of 2016

Appellant : E. Saravanan and Others

Respondent : E. Pichandi and Another

Judgement :

1. This Memorandum of Second Appeal has been directed against the Judgment and decree dated 16.11.2015 and made in the appeal in A.S. No. 18 of 2012 on the file of the I Additional District and Sessions Judge, Vellore, confirming the judgment and decree dated 06.10.2010 and made in the final decree application in I.A. No. 545 of 2010 in the suit in O.S. No. 278 of 1995 on the file of the learned Subordinate Judge, Vellore.

2. The appellants herein are the defendants 1 to 5 and 7 in the suit, whereas, the first respondent is the plaintiff and the second respondent is the sixth defendant.

3. Heard Mr. V. Subramanian, learned counsel appearing for the appellants and Mr. P. Satheesh Kumar, learned counsel appearing for the second respondent. Notice in respect of R1/plaintiff is dispensed with as he remained absent before the I Appellate Court, in view of the provisions of Order 41, Rule 14 (4) of Civil Procedure Code.

4. For the sake of convenience and also for easy reference, the appellants as well as the second respondent may herein be referred to as the defendants, whereas, the first respondent be referred to as the plaintiff, where ever the context so require.

5. The plaintiff and the defendants are the sons and daughters of M. Ellappa Mudaliar and Poongavanammal. The said Ellappa Mudaliar had acquired the schedule mentioned properties and other properties out of his trade. Admittedly, the family did not own any joint family ancestral property.

6. Ellappa Mudaliar died intestate on 18.12.1987. After the death of his father, the plaintiff is residing separately for convenience sake. Ellappa Mudaliar was having another housing property at Kalas Nimandakaran Street, Vellore. He sold the said property in or about 1986 for a sum of Rs. 1,50,000/-. The house in Uthra Madha Koil Street is in the occupation of tenants. Another house located in Perumal Koil Street (item No. 1 of A schedule) is also in occupation of tenants. Poongavanammal, who is the mother of the plaintiff and the defendants had died intestate in or about 26.01.1992. At the time of her death, she was in possession of the jewels weighing 100 sovereigns, which are described in "C" schedule. After the death of their mother, a family arrangement was effected and in the said family arrangement, the defendants 4 to 7 being the sisters had expressed that they did not want any share from the family properties which are detailed in the plaint schedules "A" to "D".

7. As per the family arrangement, the plaintiff and the defendants 1 to 3 are each entitled to get th share. The plaintiff had issued a notice to the defendants calling upon them to effect a fair and equitable division. Since the attempt made by the plaintiff was turned down, he was constrained to file the above suit for partition.

8. The defendants in their written statement have vehemently denied the averments of the plaint. The defendants 4 to 7 have specifically contended that they had never relinquished their rights of claiming share from the family property. They have also contended that they are entitled to get their respective shares from the properties left by their father Ellappa Mudaliar. The plaintiff should have brought the shop situated at Nethaji Market, which is in his possession for being

placed before the Court for partition. Hence, the suit is barred for partial partition.

9. Based on the pleadings of the parties to the suit, the trial Court had proceeded to formulate the following six issues :

(i) Whether there was a family arrangement between the plaintiff and the defendants 1 to 3, after the death of their parents ?

(ii) Whether the defendants 4 to 7 had relinquished their rights in the family arrangement ?

(iii) Whether the suit is barred for partial partition ?

(iv) Whether "B" to "D" schedule properties are available for partition ?

(v) Whether the plaintiff is entitled to th share in the suit properties ?

(vi) To what relief the plaintiff is entitled ?

10. On appreciation of the evidences both oral and documentary, the trial Court had granted a preliminary decree for partition in respect of share in "A" schedule property in favour of the plaintiff. The suit in respect of the properties specified under "B" to "D" schedules was dismissed. Based on the preliminary decree, the plaintiff, who is the first respondent in this appeal had filed an application in I.A. No. 545 of 2010 under Order 20, Rule 18 of the Civil Procedure Code, to pass the final decree.

11. In that application, an Advocate Commissioner was appointed and he had also filed his report along with the rough sketch. The plaintiff/first respondent had also filed his objections. However on 06.10.2010, the trial Court had passed the final decree as detailed below :

(i) From the properties specified under item Nos. 1 and 2 in "A" schedule, the portion shown in rose colour in the Commissioner's second plan was allotted to plaintiff, towards his th share.

(ii) From the properties specified under item Nos. 1 and 2 in "A" schedule, as per the Commissioner's report, the portion shown in blue colour in the Commissioner's plan No. 2, was allotted to sixth defendant, Amsa Ammal.

(iii) From the properties specified in item No. 1 and 2 of "A" schedule as specified in the Commissioner's report, the portion (5 feet) shown in yellow colour in the Commissioner's plan No. 2, was allotted for the common use of the parties to the suit.

12. Challenging the correctness of the final decree dated 06.10.2010, passed by the trial court, the defendants 1, 3, 4, 5 and 7 had preferred an appeal in A.S. No. 18 of 2012 on the file of the I Additional District and Sessions Judge, Vellore. After hearing both sides, the first Appellate Court had dismissed the appeal on 16.11.2015, confirming the final decree passed by the trial Court.

13. As afore stated, the defendants 1, 2, 5 and 7, stand before this Court with this second appeal, impugning the judgment of the first Appellate Court.

14. This second appeal came to be admitted on the grounds of the following substantial questions of law from the memorandum of appeal :

(i) Whether the Courts below are right in passing the final decree allotting the plaintiff 1680 sq.ft. Which is over and above 901 sq.ft. being the th share ?

(ii) Whether the Courts below erred in allotting the share to the plaintiff in total negation of the terms of the preliminary decree ?

(iii) Whether the courts below erred in not granting owelty for the excess property allotted to the plaintiff ?

15. In so far as the present suit is concerned, schedule "A" consists of two items of housing properties. The schedule "B" is the sale consideration to the extent of Rs. 1,50,000/-, said to have been realised by the sale of another housing property bearing Door No. 35/1 at Kalas Nimandakaran Street, Vellore Town. Schedule "C" encompasses 8 items of golden jewels. Schedule "D" contains seven items of household articles and furniture.

16. It is significant to note here that the suit in respect of the properties specified under B, C and D was dismissed. A preliminary decree was granted in respect of schedule "A", which contains two items of housing properties. A final decree was also passed in view of the order passed in I.A. No. 545 of 2010 on 06.10.2010. The first item of housing property in schedule "A" is situated at Kalas Pilliar Koil Street and second item (housing property) is situated at Uthara Madha Koil Street. The extent of item No. 1 is 2108 sq feet(68x31). The extent of item No. 2 is 5031 sq feet(43x117).

17. As per the commissioner's report the value of item No. 1 has been assessed @ Rs. 6,00,000/-. The value of item No. 2 has been assessed @ Rs. 8,00,000/-. The value of both item Nos.1 and 2 is @ Rs. 14,00,000/-. Therefore, the Commissioner in his report at paragraph No. 9, has suggested that the property equivalent to the value of Rs. 1,75,000/- being share each could be allotted to the plaintiff as well as to the 6th defendant. In paragraph No. 10 of his report, the Commissioner has stated that the first item of "A" schedule property is indivisible. Hence, he has suggested that the value of th share in he first item of "A" schedule property might be adjusted by allotting a share in the second item of suit "A" schedule property i.e., by allotting a portion equivalent to the value of Rs. 1,75,000/- in the second item of the suit "A" schedule property.

18. The commissioner has filed two plans along with his report. The Plan No. 1 is relating to first item of "A" schedule property, whereas, the plan No. 2 is relating to second item. As afore stated, it is an admitted fact that the suit first item is not feasible for division.

19. The Commissioner in paragraph No. 11 of his report has suggested two options.

(i)the portion marked in rose colour in his second plan might be allotted to the plaintiff towards his th share. Similarly, the portion marked in blue colour in his second plan might be allotted to the sixth defendant towards his th share. He has suggested that the passage measuring 5x120 sq. feet might be left in common for ingress and egress, which is shown in yellow colour in his second plan.

(ii) If the option No. 1, is not possible, both the suit properties i.e., item Nos. 1 and 2 of "A" schedule might be sold in Court auction and the sale proceeds might be apportioned by the parties to the suit towards their respective th share.

20. The appellants have filed their objections to the Commissioner's report saying that the Commissioner ought to have taken steps to ascertain the market value of the properties on the date of inspection and that the suggestion of division made by the Commissioner is only imaginary and not on the basis of the market value of the suit properties. Therefore, at paragraph No. 6, of their objections, the appellants have stated that the Commissioner's report might be set aside and the Commissioner's warrant might be remitted back to the file of the trial Court with necessary direction that both the items of "A" schedule shall be sold in Court auction and the sale proceeds be apportioned among the sharers towards their respective share.

21. However, the objections filed by the appellants was rejected by the trial Court and the trial Court had proceeded to pass the final decree in accordance with the first option suggested by the Commissioner in his report.

22. Mr. V. Subramanian, learned counsel appearing for the appellants and Mr. P. Sateesh Kumar, learned counsel appearing for the second respondent have suggested that item Nos. 1 and 2 of "A" schedule property might be ordered to be sold in Court auction and the sale proceeds be ordered to be apportioned among the parties to the suit towards their respective th share.

23. This court has convinced with the suggestion made by the learned counsel appearing for the appellants as well as the second respondent. As observed in the opening paragraphs, the first respondent being the plaintiff, remained absent before the first Appellant court and therefore, it is presumed that he has not evinced any interest in prosecuting the appeal.

24. Therefore, this Court is of the considered view that the suggestion made by the Commissioner in respect of the second item is not acceptable and hence both the items of "A" schedule property can be brought for sale through Court and the sale proceeds may be ordered to be apportioned among the parties towards their th

share.

25. Accordingly, the second appeal is allowed. The final decree dated 06.10.2010 and made in the application in I.A. No. 545 of 2010 in the suit in O.S. No. 278 of 1995 on the file of the learned Subordinate Judge, Vellore, is set aside and the final decree petition in I.A. No. 545 of 2010 is remitted back to the file of the learned Subordinate Judge, Vellore, with a direction to re-issue the commissioner's warrant to the very same Commissioner. The Commissioner shall be directed to bring both the suit properties for auction through Court, based on the market value of the suit properties and the sale proceeds shall have to be apportioned among the parties to the suit towards their respective th share.

Consequently, connected miscellaneous petition is closed. However, considering the relationship between the parties to the suit, there shall be no order as to costs.

Appeal allowed.

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