

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30/01/2004

CORAM

THE HONOURABLE MR.JUSTICE N.V.BALASUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE V.KANAGARAJ.

APPEAL SUIT No.977 of 1988

M.K.Muhammad Fathima.(died).

2.Abdul Hameed.

3.Abdul Kareem.

4.Balkis Beevi.

5.Rahmatunnisa.

6.Jalmanachia.

Appellants 2 to 6 brought on record

as L.Rs of the deceased sole

appellant as per order of court

dated 4.7.2002 made in C.M.P.

No.18059 to 18601 of1998. ...Appellants.

-Vs-

1.M.K.Muhammed Ibrhim. (died).

2.The Thanjavur Co-operative

Marketing Federation Ltd.,

by its Secretary,

Thiruvavarur,Thiruvavarur Munsifi.

3.P.Dorairaj.

4.M.K.Abdul Majid.

5.Mohammed Yusuf.

6.Mohammed Yakub.

7.Sheik Ahamad.

8.Halima Bivi.

9.Abdul Kareem.

10.Kader Naina Mohammed.

11.Jasoba Nachia.

12.Badurinima.

Respondents 8 to 12 are

brought on record as

L.Rs of the deceased

1st respondent as per

order dated 19.10.1995

in C.M.P.No.34835 of 1993. ...Respondents.

A.S filed under Section 96 of C.P.C.

...

!For Appellants : Mr.D.Rajagopal

^For 1st respondent : Mr.R.Subramani

Mr.John for

M/s Ramasubramanian

and Associates. ... For 5th respondent.

No Appearance. ... For respondents 2,3,
4,and 6 to 12.

:JUDGMENT.

V.KANAGARAJ.J.

This appeal has arisen from out of the fair and decretal order dated 28.10.1983 made in I.A.No. 251 of 1979 in O.S.No.614 of 1979, passed by the Court of Subordinate Judge, Pattukottai, whereby it has granted the final decree on the preliminary decree passed in the Original Suit.

2.The appellant is the plaintiff and he filed a suit originally in O.S.No.9 of 1967 on the file of District Court, West Thanjavur for partition and separate possession of her one fourth share in the suit properties providing for payment of all liabilities of the estate, for costs of the suit and for directing the 5th defendant to pay costs of the plaintiff; that it was transferred to the file of Sub Court, Thanjavur and re-numbered as O.S.No.55 of 1967; that defendants 1,2, 4 and 5 contested the suit; that a Commissioner was appointed to inspect the suit properties and to file a report; that issues were framed for consideration; that witnesses were examined and documents were marked; that after trial the Additional Subordinate Judge, Thanjavur passed a preliminary decree on 31.10.1969 in respect of the plaintiff's 1/4th share in the plaint A to D schedules and movables as per the Commissioner's inventory; that the trial court ordered that the exact amount of the outstanding due to the estate and due from the estate would be decided at the time of passing of final decree, that the 2 nd defendant would be paid Rs.1500/- out of the estate towards the funeral expenses as also the expenses of litigation in opposing the suit filed against the estate and in protecting its interest; that the costs of the suit as regards the plaintiff, 1st defendant and 2nd defendant would come out of the estate and defendants 4 and 5 would bear their own costs; that mesne profits would be determined in a separate application; that decree to be drafted after the payment of court fee.

3.Thereafter the plaintiff filed I.A.No.12 of 1979 in O.S.No.55 of 1967 to pass a final decree; that petition was transferred to Subordinate Judge, Pattukottai and the petition and suit were re-numbered as I.A.No.251 of 1979 in O.S.No.614 of 1979; that a Commissioner was appointed; that the parties filed objections to the Commissioner's report; that the trial court rejected the report of the first commissioner; that a 2nd commissioner was appointed to file the report and plan; that the trial court passed a final

decree on 28.10.1983, accepting and modifying the divisions made by the commissioner in his report and allotted 1/4th share in A to E schedule to the plaintiff; that the trial court allotted certain items in A to E schedules also to the 1 st respondent; that towards ovelty the trial court ordered that the petitioner/plaintiff has to pay a compensation of Rs.4903/- to the 2nd respondent's heirs; that the 1st respondent in turn has to pay compensation of Rs. 5367/- to the petitioner and Rs.11,193/- to the 2nd respondent's heirs; that the trial court further ordered that costs of the final decree proceedings to the petitioner would be paid by the first respondent and that the parties would bear the Commissioner's fee themselves.

4. Aggrieved, the plaintiff in the suit has come forward to prefer the above Appeal Suit on grounds such as that the lower court has not followed any uniform principle in the allotment of properties, further totally ignoring the earlier Commissioner's report; that the lower court has erred in fixing the value of the 'D' schedule properties and in awarding compensation at the rate of Rs.4,000/-each to the appellant and the heirs of the 2nd respondent; that likewise the lower court has also erred in fixing the value and awarding compensation in respect of 'A' schedule properties; that the lower court further erred in the division and allotment of items 8,12,14 and 15 of A schedule properties; that the lower court ought to have at least allotted the rice mill and Arial Pattarai portion to the appellant; that the reasoning of the lower court in respect of a male son pursuing the family business is not sustainable in law; that the lower court has also erred in arriving at the value of the property and placing reliance on the part of the commissioner for that matter. On such grounds the appellant has filed the above Appeal Suit to the relief extracted supra.

5. During arguments, the learned counsel appearing on behalf of the appellants would submit that it is a final decree petition and orders passed thereon by the lower court, which are being testified before this court in the above appeal; that the value fixed by the Commissioner is not acceptable; that the partition and allotment of the separate possession has merely taken place; that the appellant is the uterine sister of the first defendant in the suit and one M.K.Abdul Rahiman Rowther; that 2nd defendant is the widow of M.K.Abdul Rahiman Rowther and others are also related to each other; that the plaintiff claims < share to the whole of the suit properties and half share for the first defendant and < share for the 2nd defendant; that the preliminary decree had been passed on 31.10.1969 declaring the plaintiff's 1/4th share in the plaint 'A' and "D" schedule properties; that on 17.12.1977 the final decree petition was also filed originally before the court of Subordinate Judge, Thanjavur, which later got transferred to the court of the Subordinate Judge, Pattukottai; that on 6.2.1982 the Commissioner was appointed; that on 7.3.1982 the inspection was done by the Commissioner; that on 18.5.1982 a second inspection was conducted; that on 12.7.1982 the Commissioner's report was filed and on 6.9.1982 the second report was filed; that on 13.9.1982 the objection was filed by the first defendant; that on 18.10.1982 considering the Commissioner's report the court rejected the Commissioner's report and appointed a fresh commissioner, who inspected the

suit schedule properties on three occasions, viz., on 13.11.1982, 19.12.1982, and on 9.1.1983; that on 8.3.1983 the Commissioner ultimately filed its report; that on 23.4.1983 the plaintiff filed objection to the report; and that the final decree which is subject to the present appeal has been passed on 28.10.1983.

6.The learned counsel would further point out that even though there are several items of properties, the application was restricted only to one item, i.e., rice mill in the 'A' schedule and items 7,9 to 11,13 and 17; that it has been dealt with by the lower court as point No.8 and held that there was nothing to object; that regarding the other properties there was no serious dispute; that the objections are two fold; (1) the value fixed on the date of plaint cannot be taken note of; secondly it is the suit of the year 1967 and the lower court should not have taken the value of the date of the plaint, but of the date of the decree; and on such arguments purely on factual position of the case the learned counsel would ultimately pray to allow the appeal setting aside the fair and decretal order passed by the lower court in the final decree petition.

7.On the other hand, the learned counsel appearing for respondents 1 and 5 would advance their arguments stoutly opposing the above appeal and respondents 2,3,4, and 6 to 12 have not made any appearance before this court at the time of the conduct of the enquiry in the above Appeal Suit and therefore, it has become incumbent on the part of this court to decide the above Appeal Suit in consideration of the facts pleaded having regard to the materials placed on record and upon hearing the learned counsel for the appellant and respondents 1 and 5 as well.

8.It is a suit for partition and separate possession and the suit has been decreed as early as on 31.10.1969 based on which the final decree petition has been filed in which the court below having given all opportunities for parties to be heard and adhering to the decree passed in the suit, appointing an advocate-commissioner and on being dissatisfied with the performance of the advocate-commissioner originally appointed cancelling the same a second appointment had been made by the lower court appointing a fresh commissioner, who on three occasions having inspected the suit properties thoroughly had ultimately filed his report on 8.3.1983; that objections have also been filed by both sides to the report of the Commissioner and in full appreciation and overall consideration of the facts and circumstances of the case, the Commissioner's report, the objections raised and adhering the decree, the legality involved pertaining to the subjects, the lower court as on 28.10.1983 has passed the final decree regarding the division physically effected of the suit properties testifying the validity of which the plaintiff has come forward to file the above Appeal Suit on grounds extracted supra.

9.Neither the grounds of the appeal nor the arguments advanced on the part of the appellants by their counsel are impressive; nor do they make any point to interfere the fair and decretal order passed by the lower court on the final decree petition; nor does this court honestly feel that such a contingency has been created in the whole appeal preferred by the appellant objecting to the fair and decretal order passed by the lower court

on the final decree petition.

10.A careful perusal of the fair and decretal order passed by the court of the Subordinate Judge, Pattukottai in I.A.No.251 of 1979 in O.S.No.614 of 1979 would clearly reveal that it has not only traced the facts of the case without missing even the minute point but framing its own point for consideration and allowing parties to exhaust their remedies in the manner known to law with adequate opportunity would also appoint the commissioner and based on the report of the commissioner, classifying the schedule properties and to the extent possible balancing the allocation proportionate to the shares of parties as per decree in which no strong reasons are able to be found for causing interference by this court as it is sought for on the part of the appellants to be made and therefore, this court is of the firm view that no interference need be made into the well considered and merited fair and decretal order passed by the lower court; that this court is also not able to find any patent error of law or perversity in approach in the allocation of the shares to the parties concerned. Since the same has been done in full consideration of the convenience of parties including the Mill portion and therefore, this court is not inclined to cause interference into the fair and decretal order passed in the final decree petition and hence the following judgment:

In result

- 1) The above Appeal Suit does not merit acceptance and becomes liable to be dismissed and is dismissed accordingly;
- 2) The fair and decretal order dated 28.10.1983 made in I.A.No.251 of 1979 in O.S.No.614 of 1979 passed by the court of Subordinate Judge, Pattukottai is confirmed.
- 3)However, in the circumstances of the case, there shall be no order as to costs.

Index:yes

Website:yes

nyr

To

1.The Subordinate Judge,.
Pattukottai.

2.The Additional Subordinate Judge,
Thanjavur.

3.The Record Keeper,
V.R.Section, High Court,Madras.

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