



S.A.Nos.77 & 655 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgement Reserved on	11.12.2023
Judgement Pronounced on	01.03.2024

CORAM

THE HON'BLE MRS. JUSTICE K.GOVINDARAJAN THILAKAVADI

S.A.Nos.77 & 655 of 2012
and M.P.No.1 of 2012

S.A.No.77 of 2012

Renganayagi

... Appellant/Plaintiff

Versus

1.N.Kandasamy

2.Muthuraj

3.N.Ramasamy

4.N.Vaidyanathan

5.Nagarathinam

6.N.Evernamba

7.Kasthuri

8.V.Banumathi

...Respondents



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S.A.No.655 of 2012

K.Muthuraj

... Appellant/2nd defendant

1.N.Kandasamy

2.Renganayagi

3.N.Ramasamy

4.N.Vaidyanathan

5.Nagarathinam

6.N.Evernamba

7.Kasthuri

8.V.Banumathi

... Defendants

Common Prayer : These second appeals are filed under section 100 of Code of Civil Procedure, to set aside the judgment and decree dated 31.10.2011 made in A.S.No.53 of 2009 on the file of the Principal Sub Judge, Mayiladurai, reversing the judgment and decree dated 30.04.2009 made in O.S.No.89 of 2002 on the file of the District Munsif Court, Sirkali and allow the second appeal.

For Appellant in
S.A.77 of 2012 : Mr.V.V.Sathya

For Appellant in
S.A.655 of 2012 : Mr.K.Muthukumarasamy



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For R2 in S.A.No.77 : Mr.Muthukumarasamy
of 2012

For R2 in S.A.No.655 : Mr.V.V.Sathiya
of 2012

For RR1, R4 to R8
in both Second
Appeals : No appearance

COMMON JUDGMENT

Since the issue involved in both the second appeals, is same, this common judgment is being delivered.

2. The appellant in S.A.No.77 of 2012 is the plaintiff in the suit and the appellant in S.A.No.655 of 2012 is the second defendant in the suit in O.S.No.89 of 2002 on the file of the District Munsif Court, Sirkali. The second defendant sailed along with the plaintiff and both are claiming 1/3rd share in the suit property.



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3. It is a suit for partition and separate possession claiming 1/3rd shares in the suit properties by the plaintiff.

For the sake of convenience, parties are referred to, as they are ranked before the trial Court.

4. Averments made in the plaint, in brief, are as follows:

The suit property belonged ancestrally to one Neelayadakshi, wife of Subramanian Chettiar, having been obtained under a registered settlement deed dated 22.07.1959. The above said Subramanian Chettiar executed the settlement deed out of his own free will and consent and attested by witnesses. The said settlement came into force on 22.07.1959 itself. As per the settlement deed, Neelayadakshi took possession of the property settled on her and ever since then, she was in possession of the same till her death. Even before her death, her minor son also died. After her death, the plaintiff and defendants 1 & 2 are each entitled to the properties 1/3 share, as they are the legal heirs of deceased



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Neelayadakshi. Kandasamy Chettiar S/o late Narayanasamy, the 1st defendant had 3 daughters namely (1) Muthulakshmi, (2) Neelayadakshi (died interstate) and (3) Maruthambal. The said Muthulakshmi died, leaving only her grand son, by name Muthuraj, the 2nd defendant herein. Maruthambal died leaving her only daughter Renganayaki, the plaintiff herein and they are the legal heirs of Neelayadakshi and they are entitled to get 1/3 share the suit properly.

5. The Plaintiff has also issued a legal notice to the first defendant on 13.03.98 demanding for her 1/3 share. But he refused and notice was also issued to the District Collector of Nagapattinam District, Revenue Divisional Officer, Mayiladuthurai and the Tahsildar, Porayar, not to alienate the suit property. The first defendant as if, he is the only owner of the suit property, got the compensation amount under the acquisition proceedings for Samathuvapuram project. The first defendant gave a false reply and the officials also gave a reply and they are filed before the trial Court. The Plaintiff and defendants are deemed to be in joint possession of the suit property. Since the properties are not partitioned, the plaintiff claims 1/3 share and separate possession as legal



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heir of the deceased Neelayadakshi Ammal.

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6. The case of the 1st defendant as per the written statement in brief is as follows:

The suit property is not available for partition. The suit for partition filed after 50 years, is not maintainable against the 1st defendant. It is false to state that Neelayadakshi Ammal, wife of Subramanian Chettiar purchased the suit property for due consideration. The suit property is in the 1st defendant's possession and enjoyment for the past 50 years i.e., from the year 1948 onwards. The 1st defendant is in possession and enjoyment of the property continuously without any interruption openly and paying the kist and other taxes to Government. The Government records and other transactions stands in the name of 1st defendant for past 50 years. The Patta stands in the name of the 1st defendant. The plaintiff also accepted that the 1st defendant's title and possession in the suit property is open, continuous for the past 50 years. For the past 50 years, the plaintiff never claimed any right or title to the suit property. The 1st defendant treated the suit property as his own



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property for the past 50 years. The 1st defendant's possession and enjoyment of the suit property is well known to his relatives and particularly, to the plaintiff from 1948. The 1st defendant treated the suit property as of his own and many transactions have taken place regarding the properties. No other person can claim any right in the suit property. The suit had been filed only for unlawful enrichment and it is a vexatious suit. This defendant made improvements in the suit property for the past 50 years, spending huge amount and developed the suit property. Till today nobody had questioned the title of the property to this defendant. The 1st defendant perfected title in the suit property by ouster. The suit is bad for non-joinder of necessary parties. In a suit for partition, all necessary parties should be added compulsorily and this defendant had already sold the suit property. The plaintiff is not entitled to any share in the suit property. The plaintiff and defendant are separated long before and there is no relationship with regard to the property. The court fee paid is not correct. The suit for partition may be dismissed with costs.

7. The case of the 4th defendant, as averred in the written



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statement reads as follows:

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The first defendant already perfected title by ouster and even if any right the plaintiff had, has been lost by long period of fifty years of enjoyment and possession by first defendant. The 4th defendant purchased the suit property for valid consideration through registered sale deed dated 09.06.1995. After sale, the plaintiff and others are not entitled to any share as claimed. The sale dated 09.06.1995 was duly executed, attested and registered as documents in the eye of law. This defendant is a bona-fide purchaser for value from his father. The plaintiff is not in India and had been settled in Australia. The Plaintiff never claimed any interest over the suit property for the past fifty years. The genealogy table is wrong and it has nothing to do with the suit or suit property. The first defendant, by long enjoyment and possession for more than fifty years, by adverse possession, also perfected title and had become title holder of the suit property and sold the above said property to this 4th defendant for valid consideration. The suit for partition is not maintainable at this stage. This defendant therefore prays that this Court may dismiss the suit with



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8. The case of the 2nd defendant, has averred in the written statement reads as follows:

The suit property is the absolute property of late Neelayadakshi. The plaintiff's and the defendants 1 & 2 are the legal heirs of the said Neelayadakshi. Hence, the plaintiffs and the defendants 1 & 2 are entitled to 1/3rd share in the suit property. It is further submitted that the 1st defendant is in possession of the suit property on behalf of the plaintiffs and the 2nd defendant also received the share in the agricultural produce derived from the suit property and only for the past 5 years, the 1st defendant failed to share the income from the agricultural lands. Hence, the 2nd defendant submitted that the suit property shall be divided into three shares and one such share may be allotted to the 2nd defendant. Based on the above averments, the trial Court framed the necessary issues and tried the suit.

9. The trial Court has framed the following issues:



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மேற்கண்ட வழக்குரை, எதிர்வழக்குரைகள், கூடுதல்

எதிர்வழக்குரையை பரிசீலனை செய்து கீழ்க்கண்ட
எழுவினாக்கள் மற்றும் கூடுதல் எழுவினாக்கள் தீர்வுக்காக
வனையப்பட்டன.

எழுவினாக்கள்

1. தாவாச் சொத்தில் வாதிக்கு 1/3 பாக வீதம் பெற
அருகதையுடையவரா?
2. தாவாச் சொத்தின் உரிமை முதல் பிரதிவாதிக்கு உடமை
நீக்கத்திறன் அடிப்படையில் சித்தித்து விட்டதா?
3. தாவாச் சொத்தினை முதல் பிரதிவாதி ஏற்கனவே 3ஆம்
தரப்பினருக்கு விறகிரயம் செய்துள்ளதால், இந்த வழக்க
அவசியமான தரப்பினரைச் சேர்க்கத்தவறிய குறைக்கு
உள்ளாகியுள்ளது?
4. வழக்கு நீதிமன்றக் கட்டணம் செலுத்துவதற்காக
பொருமானம் சரியாக மதிப்பிடப்பட்டுள்ளதா?
5. வாதிக்கு என்ன பரிகாரம் கிடைக்கக்கூடியது?

கூடுதல் எழுவினாக்கள்

1. தாவாச் சொத்தினை 4ஆம் பிரதிவாதி அறிவிப்பு
இல்லாமல் கிரயம் பெற்ற நல்ல எண்ணத்தில்
அடிப்படையிலான கிரயதாரரா?
2. வேறு என்ன பரிகாரம்?



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8. வாதி தரப்பில் வா.சா.1, வா.சா.2, விசாரிக்கப்பட்டனர்.

வா.சா.ஆ 1 முதல் வா.சா.ஆ5 குறியிடப்பட்டன.

பிரதிவாதிகள் தரப்பில் பி.சா.1 முதல் பி.சா.4 குறியிடப்பட்டது.

பி.சா.ஆ1 முதல் பி.சா.ஆ8 குறியிடப்பட்டன?

10. Before the trial Court, the trial Court examined P.W.1 and marked as Ex.A1 to A.5. On the side of the defendants D.W.1 to D.W.4 were examined and Ex.B.1 to B.8 were marked. The trial Court decreed the suit and allotted 1/3 share to the plaintiff. Aggrieved by this, the defendants have preferred the appeal in A.S.No.89/2002 on the file of the Principal Sub Court, Mayiladthurai, and by judgment and decree dated 31.10.2011, the learned Principal Sub Judge, Mayiladthurai, allowed the appeal by setting aside the decree and judgment passed by the trial Court.

11. Aggrieved by the same, the plaintiff is before this Court with the present second appeal.

12. When the second appeals are taken up for admission, this Court has formulated the following substantial questions of law.



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a. When the plaintiff specifically pleaded that the son of Neelayadakshi pre-deceased her and this fact was not denied by the first defendant and the fourth defendant in the written statement and no issue was framed in this regard, whether the 1st Appellate Court was right in taking up this issue even without framing it as a point for consideration under Order 41 Rule 31 of Cpc by relying upon Ex.B2 proceedings in which neither the plaintiff nor the second defendant were parties?

b. Whether the 1st Appellate Court was right in reversing the judgment of the Trial Court on an issue which was not even putforth before the trial Court by the first and fourth defendants?

c. Whether the reversing judgment of the 1st Appellate Court is not vitiated by its failure to consider the pleadings of the parties, evidence and



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apply the correct principles of law?

d. Whether the 1st Appellate Court is right in law in holding that the 1st defendant alone inherited the property of the deceased Neelayadakshi under Clause II Entry IX of Section 8 of Hindu Succession Act, 1956, merely based on Ex.B.2 which was not at all pleaded by the parties?

e. Whether the 1st Appellate Court is right in law in non suiting the plaintiff and the 2nd defendant based on Ex.B.2 (judgment in O.S.No.27/2002, District Court, Nagapattinam) to which admittedly they are not parties?

13. Mr.V.V.Sathya, learned counsel appearing for the appellant in S.A.No.77 of 2012 and Mr.K.Muthukumarasamy, learned counsel appearing for the appellant in S.A.No.655 of 2012 contended that the 1st appellate Court failed to take note of the fact that even the



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contesting 1st defendant did not state in the written statement that the deceased Neelayadakshi had a son who died in the year 1964. Hence, casual finding in Ex.B.2 to which the plaintiffs and the 2nd defendant were not parties, cannot be a ground for non- suiting the plaintiffs and the 2nd defendant.

14. The 1st defendant claimed right of ownership independently and did not admit that he inherited the property through the deceased Neelayadakshi Ammal and even in the sale deed Ex,B.1 in favour of the 4th defendant, it has been shown as acquisition of the 1st defendant. Hence, the reliance placed on Ex.B.2 by the 1st appellate Court to non-suit the plaintiff and the 2nd defendant is perverse and unsustainable in law. He further submitted that the deceased Neelayadakshi obtained the suit property under a settlement deed (Ex.A.1). At the time of her death in 1962, the 1st defendant and the mother of the plaintiff, Mathurammal and another sister Muthulakshmi were alive. Hence, the plaintiff became entitled to 1/3rd share in the suit property after the death of Mathurammal who died intestate. Similarly, sharer of Muthulakshmi on whom 1/3rd



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share was derived by intestate succession, the 2nd defendant is entitled to

1/3rd share in the suit property. Such findings of the trial Court were

reversed by the lower Appellate Court. But the 1st appellate Court only

placed reliance on Ex.B.2, when there was no pleading to that effect. The

plaintiff and the 2nd defendant were not made as parties to the above suit.

Hence, the findings of the 1st appellate Court in this regard are wholly

unsustainable in law. It is further submitted that there is no rebuttable

statement made in the written statement to the plaint averment that the

minor son of Neelayadaskshi died even before her death and therefore,

findings of the lower appellate Court dismissing the suit is totally

unsustainable. The 1st appellate Court erred in holding that the 1st

defendant became entitled to the suit property as per Clause 2 and 3(9) in

the schedule to Section 8 of the Hindu Succession Act, 1956. Moreover,

the trial court has rightly held that when the plaintiff and 2nd defendant are

entitled to 1/3rd share each, the sale deed Ex.B.1 executed in favour the 4th

defendant by the deceased 1st defendant Narayanasamy, is not valid in law

and not binding on the co-sharers. Hence, the 1st appellate Court erred in

reversing the findings of the trial Court. Therefore, it is prayed that the



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judgment and decreed dated 31.10.2011 made in A.S.No.53/2009 on the file of the learned Principal Sub Court, Myladurai, reversing the judgment and decree dated 30.04.2009 made in O.S.No.89 of 2009 on the file of the District Munsif Court, Seerkazhi, is liable to be set aside.

15. On the other hand, the learned counsel appearing for the respondents would submit that the first Appellate Court based on Ex.B.2 has rightly held that the 1st defendant is entitled to the suit property as per Clause 2 and 3(9) in the Schedule to Section 8 of the Hindu Succession Act, 1956 and thereby, dismissed the suit which calls for no interference.

16. Heard on both sides and records perused.

17. The plaintiff has specifically pleaded that the son of Neelayadakshi pre-deceased her. However, this fact was not denied by the 1st defendant and the 4th defendant in the written statement. Hence, the trial Court had also not framed any issue in this regard. According to the plaintiff, the said Neelayadaskshi was the absolute owner of the property



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and both her son and her husband predeceased her and by virtue of the

same, the plaintiff and the defendants are entitled to inherit the property

of Neelayadakshi under Section 15 and Clause 1 (d) & (e) of the Hindu

Succession Act, 1956. The defendants 1 & 4 failed to deny the above facts

in their pleadings, and the trial Court had no occasion to frame an issue

in this regard. As per Order 14 Rule 1 of CPC, only on material facts

stated by one party and denied by the other, issues can be framed. Since

there was no denial of the material facts, it must be taken to have been

admitted by the defendants in accordance with Order 8 Rule 3 of CPC.

While so, the 1st appellate Court is not right in taking up this issue, even

without framing a point for consideration under Order 41 of Rule 31 of

CPC by relying upon Ex.B.2, which was the suit filed in O.S.No. 87 of

2004 by the 3rd defendant, in which a stand has been taken that said

Neelayadakshi died in the year 1962 and her son Ganapathy died in the

year 1964. The 1st appellate Court allowed the appeal only on the ground

that the plaintiff failed to prove that the son of Neelayadakshi namely

Ganapathy pre-deceased his mother. Moreover, in the above suit neither

the plaintiff nor the 2nd defendant were made as party. While so, the 1st



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appellate Court has misdirected itself that her son died only after Neelayadakshi died by relying upon Ex.B.2. Moreover, the 1st appellate Court being the last court of fact, ought to have taken additional evidence under Order 41 Rule 27 of CPC with regard to proof of the death of the said Ganapathy, whether he pre-deceased his mother or died after his mother Neelayadakshi and taking additional evidence, the 1st appellate Court ought to have framed points for determination in this regard by giving reasons as to why, without any additional evidence, with regard to the death of Ganapathy son, of Neelayadakshi, whether he predeceased his mother or died in the year 1964 as mentioned in O.S.No.87 of 2004 and without framing any point for determination in this regard, the 1st appellate Court erred in giving finding on an issue which was not projected by the parties to the proceedings. But from fact, neither the 1st defendant, nor the 4th defendant denied the factum stated in the plaint that the son of Neelayadakshi namely Ganapathy predeceased his mother. Hence, the findings of the first Appellate Court require interference. Therefore, the findings of the first Appellate Court that the 1st defendant alone can inherit the property of deceased Neelayadakshi under Clause 2



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and 3 (9) of Section 8 of Hindu Succession Act, 1956, based on Ex.B.2,

is non-suiting the plaintiff and the 2nd defendant is unsustainable.

Accordingly, these substantial questions of law are answered.

18. In the result, both the Second Appeals are allowed and the judgement and decree passed by the learned Principal Sub Judge, Myladurai, in A.S.No.53 of 2009 dated 31.10.2011 is hereby set aside and the judgement and decree of the trial Court is restored. Consequently, connected miscellaneous petition is closed. No costs.

01. 03.2024

mkn2/vsn

Index:Yes/No

Speaking Order : Yes/No

To
The Principal Sub Judge,
Myladuthurai



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K.GOVINDARAJAN THILAKAVADI,J.
mkn2/vsn

PRE- DELIVERY COMMON JUDGEMENT MADE IN

S.A.Nos.77 & 655 of 2012
and M.P.No.1 of 2012

01.03.2024