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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 09.03.2018

CORAM

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

S.A.(MD)No.526 of 2017 and
C.M.P.(MD)No.11335 of 2017

Karupayee

... Appellant/2nd Appellant/
2nd Defendant

Vs.

1. Manthiri Pandian

... 1st Respondent/1st Respondent/
Plaintiff

2. Mookammal

... 2nd Respondent/2nd Respondent/
3rd Defendant

Prayer: Second Appeal is filed under Section 100 of C.P.C., against the Decree and Judgment passed in A.S.No.05 of 2010, dated 22.12.2016 by the Sub Court, Thoothukudi, partly reversing the Decree and Judgment passed in O.S.No.290 of 1990, dated 04.08.2008 by the Principal District Munsif Court, at Thoothukudi.

For Appellant : Mr.S.Ramesh alias Ramiah

For R-1 : Mr.R.Balakrishnan

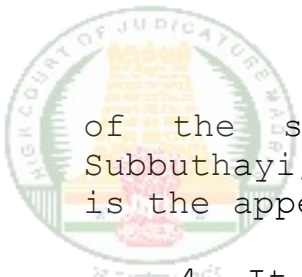
For R-2 : Mr.A.Thiruvadikumar

JUDGMENT

The second defendant in O.S.No.290 of 1990 on the file of the Principal District Munsif Court, Thoothukudi, is the appellant in this appeal.

2. The first respondent in this appeal filed a suit in O.S.No.290 of 1990 before the Principal District Munsif Court, Thoothukudi, for partition of 1/3 share in all the suit properties and for separate possession and also for mesne profits.

3. The plaintiff states that he is the son one Veerabuthira Thalaivar. It is admitted that the said Veerabuthira Thalaivar had three children, namely, two sons and one daughter, by name, Mookammal, the third defendant in the suit. It is stated that one

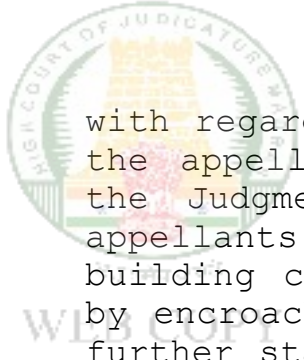


of the sons, Muniyasamy died leaving behind his wife one Subbuthayi, the first defendant in the suit and his daughter who is the appellant herein in the second appeal.

4. It is the case of the first respondent/plaintiff that the suit 1st and 2nd schedule properties are the ancestral properties of his father Veerabuthira Thalaivar and that the 3rd schedule is his self acquisition. It is further stated that the father Veerabuthira Thalaivar died intestate in the year 1980, leaving behind the plaintiff and defendants as his legal heirs. It is specifically contended by the plaintiff that defendants 1 and 2 are in the enjoyment of the suit 1st item and that therefore, they are liable to pay mesne profits. The first defendant who is the mother of the appellant filed a written statement which was adopted by the appellant, namely, the second defendant in the suit. In the written statement, it was contended that the suit 2nd item does not belong to the family as it was disposed of long back. It was further contended that the suit 1st item is a single building which is under the exclusive possession and enjoyment of defendants 1 and 2. It is also stated that the plaintiff is in enjoyment of an extent 5 cents of land and building in Sankar Colony and that the said property is not included in the suit for partition. It is further contended that the third defendant is not entitled to any share as per the oral arrangement.

5. The trial Court after framing necessary issues, granted 1/3 share in 3rd schedule to the plaintiff and declared 1/3 share in favour of defendants 1 and 2 and another 1/3 share on the eastern side of 3rd schedule in favour of the third defendant. In respect of 1st schedule, the trial Court granted a Decree for 1/2 share in favour of the plaintiff as well as another 1/2 share in favour of defendants 1 and 2. As far as the actual allotment of share in respect of 3rd item is concerned, the trial Court held that the third defendant is entitled to 1/3 share in the eastern portion as per her enjoyment and that the plaintiffs and defendants 1 and 2 should be given their 2/3 share after excluding the eastern 1/3 share of the third defendant. The trial Court dismissed the suit in respect of suit 2nd schedule stating that it is not available for partition.

6. Defendants 1 and 2 preferred an appeal in A.S.No.6 of 1996 on the file of the Additional District Court cum Chief Judicial Magistrate Court, Thoothukudi. It is seen from the Judgment of lower appellate Court that defendants 1 and 2 have challenged the Judgment of the lower Court only against the allotment of specific portion of 1/3 share in suit 3rd item in favour of the third defendant. It was stated that the third defendant is not entitled to any share in 3rd schedule as she had relinquished her right in respect of suit 3rd item. Again, it was contended by the appellant that the other property which was occupied by the plaintiff's father has not been included in the suit. No ground



with regard to the character of the suit 3rd schedule is raised by the appellant earlier. The appeal was also dismissed confirming the Judgment and Decree of the trial Court holding that the appellants have not proved that the poramboke land and the building constructed by the plaintiff was acquired by the father by encroachment and it was in the enjoyment of the father. It is further stated that the allotment of the specific portion of the suit 3rd item in favour of the third defendant was proper. As against the dismissal of the appeal in A.S.No.6 of 1996 on the file of the Additional District Court cum Chief Judicial Magistrate Court, Thoothukudi, the appellants have filed a second appeal before this Court in S.A.No.893 of 1998. This Court has allowed the second appeal and remitted the matter to the trial Court to decide afresh.

7. It is relevant to find out the scope and purpose of remand, as the learned counsel for the appellant has raised a new point which was not raised, when the matter was argued by the appellants/defendants 1 and 2 before this Court earlier. Hence, paragraph Nos.11, 12 and 13 of the Judgment of this Court in **Second Appeal in S.A.No.893 of 1998, dated 16.04.2008**, are relevant and extracted as follows:-

" 11. Points: All the substantial questions of law are taken together for discussion, as they are interlinked with each other. The only grievance of the appellants/defendants 1 and 2 is that the trial Court ought not to have granted a specific portion in the preliminary decree.

12. A preliminary decree declares the rights or shares of parties to the partition. Once the shares have been declared and a further inquiry still remains to be done for actually partitioning the property and placing the parties in separate possession of divided property then such inquiry shall be held and pursuant to the result of further inquiry a final decree shall be passed. A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree the rights of the parties are finally determined and a decree is passed in accordance with such determination, which is, the final decree. The distinction between preliminary and final decree is this: a preliminary decree merely declares the rights and shares of the parties and leaves room for some further inquiry to be held and conducted pursuant to the directions made in the



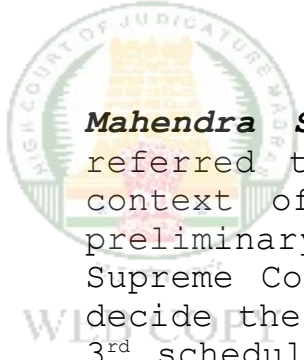
preliminary decree which inquiry having been conducted and the rights of the parties finally determined a decree incorporating such determination needs to be drawn up which is the final decree. But in this case the learned trial Judge in the preliminary decree has allotted a specific portion to the 3rd defendant in the 3rd item of property, which is not correct. In the case of *Renu Devi V. Mahendra Singh* reported in AIR 2003 Supreme Court 1608 the Honourable Supreme Court pointed out the difference between the preliminary decree and the final decree. In the light of the above decision of the Honourable Supreme Court, I am of the considered opinion that the Judgment of the trial Court is of the considered opinion that the Judgment of the trial Court is liable to be set aside. Accordingly, the substantial questions of law are answered in favour of the appellants.

13. In the result, the Second Appeal is allowed and the Judgment and Decree of the Courts below are set aside and the matter is remanded back to the trial Court for fresh disposal as per the verdict of the Honourable Apex Court in *Renu Devi V. Mahendra Singh* reported AIR 2003 Supreme Court 1608 within two months from the date of receipt of a copy of this order on the basis of the evidence already on record. No costs. Consequently, connected C.M.P. (MD) No. 13572 of 2003 is closed."

8. From the Judgment of this Court, this Court is able to see that the appellants though have raised a question of law and a question of law was framed by this Court suggesting that the 3rd schedule of the suit property is the joint family property, the issue was not argued or answered. Hence, the findings with regard to allotment of shares or declaration of shares of the respective parties was not interfered with by this Court. The only grievance expressed before this Court in the earlier round is that the trial Court ought not to have granted a decree allotting the specific portion in the preliminary Decree in favour of the third defendant in respect of 3rd schedule. Hence, though this Court allowed the appeal and set aside the Judgment and Decree of the trial Court, the purpose and scope of remand is only regarding the justification in the allotment of specific portion in the preliminary Decree itself. Hence, this Court directed the trial Court to dispose of the suit afresh.

<https://hccourtrecords.gov.in/servlet>

9. The Judgment of Hon'ble Apex Court in **Renu Devi V.**



Mahendra Singh, reported in **AIR 2003 Supreme Court 1608**, was referred to in the Judgment of this Court earlier only in the context of understanding the scope and difference between the preliminary Decree and final Decree as explained by the Hon'ble Supreme Court. Honestly speaking, the scope of remand is not to decide the issue as to the character of the property described in 3rd schedule afresh. After remand, the trial Court has granted a decree for partition, by allotting 1/3 share each to the 3 branches in respect of 1st and 3rd schedule. This Judgment of the lower Court after remand is contrary to the Judgment and Decree of the trial Court and appellate Court earlier denying any share to third defendant in respect of 1st schedule and granting 1/2 share each to the plaintiff and defendants 1 and 2. Aggrieved by the findings of the lower appellate Court, defendants 1 and 2 once again preferred an appeal in A.S.No.5 of 2010 on the file of the Sub Court, Thoothukudi. The lower appellate Court further modified the Judgment and Decree of the trial Court by granting 1/3 share each to 3 branches in respect 3rd schedule. With regard to 1st schedule, the lower appellate Court has held that the plaintiff is entitled to 4/9 share and defendants 1 and 2 jointly are entitled to 4/9 share. Only 1/9 share was allotted to the third defendant. Against the Judgment and Decree of the lower appellate Court, the present second appeal has been filed by the second defendant.

10. It is admitted that the first defendant died earlier and the appellant, namely, the second defendant in the suit being the sole legal representative of the first defendant was permitted to continue the proceedings.

11. Learned counsel appearing for the appellant has raised the following substantial questions of law:-

" (1) Whether or not it is the Burden of the 1st respondent/plaintiff to adduce Proof relating to his averment that 3rd item is a Self Acquisition of his father and whether it is discharged in a manner know to law?

(2) Whether the Courts below are correct in their determination as to the nature of the 3rd item of properties as self acquired even without proof?

(3) Whether the lower Courts are correct in not holding the 3rd item as a property belonging to the family when all other properties are found to be belonging to the joint family?

(4) Whether the Courts below are correct in not accepting that the Sankar Nagar Colony property described in all schedule attached to the statement of the appellant, also belonged to the family and available for division and ought to be divided?



(5) Whether the lower Courts are correct in not finding that the movable properties like Jewels and Vessels also belonged to the family and available for division and ought to be divided?

(6) Whether or not the suit is bad for partial partition and whether the conclusions arrived by the lower Courts in that regard are correct?

(7) Whether the lower Courts are correct in relying on the mutation or Revenue entries and the payment of taxes, to decide about the nature of the property as to either self acquired or belonging to the family and whether it is correct sustainable under law?"

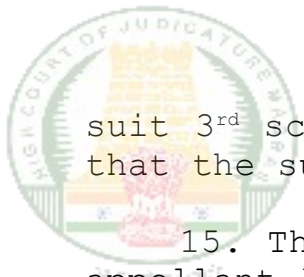
12. Though several issues were raised by the learned counsel for the appellant, only the following two points were urged before this Court.

(i) Though the plaintiff has specifically admitted that the suit 3rd schedule is a joint family property, the Courts below have proceeded as if the 3rd schedule is the self-acquired property of the father Veerabuthira Thalaivar on an erroneous appreciation of pleadings and evidence.

(ii) As contended by the defendants in the written statement about the existence of another land, the Courts below have not considered the evidence in a proper perspective. The plaintiff who is in enjoyment of the poramboke land after the father's life time cannot claim exclusive right, especially when no document is produced before this Court by the plaintiff to show that the plaintiff is entitled to claim exclusive right.

13. As far as the the issue with reference to the character of the suit 3rd schedule, this Court is unable to accept the case of the appellant for obvious reasons.

14. First of all, in the whole written statement, the defendants have not specifically disputed the character of the suit 3rd schedule, when a specific stand was taken by the plaintiff in the plaint that the suit 3rd schedule is the self acquired property purchased by the plaintiff's father. This statement was not denied in the written statement. If the suit 3rd schedule is also a joint family property, the appellant is entitled to 1/2 share. However, the plaintiff has not disputed the quantum of share to be allotted to the parties in respect of 3rd schedule. This Court considered the points raised by the appellant in the appeal that was filed in A.S.No.6 of 1996. Referring to the Judgment of lower appellate Court in the earlier round, this Court observed that the appellant has not raised any issue with regard to character of the suit 3rd schedule. When there is no specific denial in the written statement as to the character of



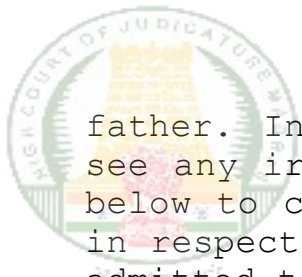
suit 3rd schedule, it can be taken that the appellant has admitted that the suit 3rd schedule is the self acquired property of father.

15. The order of remand again would clearly indicate that the appellant has given up his claim to enlarge his share by pleading that the suit 3rd schedule is a joint family property. When the fact that the defendants have not disputed the plea that the suit 3rd schedule was purchased by the plaintiff's father, the learned counsel for the appellant has raised yet another plea by stating that the suit 3rd schedule was treated as a joint family property. From the specific stand taken by the appellant before the trial Court, it can be seen that the case of the appellant was not the same that is being now raised by the learned counsel for the appellant in the second appeal. It is to be noted that the trial Court as well as the lower appellate Court have granted a Decree for partition only on the basis of the pleadings and evidence.

16. Having taken a particular stand and got allotment without demur, the appellant is estopped from claiming right more than what he had pleaded in the written statement. The specific case of the plaintiff with regard to character of the property in the plaint in so far as the suit 3rd schedule has not been disputed. This Court is of the view that the parties have not raised an issue with regard to character of the property in so far as the 3rd schedule of the property is concerned. Hence, this Court has no hesitation to hold that the appellant is entitled to only 1/3 share in the suit 3rd schedule, as the suit 3rd schedule in the suit is the self-acquired property of the plaintiff's father Veerabuthira Thalaivar and that it is not the ancestral property in the hands of the plaintiff's father Veerabuthira Thalaivar.

17. In so far as the case of the appellant with regard to existence of another property, it cannot be disputed that the burden of proof lies on the appellant to prove by producing sufficient evidence. It is to be noted that the plaintiff has admitted that he is in possession and enjoyment of the property which is a Government poramboke. The said property though admitted to be in the enjoyment of the plaintiff, it is contended by the plaintiff that he is in possession in his own right and that this property which was originally a Government poramboke land was taken by the plaintiff and not by his father. Since the plaintiff's father was never in enjoyment of this property, it is contended that there cannot be a Decree for partition in respect of the property which does not belong to the plaintiff's father. When there is a dispute with regard to the availability of the property as the property of the family, the burden lies on the plaintiff to prove the existence of the property.

<https://hcservices.courts.gov.in/hcservices> 18. In this case, the appellant has produced no material to prove that the acquisition of the property which is in the enjoyment of the plaintiff was originally made by the plaintiff's



father. In the absence of any evidence, this Court is unable to see any irregularity or illegality in the Judgments of the Courts below to conclude that the appellant is not entitled to any share in respect of the property which is not included in the suit, but, admitted to be in the enjoyment of the plaintiff.

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19. For all the above reasons, this Court is unable to see any merits in the questions of law raised in the memorandum of grounds and the arguments advanced by the learned counsel appearing for the appellant.

20. Hence, this Second Appeal is dismissed and the Judgment and Decree in A.S.No.5 of 2010, dated 22.12.2016 on the file of the Sub Court, Thoothukudi, modifying the Judgment and Decree of the Principal District Munsif Court, Thoothukudi, in O.S.No.290 of 1990, dated 04.08.2008, is affirmed. However, no order as to costs. Consequently, connected C.M.P.(MD)No.11335 of 2017 is closed.

Sd/-

Assistant Registrar(CS-III)

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Sub Assistant Registrar

To

1. The Subordinate Judge,
Thoothukudi.
2. The Principal District Munsif,
Thoothukudi,

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The Record Keeper, V.R.Section,
Madurai Bench of Madras High Court,
Madurai. (2 copies)

- + 1 cc TO Mr.S.Ramesh @ Ramiah , Advocate in SR No. 54091
- + 1 cc TO Mr.R.Balakrishnan , Advocate in SR No. 54402
- + 1 cc TO Mr.A.Thiruvadikumar, Advocate in SR No. 54252

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C.M.P.(MD)No.11335 of 2017
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