



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	DELIVERED ON
27~02~2019	20~03~2019

CORAM :

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

S.A.No.1009 of 2011
and C.M.P.No.2463 of 2019

1. Sarasu
2. Sethu
3. Moorthy
4. Babu

... Appellants/Appellants/
Defendants 5-8

Versus

1. Lakshmi
2. Shanthi

... Respondent/Respondent/ Plaintiff
... Respondent/Respondent/
Defendant 2

Second Appeal filed under Section 100 C.P.C. against the judgment and decree of III Additional Subordinate Judge, Coimbatore, dated 26.11.2010 passed in A.S.No.8 of 2010 confirming the Judgment and Decree of III Additional District Munsif, Coimbatore dated 22.07.2009 made in O.S.No.2288 of 1979.

For Appellants .. Mr.V. Raghavachari

For Respondents .. Mr.N.S. Sivakumar for R1
Mr.M. Palani for R2

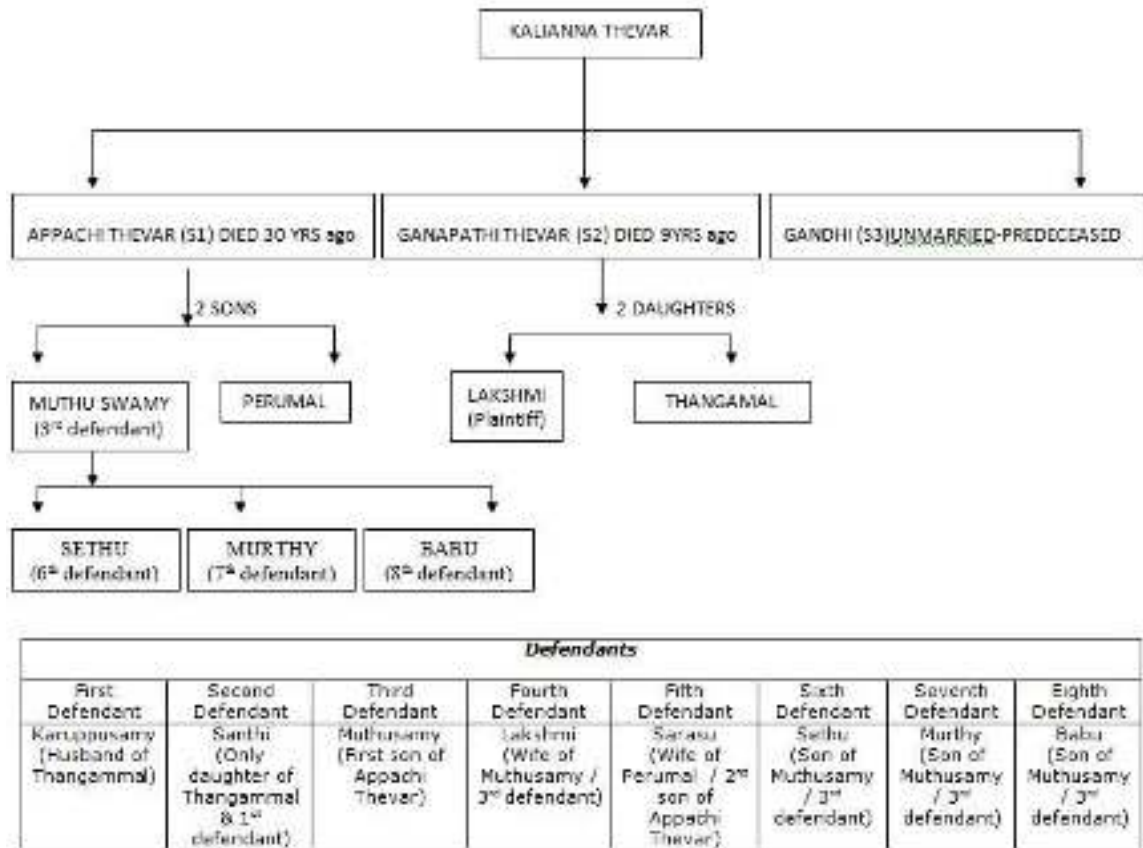
JUDGMENT

Aggrieved over the concurrent finding of the Courts below in decreeing the suit filed for declaring the Plaintiff's right and title to the half share in the suit property and also directing the defendants 3,4 and 5 to vacate and deliver possession and directing the suit property to be divided into two equal shares, allotting and giving one such share to the plaintiff in the suit property, the present second appeal has been filed.



2. The brief facts leading to file this Second Appeal is as under:

2.(a) The Suit has been originally filed for declaration of title and for partition and for recovery of possession of the suit property. The admitted facts of the suit property originally belongs to one Kalianna Thevar. Following pedigree may be followed:



2.(b) The suit has been filed by the Plaintiff on the ground that Appachi Thevar one of the sons of the Kalianna Thevar, who has executed a Release Deed dated 31.10.1931 under Ex.A.1 in favour of his father Kalianna thevar and his two brothers viz., Ganapathy Thevar and Gandhi for consideration. In view of the said Release Deed he has no right in the suit property. After the Release Deed Appachi Thevar and wife sons no right in favour of the suit property. After the Release Deed Appachi Thevar and his wife Pappammal and his sons were not entitled to any manner of right or interest in the suit properties. The release by Appachi Thevar was complete and final and for valuable consideration. Kalianna Thevar and Ganapathi Thevar were living in the suit properties as absolute owners. They had no partition. Mr.Gandhi one of the sons of the Kalianna Thevar also died without any issue. Therefore, Ganapathi Thevar become the absolute owner of the properties and he was living in the suit



properties as absolute owner till his death about 9 years ago. His wife also died 25 years ago in the suit properties. Till the death of Ganapathi Thevar, he and his two daughters late Thangammal and Lakshmi were living together in the suit properties. On his death, the said Thangammal and Lakshmi become the owners of the suit properties. They are entitled to have equal shares. 1st and 2nd Defendants being the husband and daughter of the Thangammal, who died 3 years before the suit, the Plaintiff is entitled to succeed the shares of Thangammal. Therefore, the Plaintiff is entitled to half share in the suit properties. The Defendants 3,4 and 5 are not entitled to claim any right or interest in the suit properties. Hence, Appachi Thevar had lost all his rights by virtue of his Release Deed on 31st October 1931, since then the properties were in the possession and enjoyment of Ganapathi Thevar till his death and later on his two daughters were in possession.

2.(c) Defendants 3,4 and 5 at the instigation of some interested persons have committed act of trespass and have taken wrongful possession of portions in the suit properties and have refused to vacate inspite of requests and advice. They have occupied the portion of the suit properties only recently about 6 months back. Despite several request made by the Plaintiff to vacate property they did not do so. Hence the suit. During the pendency of the suit it appears that the 3rd defendant died. His legal heirs were added as 6th 7th and 8th Defendants. 4th Defendant is wife of one Muthusamy who is one of the sons of Appachi Thevar.

3. It is the case of the Defendants 3,4 and 5 that the Plaintiff has filed the suit on the basis of the Release Deed executed by the father of the 3rd Defendant on 31.10.1931 in favour of his brothers and father. According to the defendants the Release Deed was the subject matter of the suit in the year 1942 in O.S.No.530 of 1943. The Release Deed was set aside and the appeal filed against the decree and judgment reached finality. The above suit was filed by Ganapathi Thevar which was dismissed on merits on 29.06.1944. The Appeal in A.S.No.304 of 1944 was also dismissed. In the reply statement the Plaintiff denied the contention of the Defendants.

4. Based on the pleadings, the trial Court has framed the following issues for consideration:



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1. Whether the Plaintiff is entitled to a declaration of her right in the suit property?

2. Whether the Plaintiff is entitled to a partition and separate possession?

5. In trial Court on the side of the Plaintiff P.W.1 and 2 were examined and Ex.A1 to A5 marked. On the side of the Defendants D.Ws.1 to 3 were examined and Exs.B1 to B16 were marked. The trial Court relied upon the Release Deed dated 31.10.1931 granted decree in favour of the Plaintiff. Though Ex.B2 Certified copy of the Suit Register extract of O.S.No.530 of 1943 filed, the trial Court has come to the conclusion that the suit register extract shows only the dismissal of the suit. Therefore there is no other particulars available since the Defendants have not produced the judgment and decree, the trial court decreed the suit in favour of the Plaintiff. The First Appellate Court also confirmed the the finding of the trial Court. The First Appellate Court also held that the since the Defendants have not filed any document to show that the Release Deed was set aside by the District Munsif in the year 1944 their contention cannot be countenanced. The trial Court also considered the fact that Ex.B2 certified copy of suit register extract has not been disputed by both sides, however since the judgment and decree has not been produced, the trial Court and First Appellate Court relied upon the Release Deed and granted decree. As against which, the present Second Appeal came to be filed.

6. The second appeal was admitted on the following substantial questions of law:

"1) Whether the present suit for declaration, partition or possession of the suit properties is barred by the judgment of the learned District Munsif, Coimbatore in O.S.No.530 of 1943?

2. Whether the Courts below have rendered a perverse finding, without properly appreciating the evidence adduced on the side of the defendants 3 ot 5, negating their contention that by virtue of a family arrangement the suit properties were allotted to Appachi Devar and Ganapathy Devar was allotted an agricultural land measuring 95 cents comprised in Survey No.690/2 and 690/6 of Upplipalayam village?

3. Whether the lower Appellate court has rendered a mutually conflicting and contracdictory reliefs



one by negating the plea for recovery of possession from the Defendants 3 to 5 and the other for partition of the same property among the plaintiffs, Defendants 1 and 2?"

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7. At this stage an application for reception of additional documents in CMP No.2463 of 2011 has filed to adduce additional documents certified copy of the judgment in O.S.No.530 of 1943, Certified copy of decree in O.S.No.530 of 1943, certified copy of Judgment in A.S.No.304 of 1944 and certified copy of decree in A.S.No.304 of 1944 to be marked as Ex.B.17 to Ex.B.20. In the above application it is the contention of the appellant that they have produced Ex.B.2 certified copy of the suit register extract to establish the fact the the suit filed by the Ganapathy Thevar as against the grandmother was rejected and the appeal was also dismissed. It is the contention of the Appellant that the Judgement in O.S.No.530 of 1943 and A.S.No.304 of 1944 are now available which were not available earlier and only traced now in the Court. These documents are necessary to decide the entire issue since the above judgments are very relevant to dispose of the second appeal.

8. Counter has been filed by the First Respondent for reception of additional documents stating that without the pleadings and written statement in the earlier suit, the decree and judgment alone cannot be received at this stage. It is the further contention that the findings based on the Release Deed Ex.A.1 cannot operate as res judicata in the present suit merely because there is adverse findings on the said Release Deed in the absence of any claim or counter claim to that effect. It is the contention that there was no efforts before the trial court to file those documents in evidence. The applicant has not fulfilled the conditions required under Order 41 Rule 27 C.P.C. Hence objected for reception of the above documents.

9. The learned counsel appearing for the Appellant vehemently contended that the suit itself filed for declaration of title based on Ex.A.1 Release Deed said to have been executed by one of the sons of Kalianna Thevar viz., Appachi Thevar in favour of his father Kalianna Thevar and his two brothers. The above Release Deed was subject matter of the suit filed by Ganapathy Thevar in O.S.No.530 of 1943 filed for recovery of possession against one Pappammal wife of Appachi Thevar. The above suit was filed for possession mainly on the basis of Release Deed dated 31.10.1931. According to the learned counsel there was specific defence taken in the above suit that the Release Deed is not valid and there was issue framed in respect



of the above Release Deed in the above suit and the Courts have held that the Release Deed is not valid and only a sham nominal document. The appeal filed against the above judgment reached finality. It was dismissed and the matter was reached finality in A.S.No.304 of 1944. the same Release Deed has been relied upon by the plaintiff herein to seek declaration and partition. The trial Court and Appellate court despite the suit register extract being filed to show that the suit was dismissed did not agree the contention of the Defendants and the Defendants were non suited only on the ground that the copy of the judgment and decree of the previous suit has not been filed. It is the contention of the learned counsel for the appellant that since the old records were not found in the trial court he could not get the certified copy of judgment and decree despite his efforts. Even the letter sent by the District court clearly indicate that at the relevant point of time the bundle could not be traced by the court to apply certified copy. Only when the Second Appeal is filed before this Court at the instance of this court's direction, the bundles were traced and he obtained certified copies of the judgment and decree in O.S.No.530 of 1943 and A.S.No.304 of 1944. Hence it is the contention of the learned counsel that the above judgment and decree are conclusive in nature and binding on the parties and the plaintiff father was the plaintiff in the earlier suit. His right based on such Release Deed has been negatived. Therefore, once the document is already set aside the plaintiff cannot seek for any declaration or injunction and other reliefs based on the document Ex.A.1 filed in the present suit to seek declaration and other reliefs. The Courts below non suited the appellant only on the ground that the decree and judgment has not been produced by the appellant. Hence submitted that those documents are absolutely necessary to be filed in this appeal as additional documents under Order 41 rule 27 of C.P.C. Enabling this court to pronounce the judgment or for any other substantial cause. The non-filing of those documents before the trial court is due to the fact that the old case records could not be traced out by the court itself and the certified copies could not be obtained. Therefore, those judgments are conclusive in nature and binding on the parties. No oral evidence whatsoever required to prove the above documents. Further the above documents are certainly relevant under Section 40 of the Indian Evidence Act and conclusive in nature as against the plaintiff and Defendants 1 and 2 they are claiming right through Ganapathi Thevar. Hence submitted that no oral evidence is required and the document alone can be marked. Based on the above documents the plaintiff is certainly not entitled for declaration as granted by the court below. At the most, the plaintiff and Defendants 1 and 2 together entitled to preliminary decree for partition in respect of the suit property. Admittedly Defendants 2 to 5 and other Defendants are



in a portion of the property which has been clearly pleaded by the plaintiffs themselves. Therefore, to give a quietus to the matter he prayed before this Court itself may mould relief and grant a preliminary decree according to the entitlement of the parties.

10. Learned counsel appearing for the Respondent would submit that due diligence has not been shown by the appellant to file additional documents. Without due diligence is shown, the additional evidence not to be received. Suit is of the year 1979. Despite several opportunities available to the appellant they have not filed decree and judgment. Unless the conditions setout in Order 41 rule 27 of C.P.C. is complied such document cannot be received in evidence. Hence it is the contention of the learned counsel, even if these documents received by this Court the matter should be sent to the trial court or appellate court for letting in oral evidence to dispute the correctness of the judgment. Hence submitted that additional evidence cannot be received. In merits the learned counsel for the respondents not able to advance much arguments on the rights of the parties even additional document being admitted in evidence.

11. In the light of the above submissions let me now proceed to decide the application filed for reception of additional documents. The suit has been originally filed for declaration of plaintiff's right and also for partition of the properties dividing the suit properties into two equal shares, one half to plaintiff and other half share to Defendants 2 and 3. The plaint mainly proceeded on the strength of Ex.A.1 Release Deed said to have been executed by Appachi Thevar in favour of Kalianna Thevar, Ganapathy Thevar and one Gandhi. Since one of the sons of the Kalianna Thevar, namely Gandhi died issueless, after the death of the Kalianna Thevar, Ganapathy Thevar alone become the absolute owner of the property. Therefore, the plaintiff, the daughter of Ganapathi Thevar, another daughter of Ganapathi Thevar Thangammal and her husband and daughter (Defendants 1 and 2) alone are entitled to the suit property. It is their further contention that they also sought for recovery of possession from the Defendants 3 to 8 on the ground that they trespassed into the property and they have no right in the property. Whereas it is the main defence of the Defendants that the Release Deed relied upon by the plaintiff under Ex.A.1 is already set aside and held as sham and nominal document in the previous suit filed by the father of the Plaintiff viz., Ganapathy Thevar in O.S.No.530 of 1943 and the appeal also dismissed in A.S.No.304 of 1944. To show that the suit in O.S.No.530 of 1943 filed, dismissed they also filed Ex.B.2 certified copy of suit extract register. However, trial court and First Appellate Court non



suit the Defendant/Appellant herein only on the ground that judgment and decree have not been produced and granted decree on the basis of Ex.A.1 Release Deed. The appellant has filed those documents in the Second Appeal stage on the ground that those records have been traced by the court only recently, only after the direction given by the Court. Hence, those documents are necessary.

12. It is to be noted that filing additional document in the appeal that too in the second appeal stage is not automatic. The party who sought to give additional evidence must establish the due diligence to secure the documents. Order 41 rule 27 of C.P.C. contemplates that the party has to show that despite of their exercise of due diligence they could not produce it and the document was not properly admitted by the Court and the additional documents required to be produced relevant to enabling the court to pronounce judgment or for any other substantial cause. Only on three grounds set out under Order 41 Rule 27 C.P.C. is complied, additional evidence can be received in appeal stage.

13. It is to be noted even assuming that the party wishes to produce additional document is not complied the conditions set out in Clause (a) or (aa) of Order 41 Rule 27 of C.P.C., still there is no bar for reception of such additional documents. If the court considers that those documents are necessary for the court to pronounce the judgment or for any other substantial cause, those documents may be received as evidence. The additional documents now sought to be filed are only certified copies of the Judgment and decree in O.S.No.530 of 1943 and A.S.No.304 of 1944 filed between the predecessors in title. It is also relevant to note that the trial court also clearly noted in its findings that Ex.B.2 certified copy of the suit register extract of O.S.No.530 of 1943 has not disputed by both sides. That being the position and entire crux of the issue revolve around Ex.A.1 Release Deed dated 31.10.1931 and above document is the subject matter of earlier suit and there was specific issue framed by court of competent jurisdiction and held that above document is not sham and nominal Release Deed. In view of the above Judgments in O.S.No.530 of 1943 and A.S.No.304 of 1944, those documents are certainly relevant to decide the issue in the present Appeal.

14. I have also seen the certified copy of the judgment and decree in suit as well as Appeal Suit. The same makes it clear that that O.s.No.530 of 1943 was filed by Ganapathy Thevar,



father of the plaintiff in the suit and grandfather of second Defendant and father in law of the first defendant. He has filed the suit against one Pappammal @ Ramakkal wife of Appachi Thevar. Suit has been filed for recovery of possession on the basis that Ganapathi Thevar become absolute owner of the property by virtue of the Release Deed executed by Appachi Thevar the father of the 3rd Defendant. In the above suit following issues have been framed:

1. Is the Release Deed by Defendant's husband real and valid?
2. Is the Plaintiff entitled solely to the whole property?
3. Is the suit bad for non-joinder of defendant's sons?
4. To what relief is the Plaintiff entitled

15. On merits in issue No.1 the Trial Court in the above suit has held that the Release Deed Ex.A.1 was not real and it was executed only to screen the fairly properties from the clutches of his creditors and held that the Release Deed is Sham and Nominal as against which appeal is also filed in A.S.No.304 of 1944. The Appellate Court framed following points for consideration.

1. Whether the Release Deed executed by the defendant's husband is a sham nominal transaction and not intended to be acted upon?

2. Whether the plaintiff is exclusively entitled to the entire property?

3. Whether in any event, the sit should be remanded to the lower court after framing the necessary issues?

16. In Point No.1 the Appellate Court has held that the Release Deed executed by Appachi Thevar is sham and nominal document and not intended to be acted upon and the Plaintiff is not exclusively entitled to the entire suit house and confirmed the findings of the trial Court. Though when the categorical findings have already reached finality in respect of the Release Deed Ex.A.1 which is once again relied upon to seek declaration. Those documents are very much relevant to decide this appeal. Since judgment in personem of the competent court is conclusive proof in subsequent proceedings between the same parties or their legal heirs. The previous suit between the father of the Plaintiff and wife of Appachi Thevar reached finality, the above Judgment is conclusive in its existence. Above judgment is a solemn transaction publically recorded by the court and it



affords conclusive proof of the fact that there was a litigation between the predecessor of the plaintiff and the Defendant and it is reached finality. Therefore this Court is of the view that those documents are necessary to enable this Court to advance substantial justice. Accordingly the application filed by the appellant in C.M.P.No.2463 of 2019 is ordered for reception of documents.

17. Now, the question arises whether any oral evidence is required and whether the party should be relegated before the Appellate court to decide the issue?

18. A careful perusal of the Order 41 Rule 27 of C.P.C. the appellate Court may require any document to be produced or any witnesses to be examined to enable it to pronounce the judgment or anyother substantial cause. Sub-clause (b) to Order 41 Rule 27 deals with production of documents and also any witnesses should be examined enabling the court to pronounce the judgment. Order 41 Rule 28 deals with the power of the appellate Court wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence or direct the court which passes decree or any other subordinate court to take such evidence and to send it Appellate Court. There are two options available to the Appellate Court. First it may record the evidence by permitting the party to produce the evidence before it as per Rule 28 or direct the court whose decree appeal is preferred. It is to be noted that the additional evidence sought to be produced is only a public document vis., certified copies of the judgments obtained from the court records and the Plaintiff and Defendants also not disputed the filing of the previous suit. The trial court in its judgment held that Ex.B.2 suit register extract has not been disputed. The respondents before this Court is also not disputed the copy of the judgment. Only they contend that such documents not to be received in view of the delay. In the event of admission the same may be sent to the trial court to record the finding. Since the documents are certified copies of judgments of the suit filed by the father of the respondent which also not disputed no further oral evidence is required to be adduced. There is no bar for the Appellate Court to receive such binding judgment which is conclusive proof of the issue between the parties. No further evidence or enquiry is required in this regard, since the judgment in personam is a conclusive proof between the parties or their representatives. The issue relate to Ex.A.1 Release Deed already decided in previous suit, this Court accept those documents straightaway and exhibit them as Ex.B.17 to Ex.B.20 since those documents are judgment and decree of lower courts which are conclusive proof in respect of the Release Deed Ex.A.1. Earlier suit was between



the father of the plaintiff and 3rd Defendant mother. Therefore, this Court is of the view that the parties need not be relegated to lead oral evidence once again in respect of Judgment which reached finality, which are the conclusive proof of the lis between the parties in respect of Release Deed. Therefore, this Court is of the view that the parties need not be relegated to lead oral evidence once again in respect of Judgment which reached finality produced alone sufficient to enable this court to decide the Second Appeal. No other proof or evidence is required to be filed for the purpose of proving the above judgments. The suit is of the year 1979. In order to give quietus as the issue is narrow, and the judgment has already reached finality, this Court is of the view that this court itself take the above document marked as Ex.B.17 to Ex.B.20 and no further proof is required in respect of the suit document since the documents are judgments and decree. Filing of the earlier suit is not disputed by the defendants, even in the trial stage when Ex.B.2 was exhibited. Accordingly this Court admitted those documents as Ex.B.series and marked the same as Ex.B.17 to Ex.B.20. Accordingly, the C.M.P.is ordered and documents are marked as Ex.B.17 to Ex.B.20.

19. Now, in the light of the above documents filed, it has to be seen whether the decree and judgment of the trial court and First Appellate court is sustainable. Both the trial court and First Appellate Court have non-suited the Defendants only on the ground that except the suit register extract they have not produced any documents, viz., judgment copy. The relationship of the parties are not in dispute. The genealogy as set out above has not disputed. Plaintiff and Defendants are descendants of Kalianna Thevar. The suit has been laid only on the basis of Ex.A.1 Release Deed said to have been executed by the Appachi Thevar. The Plaintiff is daughter of Ganapathy Thevar, First and Second Defendants are husband and daughter of Thangammal, another daughter of Ganapathy Thevar. Defendants 3, 4 and 5 originally legal heirs of Appachi Thevar. Their relationship is not in dispute. The Plaint pleading itself clearly indicate that the legal heirs of the Appachi Thevar is also in a portion of the suit property. The fact remains that they are in the suit property as per Plaintiff's pleadings. The Plaintiff succeeded in the courts below only on the basis of the Release Deed. The courts below non-suited the Defendants on the ground that they have not produced the decree and judgment in O.S.No.530 of 1943 and A.S.No.304 of 1944. As already discussed the Release Deed Ex.A.1 was one of the subject matter in the earlier suit there was specific issue raised in respect of the same as stated above. The Court has held that the Release Deed is not valid as sham and nominal. Appellate Court also recorded the specific finding that the Release Deed is not valid and only when the



Release Deed is not valid then the question of claiming the right on the basis of the same Release Deed by Ganapathy Thevar legal heirs does not arise at all.

20. Therefore, having regard to the conclusive nature of the document viz., the judgments and decrees in O.S.NO.530 of 1943 and A.S.No.304 of 1944 this court hold that the decree and judgment of the trial court granting declaration also partition is hereby set aside. However, taking into consideration of the fact that the suit is pending from the year 1979 and also having regard to the fact that there is no dispute between the relationship since the Release Deed executed by the Appachi Thevar is not valid. After the death of the Kalianna Thevar father of the Appachi Thevar and Ganapathi Thevar, both the sons become equally entitled to the suit properties. The admitted case of the parties that one of the sons of the Kalianna Thevar, Gandhi predeceased and unmarried. As such only two sons of the Kalianna Thevar are entitled to the suit house. In that case Ganapathy Thevar's legal heirs viz., Plaintiff, First Defendant (husband of one of the daughters of the Ganapathi Thevar, Thangammal) second Defendant (daughter of Thangammal) are together entitled to half share in the suit property. Remaining half share would go to the defendants 5 to 8 together. Accordingly, this court considering the relationship of parties and the nature of the dispute, instead of driving the parties to go for one more suit, mould the relief and declare the right of the plaintiff in the suit property. In view of the same

The plaintiff is entitled to 1/4th share in the suit property;

Defendants 1 and 2 together are entitled to 1/4th share in the suit property;

Defendants 6,7,8 together are entitled to 1/4th share in the suit property (since their father 3rd Defendant died) and

5th defendant is entitled to 1/4th share in the suit property (since her husband Perumal, son of the Appachi Devar died).

Accordingly, preliminary decree is passed dividing the suit properties into 4 equal shares and allot one such share to the Plaintiff viz., 1/4th share in the suit house; The Defendants also entitled their shares as declared above. It is for them to file necessary court fee in the final decree proceedings to get their shares as declared above.



21. Accordingly, the judgment and decree of the trial Court granting declaration and partition, confirmed by the First Appellate Court is set aside. The Preliminary Decree is passed as follows:

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Dividing the suit property into 4 equal shares and allot one such share to the Plaintiff. The Defendants also entitled to their respective shares as indicated in para 20 of this judgment on payment of proper court fees.

22. In the result, C.M.P.No.2463 of 2019 is ordered and the Second Appeal is allowed. No cost.

Encl: Ex.B.17 Judgment in O.S.No.530 of 1943

Ex.B.18 Decree in O.S.No.530 of 1943

Ex.B.19 Judgment in A.S.No.304 of 1944

Ex.B.20 Decree in A.S.No.304 of 1944

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

- | | |
|---|---------------------------------|
| 1. The Third Additional Subordinate Judge,
Coimbatore. | Enclose only to
Lower Courts |
| 2. The III Additional District Munsif,
Coimbatore. | |
| 3. The Section Officer,
VR Section, High Court,
Madras. | |

+1cc to Mr.V.Raghavachari, Advocate SR.26109

+1cc to Mr.M.Palani, Advocate Sr.26352

+1cc to Mr.N.S.Sivakumar, Advocate Sr.26694

S.A.No.1009 of 2011

rv[co]

srg 15/11/2019