



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 13.07.2021

CORAM:

THE HONOURABLE MR.JUSTICE **G.R.SWAMINATHAN**

S.A.(MD)No.1003 of 2007

and

Cross Objection (MD)No.2 of 2008

and

M.P.(MD)No.1 of 2007

In S.A.(MD)No.1003 of 2007

1.Maruthambal

2.Paulraj

3.Singaravel

4.Apparaj ... Plaintiffs / Appellants / Appellants

-Vs-

1.Chinnarasu (Died) ... Defendant / Respondent / Respondent

2.Prema

3.Vijaya

4.Veeramani

5.Duraimani

6.Revathi

7.Renuga

8.Kavitha

9.Balamurugan

(Respondents 2 to 9 brought record as Lrs of the deceased

1st respondent vide order dated 17.03.2016)

... Respondents

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree made in A.S.No.103 of 2005, dated 01.03.2007 on the file of the Principal Subordinate Court, Thanjavur confirming the judgment and decree made in O.S.No.131 of 2004, dated 10.06.2005 on the file of the District Munsif Court, Thiruvaiyaru.

For Appellants : Mr.D.Rajagopal

For R1 : Died

For R2 to R9 : Mr.V.K.Vijayaragavan



In Cross Objection (MD)No.2 of 2008

1.Maruthambal

2.Paulraj

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4.Apparaj ... Plaintiffs / Appellants / Appellants

-Vs-

1.Chinnarasu (Died) ... Cross Objector / Respondent

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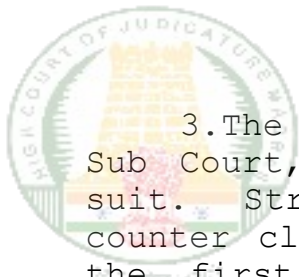
PRAYER: Cross Objection filed under Order 41 Rule 22 of the Civil Procedure Code, to set aside the judgment and decree in A.S.No.103 of 2005 on the file of the Principal Sub Court, Thanjavur, dated 01.03.2007 insofar as it is against the cross objector / respondent concerned reversing the decree and judgment passed in O.S.No.131 of 2004 on the file of the District Munsif Court, Thiruvaiyaru, dated 10.06.2005.

For Appellants : Mr.V.K.Vijayaragavan
For R1 : Died
For R2 to R9 : Mr.D.Rajagopal

COMMON JUDGMENT

The plaintiffs in O.S.No.131 of 2004 on the file of the District Munsif Court, Thiruvaiyaru are the appellants in this second appeal.

2.The plaintiffs filed the said suit seeking the relief of partition.The first plaintiff Maruthambal is the sister of the defendant Chinnarasu. The other plaintiffs are the sons of the first plaintiff. In the suit, Chinnarasu filed a counter claim in I.A.No.406 of 2004 seeking the relief of recovery of possession. By judgment and decree dated 10.06.2005, the partition suit filed by the appellants was dismissed. The counter claim filed by Chinnarasu / defendant was decreed.



3.The plaintiffs filed A.S.No.103 of 2005 before the Principal Sub Court, Thanjavur, challenging the dismissal of the partition suit. Strangely, they failed to challenge the decree made in the counter claim in favour of the defendant. During the pendency of the first appeal filed by them, the appellants took out an application for withdrawal of the suit with liberty to institute a fresh suit on the same cause of action. The first Appellate Court, by Judgment and decree dated 01.03.2007, permitted withdrawal of the appeal but declined to grant liberty to institute a fresh suit on the same cause of action. Challenging the same, this second appeal came to be filed.

4. It was admitted on the following substantial questions of law:-

"Whether the lower appellate Court has committed an error in law in dismissing the appeal after refusing to grant permission to withdraw the suit with liberty to file a fresh suit on the same cause of action without affording an opportunity to the appellant to exercise his option either to withdraw or to proceed with the appeal on merits?"

5.For reasons, I am not able to discern, the defendant had also filed a cross appeal.During the pendency of these proceedings, the defendant Chinnarasu passed away. His legal heirs have been brought on record both in the main appeal as well as in the cross appeal.

6.When the matter was taken up for final hearing, the learned counsel appearing for the legal heirs of the cross objector / deceased defendant informed the Court that the plaintiffs had originally failed to file an independent appeal questioning the decree in the counter claim. After the disposal of the first appeal, they filed an appeal questioning the decree in the counter claim. Since there was a delay in filing the said appeal, I.A.No.42 of 2008 was filed to condone the same. The learned Principal Sub Judge, Thanjavur, by order dated 27.07.2009, dismissed I.A.No.42 of 2008. As a result, the challenge to the counter claim was not even taken on record. The first appeal got dismissed at the un-numbered stage itself. Questioning the same, the plaintiffs have not filed any revision petition. If any revision petition had been filed questioning the order dated 27.07.2009, dismissing I.A.No.42 of 2008 in Un-numbered A.S.No. of 2008, then, the second appeal and the civil revision petition could have been taken up together and given a common disposal. But such is not the case here. In view of the failure to challenge the decree in the counter claim, this second appeal is not maintainable. The dismissal of I.A.No.42 of 2008 will operate as *res judicata*.

7. In this view of the matter, there is no need to answer the substantial question of law framed for consideration in the second appeal. The second appeal is dismissed. No orders are necessary in



S.A.(MD)No.1003 of 2007

the cross objection. The cross objection stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS III)

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Sub Assistant Registrar(CS)

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To

1.The Principal Subordinate Judge, Thanjavur.

2.The District Munsif, Thiruvaiyaru.

3.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

S.A. (MD)No.1003 of 2007

and

Cross Objection (MD)No.2 of 2008

and

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MGJ(09.09.2021) 4P 5C