



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 04.08.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.284 of 2008 and

C.M.P. (MD)No.1 of 2008

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1.Ramasubramanian (Died) ... Appellant/Appellant/  
Plaintiff

2. Parvathi

3. Vatsala

4. K.R.Viswanathan

5. K.R.Sridhar

6. Lakshmi

7. K.V.Krishna

8. K.R.Shankar

... Appellants 2 to 8

(Appellants 2 to 8 are brought on record

as LR's of the deceased sole appellant vide

Order dated 12.07.2021 made in C.M.P.(MD)

Nos.5477 to 5479 of 2021 in SA(MD)No.284 of 2008)

Vs.

1. Sivagami Ammal

2. Gomathi Krishnasamy

3. Suba

4. Latha

5. Ramasamy

6. Issakidurai

... Respondents/Respondents/  
Defendants

**Prayer:** Second appeal filed under Section 100 of C.P.C., against the Decree and Judgment dated 20.09.2007 passed in A.S.No.92 of 2006 by the Sub Court, Tenkasi, confirming the Decree and Judgment passed in O.S.No.975 of 2004 by the Principal District Munsif, Tenkasi, dated 04.04.2006.

For Appellants : Mr.Ramesh @ Ramiah

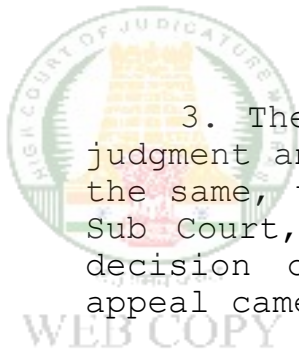
For Respondents : Mr.T.S.R.Venkatramana

\* \* \*

### J U D G M E N T

The plaintiff in O.S.No.975 of 2004 on the file of the Principal District Munsif, Thenkasi, filed this second appeal.

2. During the pendency of this appeal, the appellant passed away and his legal representatives have come on record.



3. The suit was one for partition. The learned trial Judge by judgment and decree dated 04.04.2006 dismissed the suit. Questioning the same, the plaintiff filed A.S.No.92 of 2006 before the Principal Sub Court, Thenkasi. The first appellate Court also confirmed the decision of the trial Court. Challenging the same, this second appeal came to be filed.

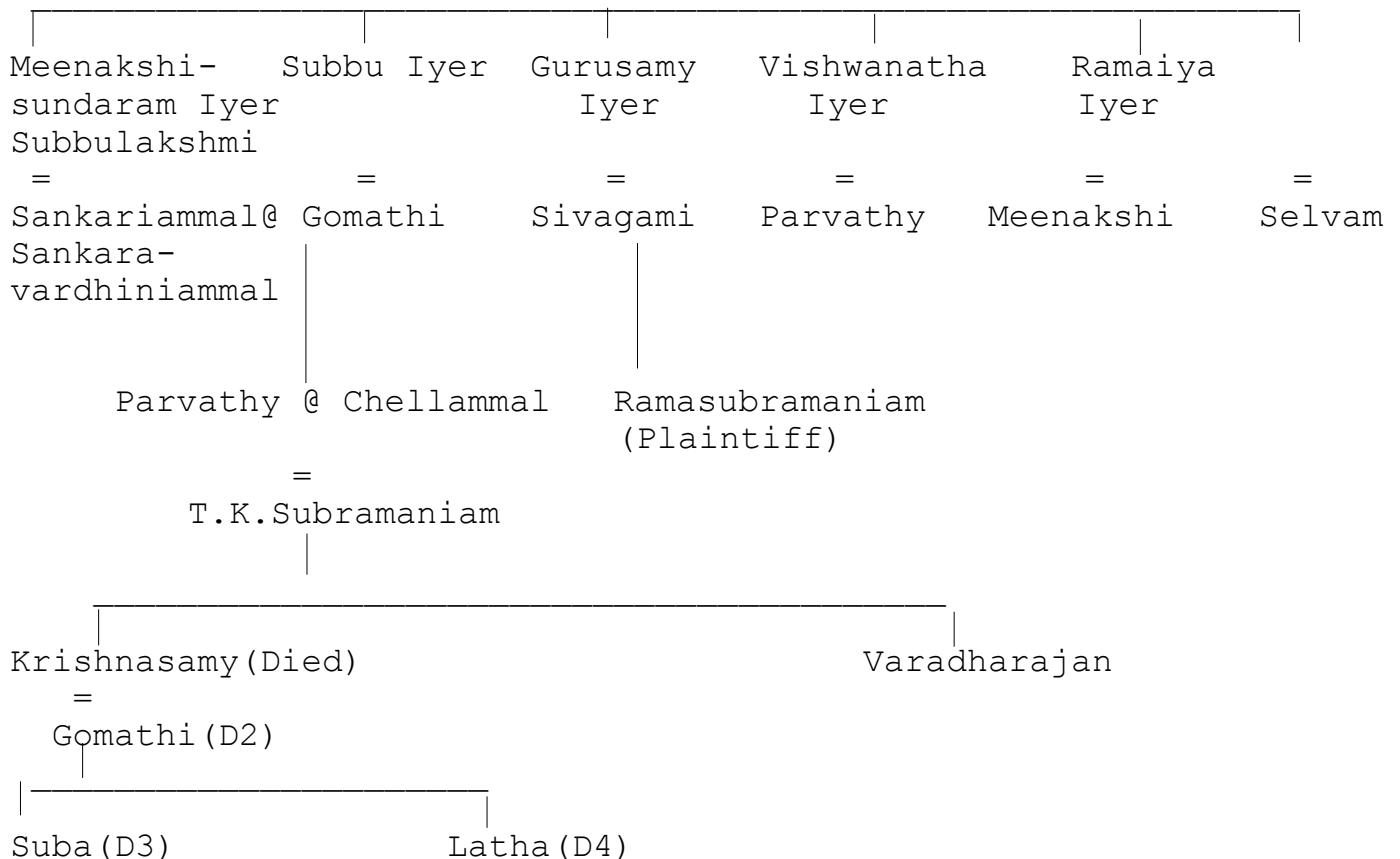
4. This second appeal was admitted on the following substantial questions of law:-

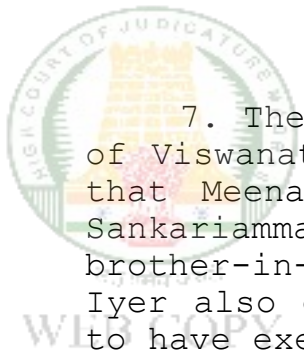
"1. Whether the judgment and decree of the Court below is perverse on account of its misconstruction of the document in Ex.A.7 when admittedly the Will has been probated in the manner known to law?

2. Whether the judgment and decree of the Court below in dismissing the suit for non-joinder of necessary party is erroneous on the facts and circumstances of the case when the proper parties are already on record representing the Estate?"

5. Heard the learned counsel on either side.

6. There is no dispute that the suit items(9 in number) are the ancestral properties that belonged to one Ramasubbu Iyer. The family tree is as follows:-



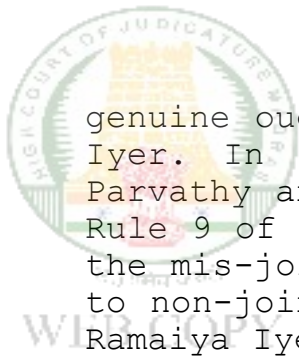


7. The case of the plaintiff is that by virtue of being the son of Viswanatha Iyer, he was entitled to 1/5<sup>th</sup> share. He also claimed that Meenakshisundaram Iyer died without any issue and his wife Sankariammal @ Sankaravardhiniammal executed a will in favour of her brother-in-law, namely, Gurusamy Iyer and Ramaiya Iyer. Gurusamy Iyer also died leaving behind any issue. His wife Sivagami is said to have executed a will in favour of the plaintiff. Likewise Ramaiya Iyer's wife Meenakshi is said to have executed a will in favour of the plaintiff. According to the plaintiff, when the said will of Meenakshi was propounded in an earlier suit, it was opposed on the ground that it was not probated. Subsequently, the plaintiff filed O.P.No.177 of 2001 before the Madras High Court and got the will probated(Ex.A.6). According to the plaintiff, he was entitled to 4/5<sup>th</sup> share in the suit properties. Seeking the said relief, the said partition suit came to be instituted.

8. The defendants filed written statement controverting the plaint averments. Based on the divergent pleadings, the trial Court framed the necessary issues. The plaintiff examined himself as P.W.1 and marked Ex.A.1 to Ex.A.11. On the side of the defendants, one Ramasamy Karaiyalar examined himself as D.W.1 and Ex.B.1 to Ex.B.13 were marked. After a consideration of the evidence on record, the trial Court by judgment and decree dated 04.04.2006 dismissed the suit. As already pointed out, the first appellate Court had confirmed the dismissal of the suit.

9. The question that arises for consideration is whether the substantial questions of law raised by the appellants deserves to be answered in his favour. I need not go into the factual controversies. The learned counsel appearing for the respondents has brought to my notice that the plaintiff Ramasubramanian had sold some of the ancestral properties vide Ex.B.2 and Ex.B.3 and that those sold out items have not been included in the suit schedule. I am in full agreement with the contention raised by the respondents that the plaintiff was obliged to file a suit for general partition. In the said suit, he must have included all the properties including those alienated by him and he should have also impleaded all the alienees. The plaintiff had not done so. Therefore, the suit was patently bad for partial partition. I sustain this contention urged by the learned counsel appearing for the respondents.

10. That apart, the plaintiff had not impleaded all the persons who would be entitled to the suit properties. In particular, Ramaiya Iyer had two daughters, namely, Parvathy and Rukmani. It is true that Ramaiya Iyer died intestate. Ramaiya Iyer had 1/5<sup>th</sup> share in the suit properties. Therefore, his wife Meenakshi would have inherited 1/3 of the said 1/5<sup>th</sup> share and the remaining 2/3<sup>rd</sup> share had obviously devolved on two daughters. Therefore, Meenakshi by her will could not have bequeathed the entire 1/5<sup>th</sup> share of Ramaiya Iyer in favour of the plaintiff. Hence, the will executed by Meenakshi in favour of the plaintiff is bad. The plaintiff's claim to the share of Ramaiya Iyer's property even if found to be true and

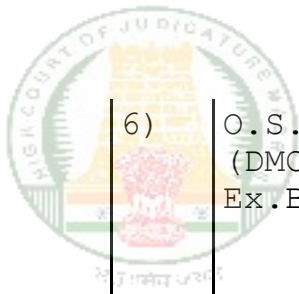


genuine ought to be confined to only 1/3<sup>rd</sup> in 1/5<sup>th</sup> share of Ramaiya Iyer. In this case, the two daughters of Ramaiya Iyer, namely, Parvathy and Rukmani have not been impleaded as defendants. Order 1 Rule 9 of C.P.C. states that no suit shall be defeated by reason of the mis-joinder or non-joinder of parties. But that would not apply to non-joinder of necessary parties. In this case, the daughters of Ramaiya Iyer are necessary parties. By not joining them, the suit is clearly hit by non-joinder also. The substantial questions of law will have to answered against the appellants.

11. At this stage, the learned counsel appearing for the appellants submitted that the appellants may be permitted to withdraw the suit itself with liberty to file a fresh suit on the same cause of action.

12. This request is strongly and vehemently opposed by the learned counsel appearing for the respondents. The learned counsel appearing for the respondents has filed his written submissions in which he catalogued the previous rounds of litigation. They are as follows:-

| <b>S. No.</b> | <b>Suit No. and Exhibit</b>                        | <b>Party and Suit Nature</b>                                                                        | <b>Status of the Suit</b> |
|---------------|----------------------------------------------------|-----------------------------------------------------------------------------------------------------|---------------------------|
| 1)            | O.S.No.179/97<br>(DMC, Tenkasi)<br>(Ex.A.6)        | Plaintiff V. Malaiappa Chettiar<br>Partition Suit                                                   | Dismissed                 |
| 2)            | A.S.No.96/2004<br>(Sub Court, Tenkasi)             | Plaintiff V. Malaiappa Cheittiar                                                                    | Dismissed                 |
| 3)            | O.S.No.144/1998<br>(DMC, Tenkasi)<br>(Ex.A.10,A11) | Plaintiff V. Sivagamiammal and Krishnasamy<br>Suit for bare injunction till partition               | Dismissed                 |
| 4)            | O.S.No.134/2000<br>(DMC,Tenkasi)<br>Ex.B.10,B11    | Plaintiff V. Ramasamy (D5/R5)<br>Suit for partition of 4/5 share and damages for use and occupation | Dismissed                 |
| 5)            | A.S.No.111/2004<br>(Pr1.Sub Court, Tenkasi)        | Plaintiff V. Ramasamy (D5/R5)                                                                       | Dismissed                 |



|     |                                                                  |                                                                                                                   |           |
|-----|------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------|-----------|
| 6)  | O.S.No.140/2000<br>(DMC, Tenkasi)<br>Ex.B12,B13                  | Plaintiff<br>V.Esakkidurai (D6/R6)<br>Suit for recovery of<br>possession and 4/5 <sup>th</sup><br>share partition | Dismissed |
| 7)  | O.S.No.42/2003<br>(DMC, Tenkasi)<br>Ex.A.4                       | Plaintiff V. Alagaiya<br>Aasari                                                                                   | Dismissed |
| 8)  | O.S.No.264/1999<br>(Sub Court,<br>Tenkasi)                       | Muthu V. Alagaiyya<br>Aasari<br>Note : Alagaiya Aasari<br>is not a party to this<br>suit                          | Dismissed |
| 9)  | O.S.No.49/1997                                                   | Plaintiff V. Family<br>members<br>Suit for partition                                                              | Dismissed |
| 10) | S.A.(MD)<br>No.280/2008<br>(Madras High Court,<br>Madurai Bench) | Plaintiff V. Ramasamy<br>(R5)<br>(Against<br>A.S.No.111/2004)                                                     | Dismissed |
| 11) | O.S.No.975/2004<br>(DMC,Tenkasi)                                 | Appellant/Plaintiff V.<br>Respondents<br>Present suit for<br>partition of 4/5 <sup>th</sup><br>share              | Dismissed |

13. Therefore, I decline to grant permission to the appellants to withdraw the suit with liberty to file a fresh suit on the same cause of action.

14. This second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

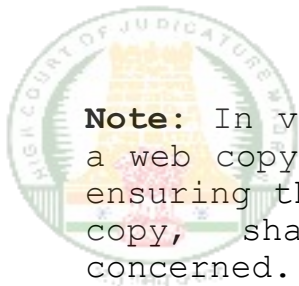
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**To:**

- 1.The Sub Judge,  
Tenkasi.
- 2.The Principal District Munsif,  
Tenkasi.

**COPY TO:-**

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

+3 CC to M/s.R.S.R.VENKAT RAMANA, Advocate (SR-25159[F]  
dated 04/08/2021 )

+2 CC to M/s.S.RAMESH @RAMAIAH, Advocate (SR-25163 & 25444[F]

S.A.(MD)No.284 of 2008

04.08.2021

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