



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 06.07.2021

CORAM

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

**S.A. (MD)No.938 of 2007**

M.A.Beer Mohaideen

... Appellant/Appellant/  
1<sup>st</sup> Defendant

**Vs.**

1. M.Aasial Beevi
2. M.Pathumuthu
3. M.Sariba
4. M.Noorjahan

... Plaintiffs/Respondents 1 to 4/  
Respondents 1 to 4

5. Sheku Fathimal  
(Since the 5th respondent  
herein was set exparte by the  
lower court she was given up)

... 2<sup>nd</sup> defendant/5<sup>th</sup> Respondent/  
5<sup>th</sup> Respondent

**Prayer:** Second appeal filed under Section 100 of C.P.C., to set aside the Judgment and Decree passed in O.S.No.248 of 2002 dated 06.02.2006 on the file of the II Additional Sub-Court, Tirunelveli which was confirmed by the Judgment and Decree passed in A.S.No.34 of 2006 dated 28.09.2006 on the file of the Principal District Court, Tirunelveli and dismiss the suit in O.S.No.248 of 2002 on the file of the II Additional Sub-Court, Tirunelveli.

For Appellant : Mr.V.Meenakshi Sundaram,  
for Mr.D.Nallathambi.  
For R-1 to R-4 : Mr.S.Balasubramanian

### **J U D G M E N T**

The contesting defendant in O.S.No.248 of 2002 on the file of the II Additional Sub Court, Tirunelveli, is the appellant in this second appeal.

2. O.S.No.248 of 2002 was filed by respondents 1 to 4 herein seeking partition and separate possession of their 7/12<sup>th</sup> share in the suit properties. They also prayed for mesne profits. The case of the plaintiffs is that the suit properties belonged to their father B.M.Abubakkar. The fifth respondent herein Sheku Fathimal is the wife of Abubakkar. The plaintiffs and the appellant were born to them. Abubakkar passed away in the year 2001. The suit items are two in number. The first item comprises a row of houses. The second item is a fixed deposit. The stand of the appellant was that even during his lifetime, Abubakkar had settled certain items of the properties in favour of the plaintiffs and in view of the same, the plaintiffs



have released their future interest in the suit property. The learned counsel for the appellant relied on the decision reported in AIR 1973 SC 554 (Gulam Abbas Vs. Haji Kayyum Ali & Ors.) for the proposition pertaining to estoppel by conduct.

3. The husband of the first plaintiff examined himself as P.W.1 and Ex.A.1 to Ex.A.5 were marked. The appellant examined himself as D.W.1 and as many as seven other witnesses. Ex.B.1 to Ex.B.15 were marked. The trial Court by judgment and decree dated 06.02.2006 rejected the plea of the contesting defendant and passed preliminary decree as sought for. The plaintiffs were also given liberty to initiate separate proceedings for mesne profits under Order 20 Rule 12 of C.P.C.. The decision of the trial Court was confirmed by the first appellate Court in A.S.No.34 of 2006 on the file of the Principal District Judge, Tirunelveli. Questioning the same, this second appeal came to be filed.

4. Though the second appeal is of the year 2007, it has not been admitted till date.

5. The learned counsel appearing for the appellant reiterating all the contentions set out in the memorandum of grounds and called upon this Court to frame substantial questions of law and admit this second appeal and thereafter take it up on merits.

6. Per contra, the learned counsel appearing for the contesting respondents/plaintiffs submitted that no substantial question of law arises for consideration.

7. I carefully considered the rival contentions and went through the evidence on record.

8. There is no dispute that the suit properties belonged to the father Late.B.M.Abubucker. There is no dispute regarding the relationship between the parties. The only ground on which the prayer for partition is opposed is that the plaintiffs are estopped by conduct. This is purely a factual issue. The Courts below have concurrently found that the plaintiffs have not relinquished their share in the suit property. No substantial question of law arises for consideration. I do not find any ground to interfere.

9. This second appeal is dismissed. No costs.

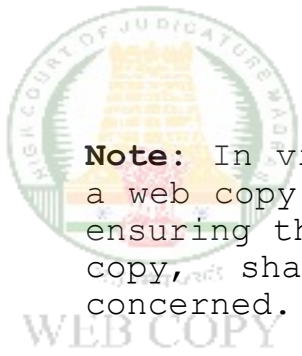
Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)



**Note:** In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

**To:**

1. The II Additional Sub Judge,  
Tirunelveli.
2. The Principal District Judge,  
Tirunelveli.
3. The Record Keeper, V.R.Section,  
Madurai Bench of Madras High Court,  
Madurai.

+2 CC to M/s.D.NALLLATHAMBI, Advocate ( SR-21403,21578[F] dated 06/07/2021 )

+1 CC to M/s.S.BALASUBRAMANIAN, Advocate ( SR-21682[F] dated 08/07/2021 )

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RK (29.09.2021) 3P 8C