



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 29.07.2021

CORAM:

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

S.A.(MD)No.1179 of 2011

and

M.P.(MD)No.1 of 2011

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Ponnayyan

... Appellant / 1st Respondent /
1st Defendant

-Vs-

1.D.Krishnan

2.D.Kumaresan

3.Raghavan

... Respondents 1 to 3 / Appellants /
Plaintiffs

4.Moni

5.Nadarajan

6.Saradha

7.Chellappan

... Respondents 4 to 7 / Respondents 2 to 5/
Defendants 2 to 5

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree passed in A.S.No.25 of 2009 dated 25.04.2011 on the file of the Subordinate Judge, Padmanabapuram, reversing the judgment and decree passed in O.S.No.216 of 2004 dated 22.12.2008 on the file of the Principal District Munsif, Padmanabapuram.

For Appellant	: Mr.C.Kishore for Mr.Sreekumaran Nair
For R1	: Dismissed (vide Court order dated 9.2.2017)
For R2 & R3	: Mr.R.Vijayakumar
For R4 to R7	: exparte

JUDGMENT

The first defendant in O.S.No.216 of 2004 on the file of the Principal District Munsif, Padmanabhapuram, is the appellant in this second appeal. The said suit was for partition. In the said suit, the plaintiffs sought the relief of partition and also permanent injunction restraining the appellant herein from disturbing their possession by executing the decree in O.S.No.72 of 1997 on the file of the District Munsif Court, Padmanabhapuram.

2. The case of the plaintiff was that in O.S.No.731 of 1973 on the file of the District Munsif Court, Padmanabhapuram, a final decree was passed on 13.12.1973, under which, 1/3rd share in the suit property was jointly allotted in favour of D11 and D15 therein.



Another 1/3rd share was allotted in favour of 14th defendant in the said suit. The plaintiff's 1/3rd share was allotted in favour of D13 in the said suit. D15 in the previous suit passed away without any children and his share devolved on D11. D11 in the previous suit was shown as first defendant in O.S.No.216 of 2004. The plaintiffs and the 5th defendant Chellappan are the legal heirs of D13 in the previous suit. D2 to D4 are the legal heirs of D14 in the previous suit. According to the plaintiffs, the first defendant, plaintiffs and the 5th defendant and D2 to D4 in the present suit will be entitled to 1/3rd share each in the suit schedule properties. They further contended that the second and third plaintiff however purchased six cents in the first item from their father Dasan. The first plaintiff and the first defendant have purchased four cents from their father. The plaintiffs prayed for partition decree after taking into account these sale deeds also. The suit prayer was strongly contested by the first defendant. The first defendant raised the plea of res-judicata. Based on that rival pleadings, the trial Court framed the necessary issues. The third plaintiff Raghavan was examined as P.W.1 and Ex.A1 to Ex.A10 were marked. The first defendant examined himself as D.W.1 and marked Ex.B1 to Ex.B9. After considering the evidence on either side, the trial Court dismissed the suit by judgment and decree dated 22.12.2008. Aggrieved by the same, the plaintiffs filed A.S.No.25 of 2009 before the Sub Court, Padmanabhapuram. The first appellate Court by the impugned judgment and decree dated 25.04.2011 set aside the judgment of the trial Court and partly allowed the appeal by granting the preliminary decree for partition alone. Aggrieved by the same, this second appeal has been filed.

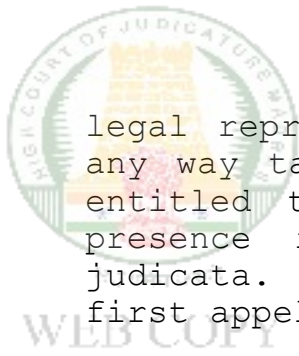
3. The second appeal was admitted on the following substantial question of law:-

“ Whether the suit is barred by res-judicata”

4. Heard the learned counsel on either side.

5.The learned counsel appearing for the appellant reiterated all the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial questions of law in favour of the appellant and set aside the impugned judgment and decree and restore the decision of the trial Court.

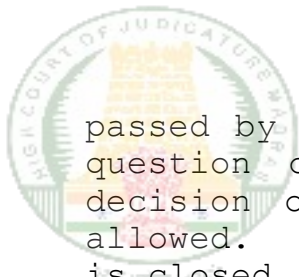
6. Per contra, the learned counsel appearing for the plaintiffs/ R1 to R3 contended that the impugned judgment and decree do not warrant interference. He pointed out that the plaintiffs have purchased 10 cents of land from their father Dasan and that the same cannot be ignored. They would point out that when the appellant herein filed O.S.No.72 of 1997 seeking the relief of partition based on the allotment made in the final decree dated 13.12.1973 made in O.S.No.731 of 1973, they were not made parties. Merely because, the plaintiffs were impleaded in the capacity of



legal representatives of their deceased father, that would not in any way take away the legal rights, to which, they are otherwise entitled to. The learned counsel would contend that their mere presence in the execution proceedings cannot operate as res-judicata. He called upon this Court to affirm the findings of the first appellate Court.

7. I carefully considered the rival contentions and went through the evidence on record. There is no dispute that the suit properties were included in the suit schedule in O.S.No.731 of 1973. A final decree was passed on 13.12.1973 in terms of which the suit properties were jointly allotted in favour of D11 to D15 therein. Since only a joint allocation was made, the appellant herein filed O.S.No.72 of 1997 seeking the relief of partition. In the said suit, Dasan / father of the plaintiffs was shown as the second defendant. He remained exparte. A preliminary decree came to be passed and it was not put to challenge. A final decree also came to be passed on 02.08.2002 whereby 18.530 cents was allotted in favour of the appellant herein. The appellant herein filed E.P.No.4 of 2003 for executing the same. During the pendency of the execution proceedings, Dasan passed away. The plaintiffs were brought on record as legal heirs of the deceased Dasan in the execution proceedings. Thereafter, delivery was ordered on 05.01.2004 and it was also effected on 03.02.2004. It is relevant to note here that D5 who is none other than the brother of the plaintiffs was shown as defendant in the main suit also ie., O.S.No.72 of 1997. What clinches the issue in favour of the appellant is that the present plaintiffs are staking their claim only in the capacity as sons of Dasan and not in independent capacity. Their claim is only under final decree made in O.S.No.731 of 1973. In other words, the present plaintiffs cannot claim any higher right than what their father was entitled to. Dasan admittedly was a party to O.S.No.72 of 1997. The plaintiff's brother / fifth defendant herein was already a party to O.S.No.72 of 1997. They suffered preliminary decree as well as final decree and the same had become final. In the Execution Petition, following the demise of their father, the present plaintiffs were impleaded as respondents.

8. The present plaintiffs did not file any revision petition challenging the orders made in E.P.No.4 of 2003. Those orders effecting delivery of 18.530 cents out of the suit schedule property in favour of the appellant herein had become final. The effect of finality cannot be overcome by instituting one more suit for partition. That was patently not maintainable. It was clearly hit by res-judicata. Even if I hold that it is not hit by res-judicata, there cannot be a re-litigation in respect of a concluded matter. The present suit will be hit by prohibition against re-litigation. The trial Court had correctly approached the issue and the first appellate Court misdirected itself by not holding that the present round of litigation is not maintainable. The judgment and decree



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passed by the first appellate Court is set aside. The substantial question of law is answered in favour of the appellant. The decision of the trial Court is restored. The second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

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Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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To

- 1.The Subordinate Judge, Padmanabapuram.
- 2.The Principal District Munsif, Padmanabapuram.
- 3.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.K.SREE KUMARAN NAIR, Advocate (SR-24645[F] dated 30/07/2021)

+1 CC to M/s.R.VIJAYAKUMAR, Advocate (SR-24649[F] dated 30/07/2021)

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