



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 15.09.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)Nos.405 & 913 of 2011

WEB COPY

S.A. (MD)No.405 of 2011

1. M.Chidambaram(Died) ... Appellant/2nd Cross Appellant/
1st Respondent/1st Defendant

2. Karthikeyan

(2nd appellant is impleaded vide Order dated 14.09.2021 made in
C.M.P. (MD)No.9659 of 2018)

... Appellant

Vs.

1. M.Ulaganathan ... 1st Respondent/
1st Respondent in Cross Appeal/
Appellant/Plaintiff

2. M.Shanmugavelayutham ... 2nd Respondent/
3rd Respondent in Cross Appeal 1&2/
3rd Respondent /3rd Defendant

3. Muthusundari

4. Babu

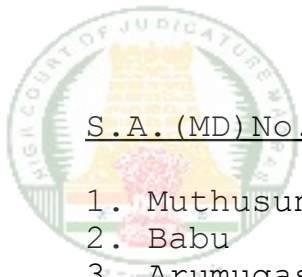
5. Arumugasundaram

6. Chidambaranathan

7. Mangalasundari ... Respondents 3 to 7/
No.4 to 8 Cross Objectors in
1st Cross Appeal/
4 to 8 Respondents
in 2nd Cross Appeal / Defendants

Prayer: Second appeal filed under Section 100 of C.P.C.,
against the Judgment and Decree passed in 2nd Cross Appeal in
A.S.No.23 of 2008 on the file of the Principal District Judge,
Thoothukudi, dated 30.09.2010 reversing the Judgment and Decree
passed in O.S.No.108 of 1994 on the file of the Sub Court,
Thoothukudi, dated 16.07.2008.

For Appellants : Mr.R.Balakrishnan
For R-1 : Mr.S.Kadarkarai
For R-3 to R-7 : Mr.M.P.Senthil



S.A. (MD) No. 913 of 2011

1. Muthusundari
2. Babu
3. Arumugasundaram
4. Chidambaranathan
5. Mangalasundari

... Appellants / Respondents 4 to 8/
Defendants 4 to 8

Vs.

1. M.Ulaganathan ... 1st Respondent/
Appellant/Plaintiff
2. M.Chidambaram (Died)
(Memo is recorded as R-2 died vide Order dated 19.07.2019)

3. M.Shanmugavelayutham ... Respondents 2 & 3 /
Respondents 1 & 3/
Defendants 1 & 3

4. Karthikeyan

(4th respondent is suo motu impleaded vide order dated
14.09.2021.) ... Respondent

Prayer: Second appeal filed under Section 100 of C.P.C., against the Judgment and Decree passed in A.S.No.23 of 2008 on the file of the Principal District Judge, Thoothukudi, dated 30.09.2010 reversing the Judgment and Decree passed in O.S.No.108 of 1994 on the file of the Sub Court, Thoothukudi, dated 16.07.2008.

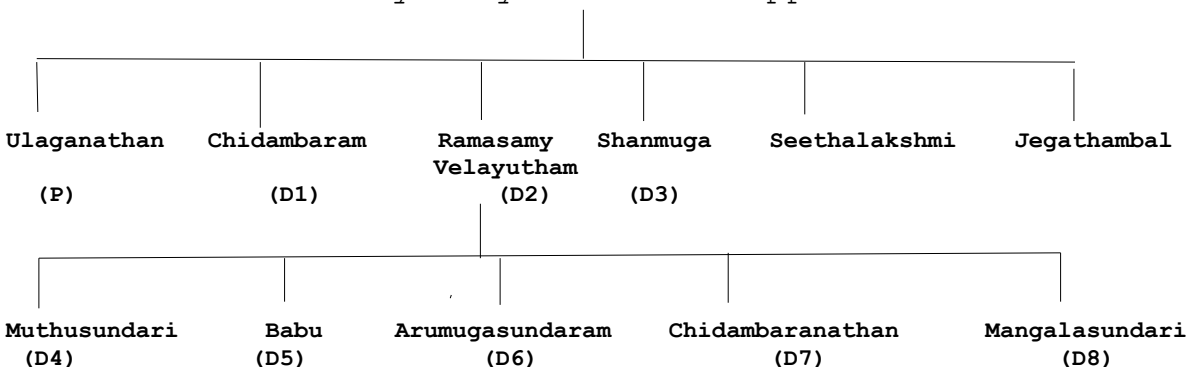
For Appellants	: Mr.M.P.Senthil
For R-1	: Mr.S.Kadarkarai
For R-4	: Mr.R.Balakrishnan

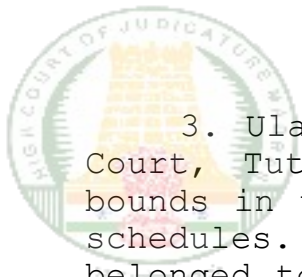
C O M M O N J U D G M E N T

These two second appeals arise out of a partition suit.

2. The geanealogy is as under:-

Muniyasamy Pillai + Pappammal



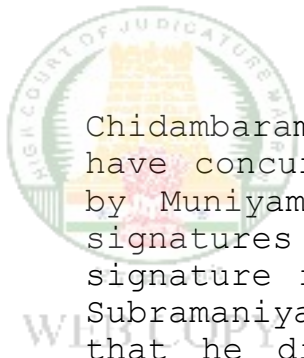


3. Ulaganathan filed O.S.No.108 of 1994 on the file of the Sub Court, Tuticorin, seeking partition of 1/4th share by metes and bounds in the suit schedule properties. There are totally four suit schedules. There is no dispute that suit schedule 1 to 3 originally belonged to Muniyasamy Pillai. The suit fourth schedule belonged to one Muniyammal, sister-in-law of Muniyasamy Pillai. Ulaganathan did not array his sisters, namely, Seethalakshmi and Jegathambal as defendants. The brothers, namely, Chidambaram, Ramasamy and Shamuga Velayutham alone were made as defendants. During the pendency of the suit, Ramasamy passed away and his legal representatives were brought on record as defendants 4 to 8. The suit claim was contested by Chidambaram, the first defendant in so far as the fourth schedule was concerned. According to Chidambaram, Muniyammal, owner of the suit fourth schedule properties had executed a registered Will dated 27.07.1988 in his favour and that therefore, the suit fourth schedule is not amenable to partition. Ramasamy also raised a counter claim pleading oral partition. Based on the divergent pleadings, the trial Court framed the necessary issues. Ulaganathan examined himself as P.W.1 and marked Ex.A.1 to Ex.A.3. Chidambaram examined himself as D.W.1 and marked Ex.B.1 to Ex.B.6. Chidambaram examined the attestor of Ex.B.5, namely, Subramaniya Pillai as D.W.2. After considering the evidence on record, the trial Court by judgment and decree dated 16.07.2008 dismissed the suit after holding that while Ulaganathan failed to prove joint possession, the legal heirs of the second respondent Ramasamy failed to prove oral partition. It has also been held that Ex.B.5 Will propounded by Chidambaram was not proved. Aggrieved by the same, Ulaganathan filed A.S.No.23 of 2008 before the Principal District Judge, Thoothukudi. Chidambaram as well as the legal heirs of Ramasamy filed cross objections in the said appeal. By judgment and decree dated 30.09.2010, the first appellate Court granted preliminary decree as prayed for. The cross objections were dismissed. Aggrieved by the same, these two second appeals have been filed.

4. Chidambaram was the appellant in S.A.(MD)No.405 of 2011. The legal heirs of Ramasamy/second defendant are the appellants in S.A.(MD)No.913 of 2011. During the pendency of these appeals, Chidambaram passed away. One Karthikeyan claiming to be the foster son of Chidambaram wanted to come on record in the place of Chidambaram in both the appeals. Though this was strongly opposed by the plaintiff Ulaganathan, according to Karthikeyan, Chidambaram had executed a registered Will dated 27.04.2017 in his favour. To prove the said Will, he was allowed to come on record in the place of the deceased Chidambaram.

5. Heard the learned counsel on either side.

6. The only scope for contest in S.A.(MD)No.405 of 2011 is whether the fourth schedule is amenable to partition or not. This question depends on whether Ex.B.5 Will was duly proved by



Chidambaram. The trial Court as well as the first appellate Court have concurrently held that Ex.B.5 Will said to have been executed by Muniyammal was not proved. I perused the original Will. The signatures in the various pages differ from each other. In the signature found at page No.3, there is an apparent mistake. D.W.2 Subramaniya Pillai who has been examined as an attester, deposed that he did not see Muniyammal going to the office of the Sub Registrar for the purpose of registration. A reading of his testimony indicates that the requirements of Section 63 of the Indian Succession Act have not been fulfilled. That is why, the Courts below held that the Will has not been proved. Exercising jurisdiction under Section 100 of C.P.C., I am of the view that it is not a fit case for interference. No substantial question of law arises for consideration.

7. The learned counsel appearing for the appellants read out the testimony of Chidambaram(D.W.1). Chidambaram had deposed before the Court below that the property was bequeathed to him only for the benefit to Karthikeyan. Chidambaram had been granted 1/4th share in all the suit schedules. Now the question is whether the share of Chidambaram will have to go to the siblings or to Karthikeyan exclusively. That would depend upon the proof of the Will dated 27.04.2017. Karthikeyan is permitted to prove the said Will in the final decree proceedings.

8. S.A.(MD)No.913 of 2011 was filed by the legal representatives of the deceased second defendant. The second defendant pleaded oral partition. It is true that in response to the counterclaim raised by Ramasamy the second defendant, no reply statement was filed. Ulaganathan was set ex-parte in so far as the counterclaim was concerned. But the fact remains that the legal heirs of Ramasamy did not lead any evidence in support of their plea of oral partition. That is why, the trial Court as well as the first appellate Court held that in the absence of any evidence, counterclaim has not at all been proved. The said finding is perfectly justified.

9. The legal heirs of the deceased second defendant claim that the second defendant had constructed shops and made improvements during his lifetime and that they should be compensated. Of course this assertion is contested by the learned counsel for the plaintiff Ulaganathan. This issue is left open. It is for the parties to prove the same in the final decree proceedings by adducing evidence.

10. The sisters were not made parties. In view of the amendment made to Section 6 of the Hindu Succession Act in the year 2005 and as interpreted by the Hon'ble Supreme Court in **(2020) 9 SCC 1 (Vineeta Sharma Vs. Rakesh Sharma)**, the sisters also will be entitled to equal share along with the brothers. The suit was instituted way back in the year 1994. Therefore, the first appellate



Court granted 1/4th share to the plaintiff. Since there are two sisters, they also will be entitled to share. Therefore, the plaintiff will be entitled to 1/6th share in the suit properties.

11. The impugned judgment and decree are accordingly modified. These second appeals are disposed of. No costs.

Sd/-

Assistant Registrar ()

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

PMU

Note: 1. 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 Principal District Judge,
Thoothukudi.
2. The Sub Judge,
Thoothukudi.
3. The Record Keeper, V.R.Section,
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.S.KADARKARAI, Advocate (SR-29188[F] dated 15/09/2021)

+1 CC to M/s.S.KADARKARAI, Advocate (SR-29190[F] dated 15/09/2021)

+1 CC to M/s.R.BALAKRISHNAN, Advocate (SR-29395[F] dated 16/09/2021

+1 CC to Mr.M.P.Senthil, Advocate, SR.No.29257 dated 16.09.2021

S.A.(MD)Nos.405 & 913 of 2011
15.09.2021

SE(CO)

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