



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 27.04.2021

CORAM

THE HONOURABLE MR. JUSTICE G.R. SWAMINATHAN

S.A. (MD) No. 420 of 2013

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Amaravathy

... Appellant/Appellant/
9th defendant/Petitioner
Vs.

1. Swarnamma
2. Marybai

Ammalu (died)
Kumaran Nadar (died)
Thankayyan (died)
Muthayyan (died)

3. Thankappan

Chinnaiah @ Chinnakutty (died)

4. Moni
5. Santha
6. Gangadharan
7. Viswanathan
8. Sankaran
9. Karunakaran

Baby (died)

10. Seelavathi

Kunjuudevi (died)

11. Gowri
12. Jeyakumari (Minor)
13. Jayaprabha (Minor)
14. Ajithkumari (Minor)

(Minor respondents 12 to 14 are rep. by Court guardian
Mr. Unnikrishnan Nair, Advocate)

15. Russel Raj
16. Rosamma
17. Rethinam
18. Lalitha
19. Subhardra
20. Palamma
21. Prabhakaran
22. Manoharan
23. Kumaresan



24. Selvi
25. Lyla
26. Kalamathi
27. Angel
28. Anand

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... Respondents/Plaintiffs and
Defendants 1 to 8, 10, 11 to 35/
Respondents

(Respondents 1, 3, 4, 6, 8 to 18 and 20 to 28 remained absent in A.S. in the lower appellate Court and hence service of notice on them may be dispensed with in the second appeal)

Prayer: Second appeal filed under Section 100 of C.P.C., against the Judgment and Decree dated 29.01.2013 of the learned Subordinate Judge, Kuzhithurai, made in A.S. No.36 of 2008, confirming the Judgment and Decree dated 11.03.2005 on the file of the learned Principal District Munsif, Kuzhithurai and made in I.A.No.635 of 2002 in O.S.No.199 of 1976 on his file.

For Appellant : Mr.Mr.R.Vijaykumar,
for Mr.T.Selvakumaran.
For R-5 : Ms.J.Anandhavalli
For R-19 : No appearance.
For R-2 & R-7 : No appearance.

* * *

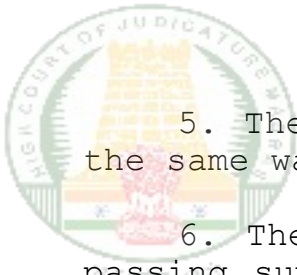
J U D G M E N T

The ninth defendant in O.S.No.199 of 1976 on the file of the Principal District Munsif Court, Kuzhithurai, is the appellant in this second appeal.

2. One T.Swarnamma filed the said suit seeking relief of partition against as many as eight defendants. In the said suit, the appellant Amaravathy got impleaded in terms of the order made in I.A.No.402 of 1977. The ostensible reason for impleading Amaravathy appears to be that she had purchased 35 cents of land vide Ex.B.6 dated 17.05.1972 from one P.Chinnakutty Nadar. The said Ex.B.6 appears to be a portion of 'B' schedule property.

3. Preliminary decree was passed on 09.09.1982 and the plaintiff was granted 37 ½ cents, while the first defendant was also given another 37 ½ cents in 'B' schedule property. It was further decreed that the remaining portion of the 'B' schedule property belong to defendants 2 to 8.

4. Now it is stated that this preliminary decree was put to challenge by way of filing first appeal by the appellant herein. The first appeal was dismissed for default.



5. The application filed by the appellant herein for restoring the same was dismissed on merits.

6. Thereafter, the appellant had filed I.A.No.292 of 2001 for passing supplementary preliminary decree. Even during its pendency, the appellant filed I.A.No.635 of 2002 for the very same relief. In the meanwhile, I.A.No.152 of 1983 filed by Swarnamma for passing final decree was allowed by Judgment and Decree dated 30.03.2004.

7. The operative portion of the final decree reads as follows:-

"6. So in view of the above circumstances of the case, I hold that 'A' plot extent about 37.500 cents has been allotted to the plaintiff according to Ext.C.4 plan. 'B' plot has been allotted to the first defendant with an extent of 37.500 cents. 'C' plot has been allotted to the 10th defendant with an extent of 53 cents. 'D' plot has been allotted to the 17th defendant with an extent of 10 cents. 'E' plot has been allotted to the defendants 22 and 23 for an extent of 12 cents according to Ext.C.4 plan.

7. In the result, final decree is passed as per the terms of the preliminary decree and second preliminary decree in the suit. Petition allowed. Ex.C.4 plan is appended with the Decree. "

8. This final decree was questioned by the appellant herein. She filed an appeal before the Sub Court, Kuzhithurai. But there was a delay in filing the appeal. The condone delay petition was dismissed. Challenging the same, the appellant filed C.R.P.(MD) No.1405 of 2010 before this Court.

9. In the meanwhile, the appellant had filed I.A. No.635 of 2002 for passing of the supplementary final decree and the same suffered dismissal. Questioning the same, A.S.No.36 of 2008 before the Sub Court, Kuzhithurai was filed and the same was also dismissed. Challenging the same, the present second appeal came to be filed. It was admitted on the following substantial question of law:-

"Whether the Judgments and Decrees passed by the Courts below in dismissing the appellant's application for passing supplementary final decree are vitiated by illegality, when the appellant claims to stepped into the shoes of the seventh defendant and when the appellant was also impleaded as a party in the preliminary decree proceedings?"

10. C.R.P.(MD) (NPD)No.1405 of 2010 was disposed of on 30.03.2021 in the following terms:-

" 6. Admittedly, the application filed by the petitioner seeking supplementary preliminary decree has



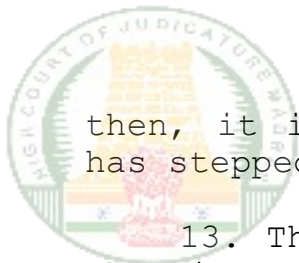
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been dismissed and the same as subject matter of the second appeal pending in this Court, allotments have been made under the final decree only to those persons, who have obtained a supplementary preliminary decree. The total extent measures about 4.14 cents and the allotment made under the final decree is much less than the actual extent available in the suit survey number shown as 'B' schedule property. The petitioner also claims only 35 cents, if at all he succeeds in the second appeal and a preliminary decree is granted in his favour, it will always be open to him to seek allotment of the remaining property, which is shown as Plot Nos.F,G & H, which remain unallotted even in the final decree. Therefore, I do not think that the petitioner need to challenge the final decree.

7.Suffice to observe that if the petitioner succeeds in the second appeal and his right is declared, he would be entitled to seek 35 cents of land from the remaining property, subject to the said right, this Civil Revision Petition is disposed of. No costs."

11. Now the question that arises for my consideration is whether the impugned Judgment deserves to be set aside and whether I.A.No.635 of 2002 filed by the appellant has to be allowed.

12. The case of the appellant is that even as per the preliminary decree dated 09.09.1982, defendants 2 to 8 are entitled to remaining portion of 'B' schedule property, after allocation of 35 cents of the land each in favour of the plaintiff and the first defendant. The appellant's counsel would claim that the appellant had purchased 35 cents vide Ex.B.6 from the seventh defendant Thiru.P.Chinnayan. However, as rightly pointed out by the learned counsel appearing for the fifth respondent herein, in the affidavit filed in support of the application, the appellant had pleaded that she had purchased 35 cents of the land from Chinnakutty Nadar. There is no specific assertion that she had purchased from the seventh defendant. However, the appellant's counsel wants me to infer from the attendant circumstances that it is only from the seventh defendant, she had purchased 35 cents vide Ex.B.6. According to the appellant's counsel, in Ex.B.6, the vendor had described himself as the son of Padmanabhan Nadar. The property concerns a portion of 'B' schedule in the original suit in O.S.No.199 of 1976. The appellant had made a categorical assertion that by virtue of purchase of 35 cents, she had also become a sharer in the property. I cannot lose sight of the fact that she has been originally impleaded by virtue of I.A.No.402 of 1977. If the appellant was an utter stranger and alien to the entire proceedings, she could not have been impleaded in the first instance. Therefore, considering the overall facts and circumstances, I am of the view that the appellant has shown existence of her interest in the property. But

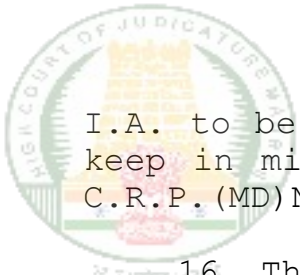


then, it is for the appellant to categorically establish that she has stepped into the shoes of the seventh defendant.

13. The Courts below had assigned as many as three reasons for throwing out the application filed by the appellant. The first reason is that the appellant had already filed I.A. No.292 of 2001 for the very same relief. Having already filed the application for the very same cause of action and the very same relief, the second application filed on the same relief is bad in law. The appellant had been castigated for having come to the Court with unclean hands. The second reason is that in the meanwhile, final decree had already been passed and that it had also become final. The third reason is that whether the so called vendor of the appellant had the necessary title to sell 35 cents of the land in favour of the appellant.

14. Though these three reasons assigned by the Courts below are weighty, still one basic fact cannot be lost sight of. The present suit proceedings are one for seeking the relief of partition. While passing the preliminary decree, the trial Court had categorically held that defendants 2 to 8 are entitled to the remaining portion of the 'B' schedule property after 75 cents were allotted to the plaintiff and the first defendant. Therefore, the existence of the right of the seventh defendant cannot be denied. There can be an area of doubt only as regards the exact share. That he has right in the 'B' schedule is no longer open to doubt because the preliminary decree dated 09.09.1982 had admittedly become final.

15. Therefore, when the appellant claims that she is the purchaser of 35 cents of land from the seventh defendant, the appellant ought not to be shown the door on technical grounds. The fifth respondent need not have any apprehension whatsoever because the High Court vide order dated 30.03.2021 in C.R.P.(MD)No.1405 of 2010, had categorically held that the allotments made vide final decree dated 30.03.2004 in I.A.No.152 of 1983 will not be disturbed. It is seen from the allotments made in the final decree that there are some portions that have not been allotted to any person. The appellant herein can only work out her rights from out of those unallotted portions. The substantial question of law is answered in favour of the appellant and the impugned judgments are set aside. However, I am not inclined to remand the matter. Instead I grant liberty to the appellant to file a fresh application for passing supplementary preliminary decree in O.S.No.199 of 1976 on the file of the District Munsif, Kuzhithurai. The learned District Munsif will number the said application. However, the burden is on the appellant to establish that Ex.B.6 was executed by none other than the person who was shown as the seventh defendant in O.S.No.199 of 1976 on the file of the District Munsif, Kuzhithurai. The appellant will have to necessarily work out her rights only from out of the unallotted plots as per the final decree dated 30.03.2004 in I.A.No.152 of 1983. The learned trial Munsif will dispose of the



I.A. to be filed by the appellant expeditiously. The appellant will keep in mind the mandate set out in the order dated 30.03.2021 in C.R.P. (MD)No.1405 of 2010.

16. This second appeal is allowed on these terms. No costs.

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Sd/-

Assistant Registrar (T&P)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

PMU

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 Subordinate Judge,
Kuzhithurai.
2. The Principal District Munsif,
Kuzhithurai.
3. The Record Keeper, V.R.Section,
Madurai Bench of Madras High Court, Madurai.(2C)

+1 CC to M/s.J.ANANDHAVALLI, Advocate (SR-17863[F] dated 28/04/2021)

S.A. (MD) No. 420 of 2013
27.04.2021

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