



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 06.09.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)Nos.133 of 2014 & 362 of 2016 and

M.P.(MD)No.1 of 2014 & C.M.P.(MD)No.7480 of 2020

WEB COPY

S.A.(MD)No.133 of 2014

Padmakshi Pillai Thankachi ... Appellant / Appellant /
Plaintiff

Vs.

1. Baby Girija Pillai Thankachi
2. Pushkala Kumari
3. Jeyakumar
4. Sreekumar
5. Harikumaran Thampi

... Respondents/Respondents/
Defendants

Prayer: Second appeal filed under Section 100 of C.P.C., to allow the second appeal and set aside the judgment and decree in A.S.No.63 of 2012 on the file of the I Additional Subordinate Judge at Nagercoil, Camp at Padmanabhapuram, dated 13.08.2013 confirming the judgment and decree passed in O.S.No.25 of 2010 on the file of the Principal District Munsif, Padmanabhapuram, dated 23.04.2012.

For Appellant	: Mr.V.M.Balamohan Thambi
For R-1	: Mr.Arumugam,
	for Mr.K.Sreekumaran Nair
For R-4	: Mr.P.Thiagarajan

* * *

S.A.(MD)No.362 of 2016

Baby Girija Pillai Thankachi ... Appellant / Cross Appellant /
1st Defendant

Vs.

1. Padmakshi Pillai Thankachi
2. Pushkala Kumari
3. Jeyakumar
4. Sreekumar
5. Harikumaran Thampi

... Respondents/Respondents 2 to 5/
Defendants 2 to 5

Prayer: Second appeal filed under Section 100 of C.P.C., to allow the second appeal and set aside the judgment and decree in Cross Appeal A.S.No.63 of 2012 on the file of the I Additional



Subordinate Judge at Nagercoil, Camp at Padmanabhapuram, dated 13.08.2013 confirming the judgment and decree passed in O.S.No.25 of 2010 on the file of the Principal District Munsif, Padmanabhapuram, dated 23.04.2012.

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For Appellant : Mr.Arumugam,
for Mr.K.Sreekumaran Nair
For R-1 : Mr.V.M.Balamohan Thambi
For R-4 : Mr.P.Thiagarajan

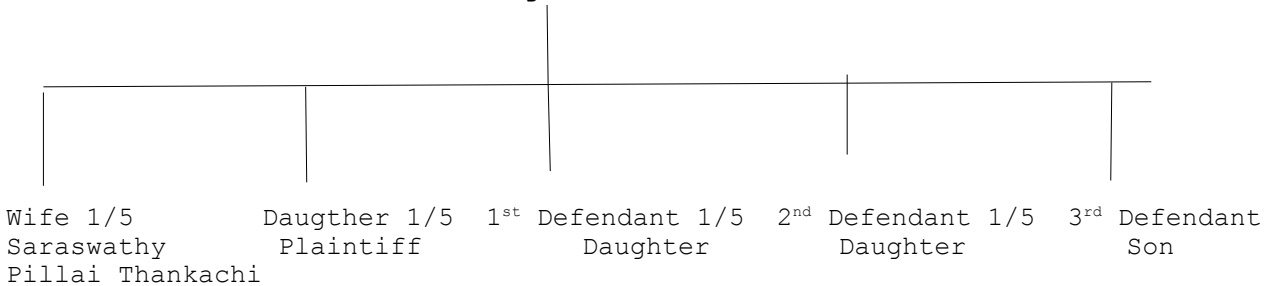
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J U D G M E N T

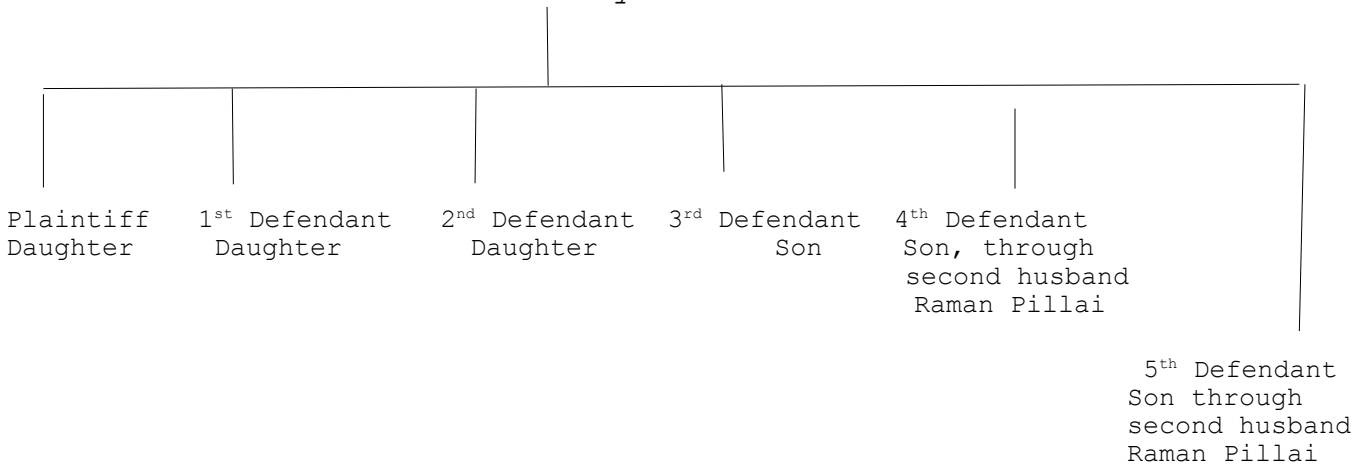
These second appeals arise out of a partition suit in O.S.No.25 of 2010 on the file of the Principal District Munsif, Padmanabhapuram.

2. The appellant in S.A.No.133 of 2014 was the plaintiff in the suit, while the appellant in the other appeal was the first defendant in the suit. The genealogy is as under:-

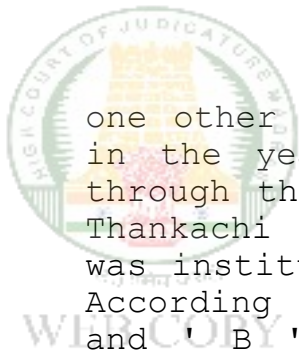
Bhagavathi Pillai



Sarawathy Pillai Thankachi



3. Bagavathi Pillai got married to Sarawathy Pillai Thankachi and through the said wedlock, the appellants herein and
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one other daughter and son were born. Bagavathi Pillai passed away in the year 1961. Saraswathy Pillai Thankachi got remarried and through the second marriage, two sons were born. Saraswathy Pillai Thankachi passed away on 26.04.2007. Thereafter, the present suit was instituted by the elder daughter born through Bagavathi Pillai. According to her, the suit schedule was divided as ' A ' schedule and ' B ' schedule. According to the plaintiff, ' A ' schedule properties belonged to their father Bagavathi Pillai and that she is entitled to 1/5th share therein. She further claimed that ' B ' schedule property belonged to the mother Saraswathy Pillai Thankachi and that she is entitled to 1/6th share. The first defendant Baby Giriya Pillai Thankachi, sister of the plaintiff claimed a higher share in the ' B ' schedule property. The fourth defendant, the son born to Saraswathy Pillai Thankachi through the second marriage contested the suit proceedings. The plaintiff examined herself as P.W.1 and marked Ex.A.1 to Ex.A.6. The first defendant examined herself as D.W.1 and the fourth defendant examined himself as D.W.2. Ex.B.1 to Ex.B.14 were marked. After a consideration of the evidence on record, the trial Court by judgment and decree dated 23.04.2012 dismissed the suit. Aggrieved by the same, the plaintiff filed A.S.No.63 of 2012 before the I Additional Subordinate Court at Nagercoil, Camp at Padmanabhapuram. The first defendant also filed cross appeal therein. Both the appellants filed I.As. for adducing additional evidence and the first appellate Court allowed the petitions filed under Order 41, Rule 27 C.P.C. and marked Ex.A.7 to Ex.A.9 and Ex.B.15 to Ex.B.23 as additional documents. After considering the evidence on record, by judgment and decree dated 13.08.2013, the appeal as well as the cross appeal were dismissed. Challenging the same, these second appeals have been filed.

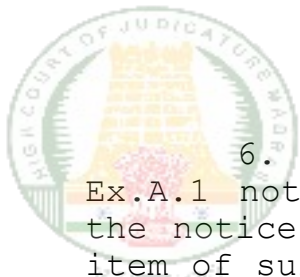
4. S.A.(MD)No.133 of 2014 is filed by the plaintiff, while S.A.(MD)No.362 of 2016 is filed by the first defendant. The second appeals were admitted on the following substantial questions of law:-

" i) Whether the Courts below is correct in law in accepting Ex.B.9 Will deed especially when the same has not been proved in accordance with the provisions of Section 63 (c) of the Indian Succession Act and Section 68 of the Indian Evidence Act?

ii) Whether the Courts below is right in dismissing the suit especially when no plea was taken in the written statement by D4 and D5 that the suit was bad for want of inclusion of certain other items of suit properties?

iii) Whether the Courts below have failed to consider the material evidence Ex.A.7 to Ex.A.9 and Ex.B.9?

iv) Whether the Courts below was right in law when it was held that the plaintiff/appellant has not proved correlation between old survey number and resurvey number especially when the defendant document Ex.B.9 Will deed itself proved the correlation between old survey number and resurvey number? "



6. It is seen that before filing suit, the plaintiff issued Ex.A.1 notice dated 30.12.2008 to the defendants. After receiving the notice, before filing suit, defendants 4 and 5 sold the second item of suit ' B ' schedule property in favour of one Suganthi vide Ex.B.5 dated 08.10.2010. However, the said subsequent purchaser was not impleaded as a defendant. The Court below had dismissed the partition suit primarily on the following grounds:-

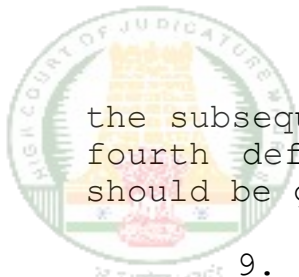
a) The plaintiff as well as the first defendant had been allotted certain items of property that belonged to their father Bagavathi Pillai vide Ex.B.8 dated 19.10.1974. The plaintiff had not whispered about the execution of certain settlement deeds in her favour. D.W.1 admitted in her testimony that some of the items covered under Ex.B.1 belonged to the father Bagavathi Pillai. However, those items were not included in the suit schedule. Therefore, the Courts below felt that the suit was bad for partial partition.

b) The subsequent purchaser Suganthi was not impleaded as a defendant. The suit was therefore hit by non-joinder.

c) The plaintiff as well as the first defendant have not established that all the suit ' A ' schedule items belonged to the father. Though some documents were marked in this regard, correlation between the documents adduced as additional evidence and the suit ' A ' schedule was not established.

7. Though all the three grounds are apparently well founded, on a closer scrutiny I have to sustain the contention of the learned counsel appearing for the appellants that due opportunity was not given to the appellants. The first appellate Court felt that the additional evidence projected by the appellants are relevant and that therefore, they deserve to be brought on record as Ex.A.7 to Ex.A.9 and Ex.B.15 to Ex.B.23. However, the first appellate Court chose to deny the opportunity of the appellants herein to let in oral evidence. Only if the oral evidence had been allowed to be adduced, the appellants could have shown the correlation between the properties covered by the additional evidence and what was included in the suit ' A ' schedule. Therefore, I have to necessarily answer the fourth substantial question of law in favour of the appellants.

8. It is true that the subsequent purchaser Suganthi was not impleaded as a defendant. But it is relevant to note that in the written statement, there is absolutely no pleading in this regard. The alienation under Ex.B.5 had been taken place, after defendants 4 and 5 received the suit notice. The suit notice is dated 30.12.2008 and the suit itself came to be filed on 20.01.2010. The alienation had taken place on 08.01.2010. The fourth defendant had also not even whispered about the sale in favour of Suganthi in his written statement. Taking note of the conduct of the fourth defendant, I am of the view that the plaintiff deserves to be given one more opportunity. Of course, if the said document had surfaced during the trial, the plaintiff could have filed a petition for impleading



the subsequent purchaser also. But taking note of the conduct of the fourth defendant, interest of justice require that the plaintiff should be given one more opportunity.

9. Substantial questions of law 1 to 3 are accordingly answered and the impugned judgment and decree is set aside. The matter is remanded to the file of the trial Court.

10. The stand of the fourth defendant is that the mother Saraswathy Pillai Thankachi had executed a Will dated 17.10.1978 (Ex.B.9). The evidence already taken will remain on record. The defendants are permitted to adduce further evidence to prove the due execution of Ex.B.9. It is also open to the parties on either side to file application for bringing the left out properties. The plaintiff is directed to file application for impleading the subsequent purchaser. The parties are directed to appear through video-conferencing or through counsel on 07.02.2022 before the Court below. The parties are also at liberty to file additional pleadings.

11. This second appeal is allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-I)

// 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 I Additional Subordinate Judge at Nagercoil,
Camp at Padmanabhapuram.
2. The Principal District Munsif,
Padmanabhapuram.

COPY TO:

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

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+1 CC to M/s.K.SREE KUMARAN NAIR, Advocate (SR-28369[F] dated 07/09/2021)

+2 CC to M/s.V.M.BALAMOZHANTHAMI, Advocate (SR-28406,SR-28407[F] dated 07/09/2021)

+1 CC to M/s.P.THIYAGARAJAN, Advocate (SR-28481[F] dated 07/09/2021)

S.A.(MD)Nos.133 of 2014 & 362 of 2016
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_RD(03.02.2022) 6P 9C