



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 06.08.2021

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.42 of 2014

And

**M.P. (MD) .No.1 of 2014 & CMP(MD)No.8035 of 2017 in Cros.Obj (MD)
No.SR31544 of 2017**

Anngelin Mohana Edwin

... Appellant/Appellant/
Defendant

Vs.

1.Danley Edith Justin
2.Daise Titus
3.Ms.Mercy Paul

... Respondents/Respondents/
Plaintiff

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the Judgment and Decree passed in A.S.No.38 of 2007 on the file of District Judge, Kanyakumari at Nagercoil dated 22.10.2010 confirming the judgment and Decree in O.S.No.200 of 1999 on the file of the First Additional Sub Judge, Nagercoil, dated 09.03.2007.

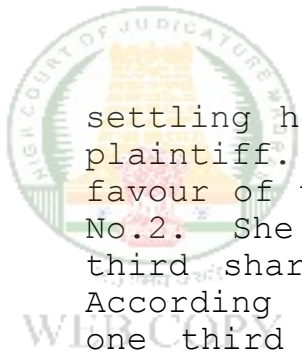
For Appellant : Mr.C.K.M.Appaji

For Respondents : Mr.V.Meenakshi Sundaram
For Mr.D.Nallathambi.

JUDGMENT

The defendant in O.S.No.200 of 1999 on the file of First Additional Sub Judge, Nagercoil is the appellant in this Second Appeal. The suit was for partition.

2.The suit schedule properties belonged to the father of the parties herein, namely, A.T.Paul. He passed away on 10.01.1986, leaving behind wife Danispaul and four daughters, the parties herein as his legal heirs. Since the parties are Christians, one third share in all the five items devolved on the widow, namely, Danispaul. She passed away on 30.06.1996. It is stated that during her life time, she executed a gift deed dated 07.05.1993



settling her 1/3rd share in the first item in favour of the first plaintiff. She also executed release deed dated 11.01.1994 in favour of the second plaintiff relinquishing her 1/3rd share in Item No.2. She also executed a Will dated 03.06.1993 bequeathing her one third share in items 3 to 5 in favour of the third plaintiff. According to the plaintiffs, while they were given their mother's one third share, the appellant herein got her blessings. The partition suit was filed on the strength of their independent share coupled with the interest derived from the mother.

3.The appellant herein filed her written statement controverting the plaint averments. Based on the divergent pleadings, the trial court framed the necessary issues. The first plaintiff examined herself as PW.1 and marked Ex.A1 to A27. The appellant examined herself as DW.1 and marked Ex.B1 to B12. After consideration of the evidence on record, the learned trial Judge concluded that the gift deed/Ex.A2 dated 07.05.1993 and the Will/Ex.A5 dated 03.06.1993 have not been proved. However, the Trial Court held that the deed of relinquishment Ex.A3 dated 11.01.1994 is genuine. Therefore, the second plaintiff was granted 1/4th share in the second item while the other plaintiffs and the appellant were given 1/6th share in the second item. In respect of the remaining four items, all the parties were held entitled to 1/4th share each. Challenging the judgment and decree passed by the Trial Court on 09.03.2007, the defendant filed A.S.No.38 of 2007 before the Principal District Court, Kanyakumari District at Nagercoil. The respondents herein also filed A.S.No.56 of 2007. Both the appeals were heard together and dismissed by the impugned judgment and decree dated 22.10.2010. The appellant herein filed SA(MD)No.42 of 2014 questioning the impugned judgment and decree passed by the first appellate court. The respondents failed to file any independent Second Appeal. Instead they filed Cross Appeal in the year 2017. They also filed CMP(MD)No.8035 of 2017 for condoning the delay. The cross objection was not filed in time. There is a delay of 1705 days in filing the same. I went through the affidavit filed in support of the condone delay petition. No sufficient cause has been made out. CMP(MD)No.8035 of 2017 is dismissed.

4.The Second Appeal was admitted on the following substantial questions of law :

- *Whether the release deed executed by a coparcener on her undivided interest in the coparcener's property is enforceable?*
- *When the mortgage in respect of one of the family properties is in subsistence, non-inclusion of the said property in the partition suit amounts to partial partition?*



- *Whether the partition suit is hit by non-joinder of necessary party?*

5.The counsel 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 judgments and decrees. Per contra, the learned counsel for the respondents submitted that the impugned judgments and decrees passed by the courts below do not warrant any interference and called for dismissal of this second appeal.

6.I carefully considered the rival contentions and went through the evidence on record. I now proceed to pass this oral order in the presence of the counsel on either side in the open court.

7.The Courts below have concurrently rendered a finding that Ex.A3 dated 11.01.1994 was validly executed. This is a pure finding of fact. The appellant has not been able to show that this finding is perverse. Nothing has been brought out in this second appeal to dislodge the said finding. It is relevant to note that though the plaintiffs projected as many as three documents as having emanated from their mother, the trial court upheld only the release deed and rejected the other two. There has been application of mind on the part of the trial court. The first appellate court has also endorsed the said finding. Exercising jurisdiction under Section 100 of CPC, I decline to the upset the said finding.

8.The primary contention of the learned counsel appearing for the appellant is that Danispaul, the mother of the parties herein could have only relinquished her 1/3rd right and interest in the suit items only in favour of all the daughters and she could not have been selective in the choice of the beneficiary. In other words, she could not have released his share in favour of one particular daughter. This contention would have been correct if the parties were coparceners. The concept of coparcenary will have no application in the case of Christians. When the parties are Christians, such a plea cannot be advanced. Ex.A3 was not executed by a coparcener. The substantial question of law had been framed on an erroneous assumption. I, therefore, answer the first substantial question of law against the appellant.

9.The learned counsel would strongly contend that the suit is bad for partial partition. It is true that one of the family properties was not included in the suit schedule. But, as rightly pointed out by the learned counsel for the respondents, the property had been mortgaged in favour of the husband of the first plaintiff on 16.03.1970. To redeem the same, the defendant filed O.S.No.216 of 1999. The suit was dismissed for default. The right of redemption also got extinguished in the year 2005. Thereafter, the husband of the first plaintiff became the owner of the said property. The suit property itself is not available for partition. Hence, the suit cannot be said to be bad for partial partition. The 2nd and 3rd



substantial questions of law are answered against the appellant. The impugned judgments and decrees passed by the courts below are confirmed. Accordingly, this Second Appeal stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

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Assistant Registrar (CS-II)

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Sub Assistant Registrar(CS)

skm

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To:

1. The First Additional Subordinate Judge, Nagercoil.
2. The District Judge, Kanyakumari at Nagercoil.

Copy to:

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

+1 CC to M/s.D.NALLATHAMBI, Advocate (SR-25699[F] dated
09/08/2021)

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RK(28/03/2022) 4P 6C