



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 18.04.2022

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.537 of 2010

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Chinnasamy Naicker (Died) ... 1st Respondent / 1st Plaintiff

1. Manimegalai ... 1st Appellant / 2nd Respondent /
3rd Plaintiff

2. Venkittammal ... 2nd Appellant / 3rd Respondent /
2nd Plaintiff

3. Pushpam ... 3rd Appellant / 4th Respondent /
4th Plaintiff

4. Ganesan ... 4th Appellant / 5th Respondent /
5th Plaintiff

Vs.

Kuppusamy Naicker (Died) ... 1st Appellant / 1st Defendant

1. Subbammal ... 1st Respondent / 2nd Appellant

2. Venkidusamy ... 2nd Respondent / 3rd Appellant

3. Neelakannan (Died) ... 3rd Respondent / 4th Appellant

4. Krishnasamy ... 4th Respondent / 5th Appellant

5. Marammal ... 5th Respondent / 6th Appellant

Lakshmi Ammal (Exonerated)

... 6th Respondent / 2nd Defendant

6. Nagaraj ... 6th Respondent / 7th Respondent /
3rd Defendant

Dhanam Ammal (Died) ... 8th Respondent / 4th Defendant

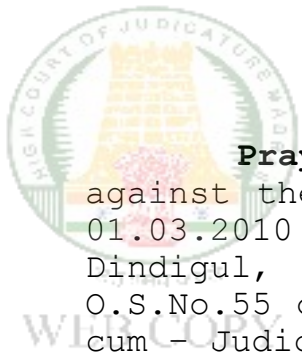
7. Siron Mani

8. Dhivya

9. Keerthika

(R-7 to R-9 were brought on record as LRS
of the deceased 3rd respondent vide Order
dated 14.02.2022 in C.M.P.(MD)No.1161 of
2022)

... Respondents 7 to 9 /
Respondents 7 to 9



Prayer: Second appeal filed under Section 100 of C.P.C., against the Judgment and Decree passed in A.S.No.632 of 2004 dated 01.03.2010 passed the learned Additional Subordinate Judge, Dindigul, by setting aside the Judgment and Decree passed in O.S.No.55 of 1995 dated 14.10.2004 by the learned District Munsif - cum - Judicial Magistrate, Veda sandur.

For Appellant : M/s.N.Tamilmani

For R-1 to R-5 &
R-7 to R9 : Mr.H.Lakshmi Shankar,
for Mr.S.Harihara Ramachandran.

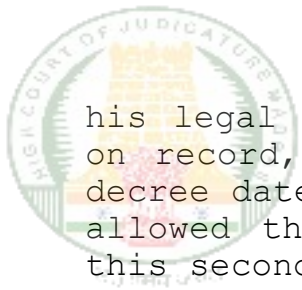
For R-6 : No appearance.

* * *

J U D G M E N T

The plaintiffs in O.S.No.55 of 1995 on the file of the District Munsif - cum - Judicial Magistrate, Veda sandur, are the appellants in this second appeal.

2. The suit was for partition by metes and bounds of ' A ' schedule property out of the ' B ' schedule property and for putting the plaintiffs in separate possession of the same. The case of the plaintiffs is that the first defendant Kuppusamy Naicker and the first plaintiff Chinna samy Naicker who are brothers were born to Late.Neelama Naicker through his first wife Chellammal. Neelamma Naicker during his lifetime settled a number of properties in favour of the first plaintiff and the first defendant under settlement deed dated 18.03.1955 (Ex.A.1). The specific case of the plaintiffs is that 32 cents in old survey No.512 and an extent of 1 acre and 11 cents in survey No.514/2 were retained by the first plaintiff and the first defendant, while the rest of the properties were alienated either individually or jointly. Since the first defendant did not come forward for an amicable partition of the retained items, the suit came to be laid. The contesting defendant filed written statement controverting the plaint averments. Based on the divergent pleadings, the trial Court framed necessary issues. During the pendency of the suit, Chinna samy Naicker passed away and his legal heirs had come on record. The fifth plaintiff examined himself as P.W.1 and two other witnesses were examined. Ex.A.1 to Ex.A.13 were marked. The first defendant examined himself as D.W.1 and two other witnesses were examined. Ex.B.1 to Ex.B.15 were marked. After considering the evidence on either side, the trial Court by judgment and decree dated 14.10.2004 granted preliminary decree as prayed for. Aggrieved by the same, the contesting defendant filed A.S.No.632 of 2004 before the Additional Sub Court, Dindigul. During the pendency of the first appeal, Kuppusamy Naicker passed away and



his legal heirs had come on record. After considering the evidence on record, the first appellate Court by the impugned judgment and decree dated 01.03.2010 reversed the decision of the trial Court and allowed the appeal and dismissed the suit. Challenging the same, this second appeal came to be filed.

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3. The second appeal was admitted on 29.06.2010 on the following substantial questions of law:-

" 1. Whether the first appellate Court is correct by allowing the appeal accepting oral evidence without pleadings which is not admissible in law?

2. When Ex.A.2 clearly stated about the properties are common or in common enjoyment whether the first appellate Court is right by rejecting the above exhibits and allowed the appeal?

3. Whether the first appellate Court is right by holding that when a plaintiff filed suit for partition entire properties belonged to the ancestor should be unpartitioned? "

4. The learned counsel appearing for the appellants 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 appellants and set aside the impugned judgment and decree and restore the decision of the trial Court.

5. Per contra, the learned counsel appearing for the contesting respondents submitted that the impugned judgment and decree do no call for any interference.

6. I carefully considered the rival contentions and went through the evidence on record.

7. There is no dispute that the first plaintiff Chinnasamy Naicker and the first defendant Kuppusamy Naicker are siblings born to one Neelama Naicker through his first wife. It is also true that Neelama Naicker executed a settlement deed dated 18.03.1955 (Ex.A.1) settling number of items in favour of the first plaintiff and the first defendant.

8. The learned counsel appearing for the contesting respondents fairly stated that item No.6 of ' A ' schedule is a common pathway and that it cannot be partitioned. This submission made by the learned counsel is placed on record. Therefore, the contest revolves only around item Nos.1 to 5. Item Nos.1 and 2 are traceable to the settlement deed dated 18.03.1955. The learned counsel appearing for the appellants took me through the deposition of Kuppusamy Naicker and tried to impress upon me that item Nos.1 and 2 of ' A ' schedule property will have to be given to the appellants. Though this submission of the learned counsel appearing for the appellants is on the face of it attractive, on a deeper



scrutiny, it does not have any merit. This is because the first plaintiff executed a settlement deed dated 03.09.1963 in favour of his wife Dhanam Ammal. The said settlement deed was marked as Ex.B.3 by the first defendant.

9. I went through the description of the property in the schedule. The first plaintiff while describing item No.2 in the schedule of the settlement deed, one of the four boundaries is as under:-

" To the west and north of common pathway, to the east of Lakshmi Ammal's land and to the south of my land and Kuppusamy's land. "

The land measuring 12 cents was settled in favour of his wife by the first plaintiff under Ex.A.3. This description clearly indicates that the lands that were jointly owned and enjoyed by the first plaintiff and the first defendant had already been partitioned. The first appellate Court had catalogued such alienations made by the respective parties. This clearly belies the claim of the first plaintiff that two items out of the suit items settled in his favour under Ex.A.1 was retained in common. Item Nos.3, 4 and 5 in ' A ' schedule are referable to ' B ' schedule. It is beyond dispute that item Nos.3, 4 and 5 in ' B ' schedule property were not purchased in common by the parties. The first plaintiff made individual purchases. The first defendant also made individual purchases. Of course they had purchased different portions out of the same survey number. The names of both the parties are found in the revenue records. That will not mean that they are enjoying the properties in common. What had been separately purchased will be enjoyed separately by the respective parties. That is why, the first appellate Court rightly allowed the appeal. The suit for partition was clearly not maintainable. The substantial questions of law are answered against the appellants.

10. This second appeal is dismissed. No costs.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2022

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 Additional Subordinate Judge,
Dindigul.
2. The District Munsif -cum-Judicial Magistrate,
Vedasandur.
3. The Record Keeper, V.R.Section,
Madurai Bench of Madras High Court,
Madurai. (2 COPIES)

+1 CC to M/s.N. TAMILMANI, Advocate (SR-19300[F] dated 19/04/2022)

+1 CC to M/s.H. LAKSHMI SHANKAR, Advocate (SR-19254[F] dated
19/04/2022)

S.A.(MD)No.537 of 2010
18.04.2022

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