



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 17.03.2022

CORAM:

THE HONOURABLE MR. JUSTICE G.R.SWAMINATHAN

S.A. (MD) No.8 of 2010

and

M.P. (MD) No.1 of 2010

Muthaiah ... Appellant / 1st Respondent / Plaintiff /
Petitioner

-Vs-

1.Sankaranarayanan Chettiar ... 1st Respondent / Appellant /
1st Defendant / 1st Respondent

2.S.Palaniappan

3.Meiyappan

4.S.Valliammai

5.Lakshmi

6.RM.Visalakshi Achi (died)

7.Sabarathinam Chettiar

8.Lakshmanan

9.Palaniyappan(died) ... Respondents 2 to 9 / Respondents 2 to 9/
Defendants 2 to 9 / Respondents 2 to 9

10.RM.Palaniappan

11.Minor Visalakshi

12.Minor.Ramanathan ... Respondents
(Respondents 11 & 12 are rep.
through their natural guardian
mother Meenakshi @ Deivanai w/o.
Palaniappan)

(Respondents 10 to 12 are *suo motu*
impleaded as Lrs of the deceased 6th
respondent vide order dated
14.02.2022)

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree passed in A.S.No.28 of 2007, dated 09.04.2009 on the file of the District Court, Sivagangai set

<https://hcservices.ecourts.gov.in/hcservices/>



aside the judgment and decree passed in I.A.No.351 of 2002 in O.S.No.124 of 1994, dated 18.04.2005 on the file of the Sub Court, Devakkottai.

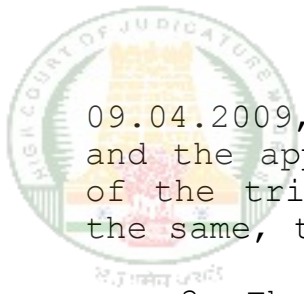
For Appellant : Mr.R.Sundar Srinivasan
For R1 : Mr.S.Madhavan
for Mr.T.Srinivasa Raghavan
For R2 : Mr.V.A.Shanmugaraj
For R7, R11 & R12 : Mr.V.R.Shanmuganathan
For R3 & R5 : no appearance

WEB COPY

JUDGMENT

This second appeal arises out of the final decree proceedings in a partition suit.

2. The suit was filed by the appellant herein namely Muthiah against his father, siblings and others. There were totally nine defendants. The first defendant is the father, while the defendants 2 to 5 are the siblings. The 6th defendant Visalakshi Achi is the wife of the first defendant's brother. The 7th defendant Sabarathinam Chettiar is the son of the 6th defendant. The defendants 8 & 9 Lakshmanan and Palaniyappan are the purchasers of portions of the suit schedule. The first defendant / father filed written statement controverting the plaint averments. Based on the divergent pleadings, issues were framed. The plaintiff examined himself as P.W.1 and marked Ex.A1 to Ex.A8. The first defendant examined himself as D.W.1. Two other witnesses were examined on the side of the defendants. Ex.B1 alone was marked. After consideration of the evidence on record, the trial court passed preliminary decree on 21.09.1999. As per the preliminary decree, in the suit schedule first item, the plaintiff and the second defendant were allotted 1/18th share. As regards the suit items 2 & 3, the plaintiff and D1 to D5 were allotted 1/6th share each. Regarding the marriage expenses to be incurred for the 5th defendant, the matter was to be decided in the final decree. Aggrieved by the same, the plaintiff filed A.S.No.28 of 2000 before the Additional District Court, Sivagangai. By judgment and decree dated 18.04.2002, the preliminary decree passed by the trial court was confirmed and the appeal was dismissed. The plaintiff filed I.A.No.351 of 2004 for passing final decree. An Advocate Commissioner was appointed. The plaintiff examined himself as P.W.1. The first defendant Sankaranarayanan Chettiar filed the proof affidavit. On the side of the respondents, in the final decree proceedings, Ex.B1 to Ex.B8 were marked. An Advocate Commissioner was appointed and his report and plans were marked as Court exhibits 1 to 7. After considering the evidence on record, the trial court passed final decree on 18.04.2005. Questioning the same, the first defendant / father of the plaintiff alone filed A.S.No.28 of 2007 before the District Court, Sivagangai. By the impugned judgment and decree dated



09.04.2009, the final decree passed by the trial court was set aside and the appeal was allowed and the matter was remanded to the file of the trial court for passing a fresh final decree. Challenging the same, this second appeal came to be filed.

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

"(1) Whether the learned District Judge, Sivagangai is legally right in allowing the appeal by setting aside the well considered judgment and decree of the learned Subordinate Judge, Devakkottai when the learned Subordinate Judge has assigned valid and cogent reasons for passing the final decree on the basis of the report of the Advocate Commissioner and disallowing the claim for marriage expenses.

(2) When the commissioner has effected division on the basis of the consensus between the parties regarding mode of division and based on the representation given by the parties and there was no objections to the report of the commissioner regarding division, whether the final decree for partition by the court based on the report of the advocate commissioner could be set aside by the lower appellate court by saying that the commissioner has not valued each and every item?

(3) Whether the direction to make provision for marriage expenses when it was claiming by way of reimbursement of payment of alleged dowry and other expenses without permission of the court before allegedly expending the said amounts?"

4. The learned counsel appearing for the appellant pointed out the first appellate court needlessly adopted a narrow and technical approach. It is true that the advocate commissioner did not undertake the exercise of valuation. Though as rightly pointed out by the first appellate court, the statutory mandate set out in Order 26 Rule 14 of C.P.C might not have been adhered to, the fact remains that the report of the Advocate Commissioner was not objected to at all. When the parties concerned did not contest the correctness of the Advocate Commissioner's report, it was absolutely unnecessary on the part of the first appellate court to have gone into the issue at all. In fact, except the first defendant, the other defendants did not file any appeal. The first defendant was aggrieved only by disallowing of his claim for reimbursement of the marriage expenses of the daughter. The first defendant was in possession of the joint family funds all along. According to him, the marriage expenses came to Rs.8,24,646.75/-. In my view, as a father, he had not only a moral but also a legal obligation to perform the marriage of his daughter. In fact, he should not expect the sons to share the expenses.

5. In any event, since there are five sharers apart from the first defendant and each of them has been allotted a share in the property, in the interest of justice, it is directed that the



plaintiff and D2 to D5 shall each pay a sum of Rs.1,00,000/- to the first defendant. This amount shall be paid within a period of six weeks from the date of receipt of a copy of the decree. On such default, it would carry interest at 12% thereafter.

6. There is yet another reason for me to interfere with the impugned judgment and decree passed by the first appellate court. It is seen that based on the allotment made in the final decree, the first defendant himself had sold away his portions and the purchasers have put up super structures thereon. The sale deeds have been executed jointly by the first defendant and D3 to D5. In view of the said subsequent development, it is not possible to re-work the allotment also. Post remand, it is virtually impossible to divide the property by metes and bounds or go for a fresh allotment. It is the first defendant who had contributed to this. The substantial questions of law are answered in favour of the appellant. The judgment and decree passed by the first appellate court is set aside in view of the following reasons:-

(a) not objecting to the Advocate Commissioner's report by the parties concerned before the trial court.

(b) the claim of the father being confined only to the question of reimbursement of the marriage expenses.

(c) joint sale by D1, D3 to D5 of the portions allotted to them.

7. There is one more aspect to be gone into. It is true that D6 & D7 are having interest only in suit item No.1. They have no claim as regards the items 2 & 3. Suit item No.1 was parcelled into three portions namely Plot No.1, Plot No.2 & Plot No.3. Plot No.1 was allotted jointly to the plaintiff & D1 to D5. Plot No.2 was allotted to D6. Plot No.3 was allotted to D7. Plot No.2 is situated to the west of Plot No.1. Plot No.3 is situated to the west of Plot No.2. A common lane measuring 5 feet wide has been ear-marked to run from east to west. In my view, beyond Plot No.1, the lane can be common only between the legal heirs of D6 & D7. The plaintiff and D1 to D5 cannot have any right or interest over the portion of the common lane beyond the western portion of Plot No.1. Even though D6 & D7 did not file any appeal questioning the final decree, in the interest of justice, the aforesaid modification has been made. A fresh sketch setting out the common portion is annexed to the decree.

8. The second appeal is allowed. No cost. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS II)

/TRUE COPY/

/ /2022

Sub Assistant Registrar(CS)



rmi

To

- 1.The District Judge, Sivagangai.
- 2.The Subordinate Judge, Devakkottai.

Copy To

The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

+2 CC to M/s.R.SUNDAR SRINIVASAN, Advocate (SR-12848[F] dated 18/03/2022)

+1 CC to M/s.VR.SHANMUGANATHAN, Advocate (SR-13232[F] dated 21/03/2022)

Judgment made in
S.A. (MD)No.8 of 2010
17.03.2022

MK/19.04.2022/5P/8C