



C.M.A(MD)No.599 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 18.10.2022

PRONOUNCED ON:23 .12.2022

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.M.A(MD)No.599 of 2022

and

C.M.P.(MD)No.5110 of 2022

1.Dharmar

2.Annal Jothimani

: Appellants / Respondents 2 & 4/
Defendants 2 & 4

Vs.

1.Rathinavathy @ Nishabanu

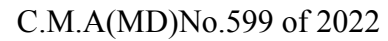
: 1st Respondent/Appellant/
Plaintiff

Ramalingam(died)

2.Aruppukottai Municipality,
Through its Commissioner,
Arupukkottai Town,
Virudhunagar District.

: 2nd Respondent/5th Respondent/
5th Defendant

PRAYER:- Civil Miscellaneous Appeal filed under Section 43 Rule 1(u) of the Civil Procedure Code, against the Judgment and Decree, dated 02.12.2021, passed in A.S.No.42 of 2020, on the file of the Subordinate



For Appellants : Mr.R.Ramadurai

For Respondents :Mr.N.Dilip K Umar
for R2

: No Appearance
for R.1

JUDGMENT

The Civil Miscellaneous Appeal is directed against the Judgment and Decree passed in A.S.No.42 of 2020, dated 02.12.2021, on the file of the Subordinate Court, Aruppukkottai.

2. The gist of the plaint is as follows:

(a) Originally the suit property belonged to the plaintiff's grandfather Muthiah Kudumban. After the death of Muthiah Kudumban, the plaintiff's father – first defendant herein and his brothers Lakshmanan and Dhanushkodi had partitioned the property orally and in that oral partition, the suit property was allotted to the share of the first defendant. The first defendant had married the plaintiff's mother Packiam and their



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three male children had died in their young age. The plaintiff is the only remaining legal heir of the first defendant. The first defendant had left the plaintiff and her mother and was residing with one Parvathi, who is the wife of one Maruthu and her son Thayamuthu. As per the Hindu Succession Amendment Act, the plaintiff is entitled to get $\frac{1}{2}$ share in the suit property. The plaintiff's husband is a Muslim and they had married on 25.03.1999. The second defendant is the friend of the first defendant. The plaintiff has sent a legal notice to the defendants. The defendants having received the same, have not sent any reply. The plaintiff has sent a legal notice dated 11.05.2004, demanding partition and allotment of her share. Since the defendants have been attempting to create fraudulent documents in respect of the suit property, the plaintiff was constrained to file the above suit for partition.

(b) Pending suit, the first defendant had died on 24.05.2004. The plaintiff and her mother – third defendant are the only legal heirs and as such, the plaintiff and her mother-third defendant are entitled to get equal shares in the share of the first defendant.



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3. The defence taken by the defendants 2 and 4 is as follows:

The plaintiff has suppressed her religion in her long cause tile of the plaint. The plaintiff had married one Kumaraiyan and after the death of said Kumaraiyan, the plaintiff had married another Kumaraiyan , who belonged to Christian religion. After the death of the said Kumaraiyan, the plaintiff converted to Muslim religion and married one Haniffa and is now residing with him. Due to misunderstanding, the first defendant had divorced his first wife Packiam (the third defendant), a per the community custom and practice and on that basis, divorce document was executed on 09.06.1974. After the said divorce, the first defendant had married Parvathi and through her, he had a son Thayamuthu. The first defendant had executed a registered Will in favour of his second wife Parvathi in respect of the suit property. But after the birth of his son Thayamuthu, he executed a registered settlement dated 30.04.1990 in favour of his son Thayamuthu in respect of the suit property and subsequently, executed another settlement deed dated 19.03.1991 in favour of the said Thayamuthu in respect of the vacant site situated on the south of their house. The said Parvathi and his son Thayamuthu have executed a General Power of Attorney deed dated 22.09.2003 in favour



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of the second defendant and on the basis of the said Power of Attorney, the second defendant had executed a sale deed dated 08.10.2004 in favour of his wife Jothimani. Since the plaintiff had converted to Islam, the plaintiff is not entitled to claim any share in the property belonging to a Hindu family. Since the plaintiff got married in the year 1982 itself and the first defendant had settled the suit property in favour of his son Thayamuthu, the plaintiff is not entitled to claim partition. The suit is bad for non-joinder of the wife of the second defendant, who purchased the property.

4. The fifth defendant has filed a written statement stating that the fifth defendant had no connection whatever with the suit property and the claim of the plaintiff.

5. On the basis of the pleadings, the trial Court has framed the following issues:

1. Whether the plaintiff is entitled for $\frac{3}{4}$ share in suit property?
2. Whether the plaintiff is entitled for preliminary decree for partition as prayed for in the plaint?
3. Whether the suit is bad for non-joinder of necessary parties?



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4. Whether the suit is bad for want of cause of action?

5. Whether the suit is bad for mis-joinder of parties?

6. Whether the Hindu Succession Act does not apply to the Plaintiff?

7. Whether the suit is properly valued and appropriate court fee has been paid?

8. To what other relief, the plaintiff is entitled ?

6. During trial, the plaintiff has examined herself as P.W.1 and exhibited ten documents as Exs.P.1 to P.10. On the side of the defendants, the second defendant was examined as D.W.1 and One Marimuthu as D.W.2 and exhibited ten documents as Exs.B.1 to B.10. One witness document has been marked as Ex.X.1. The trial Judge, upon considering the evidence both oral and documentary and on hearing the arguments of both sides, has passed the judgment dated 10.09.2019 dismissing the suit. Aggrieved by the dismissal of the suit, the plaintiff has filed an appeal in A.S.No.42 of 2000. The learned Appellate Judge, upon considering the evidence on record and on hearing the arguments of both sides, has passed the impugned judgment dated 02.12.2021, allowing the appeal and setting aside the judgment and decree of the trial Court in O.S.No.



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403 of 2004, dated 10.09.2019 and remanded the suit back to the trial Court with certain directions. Aggrieved by the order of remand, the defendants 2 and 4 have come forward with the present Civil Miscellaneous Appeal.

7. The appeal grounds are as follows:

The plaintiff has failed to prove her title against the defendants. The first appellate Court has failed to note that the plaintiff had already converted to other religion and as such, she cannot claim right of succession under the Hindu Succession Act. The alleged legal heirs of the first defendant have already conveyed their absolute property to the fourth defendant through their power of attorney and as such, they have no manner of right or interest in the suit property. The trial Court has erroneously held that the legal heirs of the first defendant Parvathi Ammal and her son are necessary parties and they have to be impleaded and the remand on the above ground is erroneous in law. In view of Exs.B.3 and B.4 settlement deeds and subsequent sale deed under Ex.B. 2, the fourth defendant alone is the absolute owner of the suit property. The appellate Court has failed to see that the plaintiff has not produced



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any evidence to show that she is in possession of the suit property.

Hence, the Civil Miscellaneous Appeal is liable to be allowed.

8. The point that arises for consideration is as to whether the judgment and decree of the first appellate Court remanding the suit is proper and is in accordance with law?

9. Admittedly, the plaintiff is the daughter of the first defendant and the third defendant. The suit property was originally owned by the first defendant's father Muthiah Kudumban and after his death, his three sons viz., the first defendant, Lakshmanan and Dhanushkodi had partitioned the property orally and in that partition, the suit property was allotted to the share of the first defendant.

10. As already pointed out, pending suit, the first defendant had died and subsequently, the third defendant had also died and both of them have not filed any written statement. It is the case of the defendants that the first defendant, after divorcing the third defendant, as per the custom and practice of their community and by executing a divorce deed on 09.06.1974, married one Parvathi and he had a son by name Thayamuthu



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through his second wife Parvathi. But the plaintiff has specifically disputed the customary divorce between the first defendant and the third defendant and the second marriage alleged to have been entered into between the first defendant and the said Parvathi.

11. It is the further case of the defendants that the first defendant had executed a registered Will dated 03.12.1985 under Ex.B.5 in favour of his wife Parvathi in respect of the suit property and that after the birth of their son Thayamuthu, the first defendant had executed a settlement deed dated 30.04.1990 in respect of the suit property under Ex.B.4 and another settlement deed dated 19.03.1991 under Ex.B.3 in respect of the vacant site situated on the south of their property in favour of his son Thayamuthu.

12. The appellate Court, by considering the evidence on record has come to a decision that three more questions have to be decided and the said passages are extracted hereunder:

“19. From the above discussion in the light of written statement of 2nd Defendant, P.W.1's evidence, Ex.B.3



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settlement deed, Ex.B.4 settlement deed, Ex.B.5 Will and Ex.B.10 written document about divorce, it is clear that this Court has to decide three more questions as below with regard to non-joinder of necessary party issue:

- 1. Whether divorce between 1st Defendant and 3rd Defendant is valid one, on the category of customary divorce as detailed by 2nd Defendant?*
- 2. Whether Parvathi and her son Thayamuthu are legal heirs of the 1st Defendant Ramalingam as wife and son through his 2nd marriage?*
- 3. Whether Parvathi and Thayamuthu are entitled any share in suit property along with Plaintiff or not?*

20. It is settled law that in partition suit, non-joinder of necessary parties is one among the main issues. Eventhough, trial Court had framed and decided on non-joinder of necessary parties issue through issue No.3, trial Court has not discussed and decided about the customary divorce stand taken by 2nd Defendant in para 5 of his written statement.

21. Hence, this Court comes to conclusion that the above said questions should be decided before deciding the remaining issues. But, before this Appellate Court, neither Parvathi nor Thayamuthu are parties. To decide whether customary divorce between 1st and 3rd Defendant is valid or not and 2nd marriage between 1st Defendant and Parvathi is



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valid or not and Parvathi, Thayamuthu are legally entitled any share or not, the presence of Parvathi and Thayamuthu, deciding the above said three questions will not be fair. Hence, this Appellate court comes to conclusion that Parvathi and Thayamuthu should be impleaded in the suit and opportunity should be given for them to file written statement and putforth their evidence with regard to above said three questions.”

13. Thereafter, the first Appellate Court by invoking Order 41 Rule 23(A) C.P.C., set aside the Judgment and Decree of the trial Court and remanded the matter back to the file of the Principal District Munsif Court, Aruppukottai with a direction to direct the plaintiff to implead Parvathi and Thayamuthu as defendants and provide them opportunity to file their written statement and also to lead evidence on their side and also to permit both parties to adduce oral evidence with regard to their stand and that the trial Court was further directed to dispose of the case as early as possible.

14. But the trial Court as well as the first Appellate Court have failed to consider another important aspect that the suit property is the



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ancestral property of the first defendant. In Ex.B.5 Will, the first defendant has specifically observed that the suit property is the ancestral property. The plaintiff in the plaint has specifically alleged that to the defendants 1 and 3, three sons were born and all of them had died in their younger age. No doubt, the defendants have disputed the above aspect in the written statement. When P.W.1 was in witness box, she was cross-examined with respect to the above aspect and she would say that she had three brothers and that all of them had died without marriage in their younger age and that she was having documents to show that all the three sons of the first defendant had died.

15. It is pertinent to note that no suggestion was made disputing the version of the plaintiff that she had three brothers and all of them had died unmarried. If this factum is true, then there would be more changes in the shares to be owned by the parties. In case, if one son is born and died, then the first defendant would have got $\frac{1}{2}$ share and the remaining $\frac{1}{2}$ share would have gone to mother, being the only Class-I heir. If the version of the plaintiff that she had three brothers and all of them had died unmarried is true, then the first defendant would have only minimal share and the third defendant being the mother and Class-I heir, she



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would be entitled to maximum share. Hence, the trial Court has to decide the above issue also in addition to the points raised by the first Appellate Court. With the above directions, the Civil Miscellaneous Appeal is liable to be dismissed and the above point is answered accordingly.

16. In the result, the Civil Miscellaneous Appeal is dismissed and the Judgment and Decree, dated 02.12.2021, passed in A.S.No.42 of 2020, by the first Appellate Court remanding the matter back to the trial Court is confirmed. The trial Court is directed to follow the directions given by the first Appellate court and to complete the trial as expeditiously as possible preferably within a period of three months from the date of receipt of a copy of this order. Consequently, the connected Miscellaneous Petition is also dismissed. The parties are directed to bear their own costs.

23.12.2022

Index : Yes : No
Internet : Yes : No

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To

1. The Subordinate Court, Aruppukottai.
2. The Principal District Munsif Court, Aruppukottai.
3. The Commissioner,
Aruppukottai Municipality,
Arupukkottai Town,
Virudhunagar District.



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K.MURALI SHANKAR,J.

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PRE-DELIVERY JUDGMENT MADE IN

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