



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

**RESERVED ON : 18.02.2022
DELIVERED ON : 24.02.2022**

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

**S.A(MD)No.209 of 2019
and
C.M.P(MD)No.4315 of 2019**

Muniyammal ... Appellant/
6th Respondent/6th Defendant

Vs.

1.Muthaiya (Died) ... 1st Respondent/
Appellant/1st Defendant
2.Irullappan ... 2nd Respondent/
1st Respondent/Plaintiff
3.Ganesan @ Thonthiyappan
4.Palani @ Palanisamy
5.Kotaram Muthu
6.Rajammal ... Respondents 3 to 6/
Respondents 2 to 5/
Defendants 2 to 5

(R1 died memo dated 8/11/2021 filed on 11/11/2021 in
USR No. 24978 is recorded)

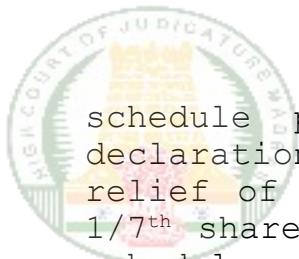
PRAYER : Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree made in A.S.No.25 of 2013, dated, 25.02.2019 on the file of the Additional Sub Court, Srivilliputhur, reversing the judgment and decree made in O.S.No.292 of 2005, dated, 02.11.2010 on the file of the Additional District Munsif, Srivilliputhur.

For Appellant : Mr.M.Thirunavukkarasu
For Respondents : Mr.S.Ramasamy
for R3,R4 and R6

JUDGMENT

The 6th defendant is the appellant.

2. The plaintiff filed a suit for declaration that the 1st schedule property belongs to the plaintiff and for recovery of possession. In the alternative, the plaintiff prayed for partition of the 2nd schedule properties and grant him 1/7th share in the suit



schedule properties. The trial Court rejected the prayer for declaration and recovery of possession. But granted the alternative relief of partition of 1/6th share in 3rd item of the 1st schedule, 1/7th share in item 1 and 2 of 1st schedule and items 1 to 3 of 2nd schedule property. The trial Court dismissed the suit with regard to items 4 to 8 in the 2nd schedule property. As against the same, the 1st defendant filed A.S.No.25 of 2013 before Additional Subcourt, Srivilliputhur. The learned Subordinate Judge allowed the appeal and set aside the judgment and decree of the trial Court. The First Appellate Court restricted the decree for partition with regard to 3rd item of 2nd schedule property alone granting 1/7th share. With regard to the other reliefs, the suit was dismissed by the First Appellate Court. As against the same, the 6th defendant has filed the present second appeal.

3. The plaintiff has contended that one Karuppayi, is the 1st wife of the 1st defendant and the 5th defendant is the 2nd wife of the 1st defendant. According to the plaintiff, the plaintiff and the 6th defendant are the children through the 1st wife. The defendants 2 to 4 are the children through the 2nd wife, namely, the 5th defendant. The plaintiff had further contended that the 1st schedule property is part of the 2nd schedule property. The 1st defendant, namely, his father had married one Karuppi Ammal(1st wife), 40 years back. While the plaintiff was 4 years old, the plaintiff's mother Karuppi Ammal had passed away and 2 years thereafter, the 1st defendant had married the 5th defendant.

4. According to the plaintiff, all the siblings are living as a joint family and based upon the joint family income, the properties have been purchased in the name of the 1st defendant. The plaintiff further contended that the 1st item in the 2nd schedule property was also purchased in the name of the 1st defendant, using the joint family income. Though the 7th item in the 2nd schedule property stands in the name of the 5th defendant, the same is also treated as a joint family property. The plaintiff further contended that the other items in the 2nd schedule property have been purchased though in the name of the defendants 2 to 4, all the properties have to be treated only as a joint family property. The plaintiff further contended that there was an oral partition 10 years back, under which, the plaintiff and the defendants have been enjoying the suit schedule property separately and the said family arrangement has also come into force. Based upon the said family arrangements, revenue records have also been mutated in their respective names. The plaintiff insisted the defendants to execute a registered document in accordance with the oral partition in order to carry out mutations in the revenue records and assessment of property tax. The defendants did not comply with the said request. Hence, the present suit for declaration of title and recovery of possession. In case, if the Court come to a conclusion that still the properties remain undivided, an alternative prayer was sought for partition of the



5. The defendants 1 to 5 filed a written statement, admitting the relationship between the parties. The defendants further contended that the suit 1st and 2nd schedule properties have been treated and enjoyed by the 1st defendant only as his self-acquired property. Except the 3rd item in the 1st schedule property, all other properties are the self-acquired properties of the 1st defendant. The defendants further contended the 1st item properties mentioned in the 1st schedule are the self-acquired properties of the 1st defendant under 3 sale deeds. When these properties were purchased by the 1st defendant, the plaintiff and other defendants were minor children. The plaintiff has not pleaded that the joint family properties had sufficient surplus to purchase the properties standing in the name of the 1st defendant.

6. The 6th defendant filed a written statement admitting the Genealogy projected by the plaintiff. The 6th defendant supported the case of the plaintiff by contending that the plaintiff is entitled to 1/7th share in the 2nd schedule properties.

7. The trial Court after careful consideration of oral and documentary evidence, came to a conclusion that there was no oral partition between the plaintiff and the defendants and hence, the plaintiff is not entitled to a decree for declaration of title and recovery of possession. The trial Court also arrived at a finding that the suit schedule properties continued to be a joint family properties and granted a decree for partition. The trial Court granted 1/6th share in the 3rd item of the 1st schedule and 1/7th share in items 1 and 2 of the 1st schedule and items 1,2 and 3 of 2nd schedule property. The trial Court arrived at a finding that items 4 to 8 in the 2nd schedule property are the separate properties of D.2 to D.5 and dismissed the suit with regard to those items.

8. Challenging the decree of the trial Court, the 1st defendant preferred A.S.No.25 of 2013. The learned subordinate Judge after independently re-appreciating the oral and documentary evidence on either side, arrived at a finding that items 1 and 2 in the 2nd schedule property are the self-acquired property of the 1st defendant. Since the 1st defendant is alive, the plaintiff is not entitled to claim partition in the said items during the life time of the 1st defendant. Based upon the said finding, the First Appellate Court allowed the appeal, restricting the decree for partition with regard to 3rd item of the 2nd schedule property alone granting 1/7th share in favour of the plaintiff. The suit was dismissed with regard to other items and other prayers. As against the same, the 6th defendant has filed the present second appeal. Pending second appeal the 1st defendant, who is arrayed as the 1st respondent in the appeal had passed away.

<https://hcservices.courts.gov.in/hcservices> This second appeal has been admitted in the following



substantial question of law:

(i) *When the 1st defendant had passed away, is not the plaintiff entitled to claim the share in items 1 and 2 of the 2nd schedule property also?*

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10. The learned counsel for the appellant contended that the First Appellate Court has rejected the prayer for partition with regard to items 1 and 2 of the 2nd schedule property only on the ground that they are the self-acquired properties of the 1st defendant. Now that the 1st defendant had passed away pending second appeal, there is no impediment to partition, items 1 and 2 of the 2nd schedule property. Apart from this submission, no other submission was made on the side of the learned counsel for the appellant.

11. The learned counsel for the respondents contended that once a co-sharer died during the pendency of the appeal, the shares of the other co-sharers have to be re-worked. The decree granted by the First Appellate Court has not been challenged by any one of the other co-sharers, except the 6th defendant.

12. I have carefully considered the submissions on either side.

13. The learned counsel for the appellant has restricted his submissions with regard to his claim for partition over the items 1 and 2 in the 2nd schedule property. The claim for partition with regard to the above items have been rejected by the First Appellate Court on the only ground that they are the self-acquired properties of the 1st defendant. When the 1st defendant is alive, the children of the 1st defendant are not entitled to make a claim for the share in the said properties. Only on the above said ground, the First Appellate Court has rejected the prayer for partition of items 1 and 2 of the 2nd schedule property.

14. The 1st defendant had passed away pending second appeal, admittedly, without execution of any testamentary documents. Hence, as rightly contended by the learned counsel for the appellant, the plaintiff will be entitled to 1/6th share even in items 1 and 2 of the 2nd schedule properties. The First Appellate Court has already granted a decree for 1/7th share in 3rd item of the 2nd schedule property. Since the 1st defendant had passed away, the shares has to be re-worked and the plaintiff will be entitled to 1/6th share. To summarize, the plaintiff will be entitled to 1/6th share in items 1,2 and 3 of the 2nd schedule property. With regard to the other prayers and other suit schedule properties, the judgment and decree of the First Appellate Court are confirmed.

15. In view of the above said discussion, the substantial question of law is answered as follows:

In view of the death of the 1st defendant, the

<https://hcservices.ecourts.gov.in/hcservices/> plaintiff will be entitled to 1/6th share in items 1,2



and 3 of the 2nd schedule property.

16. In view of the above said discussion, the second appeal is partly allowed to the extent as stated above. The plaintiff is entitled to a decree for partition of 1/6th share in items 1,2 and 3 of the 2nd schedule property. The Second Appeal is partly allowed. (*) **The appellant is at liberty to approach the trial court for passing of supplementary preliminary decree in his favour on payment of deficit court fee. No Costs, Consequently, connected Civil Miscellaneous petition is closed.**

Sd/-

Assistant Registrar (CS-I)

(*) Corrected as per the order of this court dated 13.04.2022 made in SA(MD).No. 209/2019

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

gbg

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 be substituted the order already despatched on 17/03/2022

To

1.The Additional Subordinate Judge,
Srivilliputhur.

2.The Additional District Munsif,
Srivilliputhur.



Copy to

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

+1 CC to M/s.S.RAMASAMY, Advocate (SR-8565[F] dated 25/02/2022)

+1 CC to M/s.M.THIRUNAVUKKARASU, Advocate (SR-8235[F] dated 24/02/2022)

S.A(MD)No.209 of 2019
24.02.2022

RK(07/03/2022) 6P 7C

KB(02/05/2022) 6P 7C