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S.A.No.714 of 2020

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

**DATED : 27.11.2023**

**CORAM**

**THE HONOURABLE MR. JUSTICE S.SOUNTHAR**

**S.A.No.714 of 2020**  
**and C.M.P.No.14742 of 2020**

Selvaraj

...Appellant

Vs.

1.Nithiyanandam  
2.Sivaraman  
3.Santhi  
Sulochana (died)  
4.Vijayan Naidu  
5.Senthil  
6.Prabakaran  
7.Radhakrishnan  
8.Balasubramanian  
9.Karthikeyan  
10.Lakshmi  
11.Ramanathan  
12.Shanmugam Prabhu  
13.Reka

...Respondents

**PRAYER :** Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 07.11.2019 passed in A.S.No.66 of 2018 on the file of the Additional District Court (FTC), Villupuram confirming the Judgment and decree dated 02.07.2018 passed in O.S.No.317 of 2013 on the file of the II Additional Subordinate Court, Villupuram.



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For Appellant : Mr.S.Mukunth  
Senior Advocate  
for Mr.K.Venkatasubban

For Respondent 2 : Mr.M.R.Thangavel  
For Respondents 3 to 12 : set *ex-parte*

### **J U D G M E N T**

The second defendant, who suffered decree for partition is the appellant before this Court. The first respondent/plaintiff filed the suit for partition seeking allotment of 1/3 share in the suit properties. The Trial Court granted a preliminary decree for partition as prayed for. The first appeal filed by the appellant is also dismissed. Challenging the concurrent findings against him, the appellant has come by way of this second appeal.

2.According to the first respondent/plaintiff, the Suit 'B' Schedule properties are ancestral properties of the family. The first respondent/plaintiff, the second respondent/first defendant and the appellant/second defendant are brothers. The third respondent is the sister of appellant, the first and second respondents. The respondents 4 to 13 are children of deceased sister of appellant, the first and second respondents. It was the case of the first respondent that after death of his father Krishnamoorthy Naidu, his daughters



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namely sisters of first and second respondents gave up their right over the suit properties. In the year 1989, the properties were tentatively divided among the brothers for convenient enjoyment without any pucca partition. Later on misunderstanding arose among the brothers and hence, the first respondent was constrained to file the suit for partition seeking allotment of 1/3 share in the suit properties.

3. The appellant herein filed the written statement and resisted the suit on the ground that on 09.05.1989, there was a pucca partition among the appellant, the first and second respondents. It was claimed by the appellant in the written statement that the first respondent/plaintiff was allotted with 25 items of 'B' Schedule properties with an extent of 11 acre 21 cents. The second respondent/first defendant was allotted with 24 items of 'B' Schedule properties with an extent of 11 acre 30 cents. The appellant/second defendant was allotted with 11 items of 'B' Schedule properties with an extent of 7 acre 18 cents. Thus, the appellant herein pleaded oral partition among three brothers even in the year 1989 itself. It was also claimed that all the brothers had been enjoying the respective properties allotted to their share on that day onwards and therefore, the suit for partition filed by the first respondent was



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not maintainable.

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4. Before the Trial Court, the first respondent was examined as P.W.1 and 6 documents were marked on his side as Ex.A1 to Ex.A6. The second respondent/first defendant was examined as D.W.1. The appellant /second defendant was examined as D.W.2. An independent witness one Venkadachalam was examined as D.W.3. On behalf of second respondent, 3 documents were marked as Ex.B1 to Ex.B3. On behalf of the appellant, 13 documents were marked as Ex.B4 to Ex.B16.

5. The Trial Court, on appreciation of oral and documentary evidence available on record, especially the deposition of appellant and D.W.3, came to the conclusion that there was no partition in the family during 1989, the properties were divided tentatively and enjoyed by the brothers for convenient enjoyment. Accordingly, the Trial Court granted the preliminary decree for partition of 1/3 share in favour of first respondent/plaintiff as prayed for. Aggrieved by the same, the appellant herein preferred an appeal in A.S.No.66 of 2018 on the file of Additional District Court (FTC), Villupuram. The First Appellate Court concurred with the findings of the Trial Court dismissed the appeal. Aggrieved by the same, the appellant is



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before this Court.

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6. The learned senior counsel appearing for the appellant submitted that the first respondent herein even in his plaint averment admitted about separate mess among the brothers and hence, the oral partition pleaded by the appellant should have been accepted by the Courts below. The learned counsel further submitted that when the partition of suit properties in the year 1989 itself was established by the appellant, there was no cause of action for the first respondent to maintain a fresh suit for partition. The learned senior counsel further submitted that the Courts below without considering the documentary evidence let in by the appellant namely the account book maintained by the first defendant, rough plan drawn by the parties to effect partition of the properties and mutation of appellant's name in Electricity Board in respect of electricity connection to pump set in suit properties etc., erroneously came to the conclusion that the appellant failed to prove the oral partition pleaded.

7. In the plaint averments, the first respondent/plaintiff clearly pleaded that after death of parents, for the sake of convenient enjoyment, the



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properties were tentatively divided among the brothers and there was no proper partition by metes and bounds. The 1st respondent also pleaded that sisters relinquished their share in favour of three brothers. The suit was mainly resisted by the appellant on the ground that there was a pucca partition by metes and bounds on 19.05.1989 among three brothers. Therefore, the plea raised by the first respondent that sisters have given up their right over the suit properties was not at all disputed by the appellant. Further, sisters and their legal representatives failed to appear before the Court and resisted the suit claim. An independent witness examined on behalf of the appellant as D.W.3 also supported the case relinquishment of share by sisters. In such circumstances, the Courts below are justified in coming to the conclusion that the sisters of the appellant, the first and second respondents gave up their right over the suit properties.

8. In the plaint averment, the first respondent clearly pleaded that there was no partition among the brothers by metes and bounds and properties were divided tentatively only for convenient enjoyment.

9. It is settled law that merely because there is a separate mess among



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the brothers, partition of cultivable land cannot be presumed. The appellant herein, who pleaded oral partition of cultivable land has to prove the same by acceptable evidence. The appellant herein was examined as D.W.2 and he marked a letter said to have been addressed to Electricity Board by brothers and sisters under Ex.B10.

10. The Trial Court, after considering the said letter Ex.B10 came to the conclusion that brothers and sisters of appellant in that letter clearly mentioned that the properties were divided for the sake of convenience. The appellant, who was examined as D.W.2 also admitted the properties which were tentatively allotted to the share of second respondent Sivaraman was mortgaged by him (appellant). If the properties were properly divided and allotted to the share of Sivaraman, it is not open to the appellant to mortgage the same. Therefore, based on the admissions of appellant as D.W.2 and documents marked by him especially Ex.B10, the Courts below rightly came to the conclusion that the appellant failed to prove that the properties were divided by metes and bounds among the brothers. Accordingly, the Trial Court as well as the First Appellate Court came to the conclusion that the first respondent was entitled to decree for partition as prayed for. The said factual



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conclusion of the Courts below is based on proper appreciation of oral and documentary evidence available on record. Therefore, I am not inclined to interfere with the judgment and decree passed by the Courts below.

11. At this juncture, the learned senior counsel appearing for the appellant submitted that the properties which are in enjoyment of the appellant has been improved by him. Therefore, he must be permitted to workout his equity in final decree proceedings. It is always open to the appellant to work out equity in the final decree proceedings in accordance with law. If any request is made by any of the parties with regard to allotment of properties based on equity, the said claim has to be considered by the Trial Court in final decree proceedings, in accordance with law, on it's own merits.

12. With these observations, the second appeal stands dismissed

a) by affirming the judgment and decree in A.S.No.66 of 2018 on the file of Additional District Court (FTC), Villupuram dated 07.11.2019, confirming the judgment and decree in O.S.No.317 of 2013 on the file of II Additional Subordinate Court, Villupuram, dated 02.07.2018.



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b) In view of the above facts and circumstances of the case, there will be no order as to costs. Consequently, connected miscellaneous petition is closed.

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Index : Yes/No  
Internet : Yes/No  
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**To**

1. The II Additional Subordinate Court, Villupuram.
2. The Additional District Court (FTC), Villupuram.



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**S.SOUNTHAR, J.**

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**S.A.No. 714 of 2020**

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