



**SA(MD)No.476 of 2017**

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

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Dated : 23.08.2023

CORAM:

**THE HONOURABLE MR.JUSTICE C.KUMARAPPAN**

S.A.(MD)No.476 of 2017

and

C.M.P.(MD)No.10048 of 2017

Arumugam

... Appellant/ Respondent / Defendant

Vs.

Murugan

... Respondent / Appellant / Plaintiff

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 07.03.2017 passed in A.S.No.6 of 2016 on the file of the Principal District Court, Tirunelveli, reversing the judgment and decree dated 30.11.2015 passed in O.S.No.219 of 2012 on the file of the Principal Sub-Court, Tirunelveli.

For Appellant : Mr.V.Meenakshisundaram

For Respondent : Mr.P.Selvan



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## **JUDGMENT**

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The appellant herein is the defendant before the Court below.  
The respondent herein is the plaintiff before the trial Court. The plaintiff and respondent are brothers.

2.For the sake of convenience, the parties will be referred to as per their rank before the trial Court.

3.The brief averments of the plaint, are as follows:

Originally the suit property belonged to one Andi Kudumban. Through his wife Lakshmiammal, he had three sons and three daughters. Whiles on 04.01.1971, the plaintiff and the defendant along with their mother Lakshmiammal entered into a partition. In which, the second schedule property of the partition deed dated 04.01.1971 was jointly allotted to the plaintiff and the defendant. The said property is shown as first schedule property in the suit. Likewise, in the very same partition deed, the other brother namely, Eswaran was allotted the first schedule of the partition deed, which is referred herein as second and third schedule in the suit. According to the plaint averments, the said Eswaran had sold



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item Nos.2 and 3 of the suit property to Esakki Thevar, who in turn sold the same to the plaintiff and the defendant on 20.12.1971. Thus according to the plaintiff, the suit property is the joint property of the plaintiff and the defendant. Hence, he filed a suit for partition to divide the suit property into two equal share and for allotment of one such share.

4.The brief facts of the written statement, are as follows:

The suit was resisted by the defendant by contending that the alleged partition deed dated 04.01.1971 is fabricated and cooked up document, and that he never signed in any of the partition deed much less one dated 04.01.1971. According to the defendant, the partition deed dated 04.01.1971 is nothing but a rank one forged document. The defendant also disputed the purchase of the property from Esakki Thevar vide sale deed dated 20.12.1971, and would submit that when the very partition deed itself is a forged one, the question of purchasing the property from other sharer qua from Eswaran does not arise. He also pleaded that, since the suit property was originally belonged to Andi Kudumban, after his demise, all his first class legal heirs are entitled to have share. However in the plaint, the plaintiff did not include the other sharers namely, the female legal heirs



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and the legal heirs of deceased Eswaran. Therefore, he would submit that apart from other ground, the suit is hit by the principle of non-joinder of necessary parties. He also further contended that, the instant suit is also hit by the principle of partial partition. Hence, he prayed for dismissal of the suit.

5.Before the trial Court, the plaintiff examined 2 witnesses as P.W.1 and P.W.2 and marked 6 documents as Ex.A1 to Ex.A6. On behalf of the defendant, 2 witnesses were examined as D.W.1 and D.W.2 and no document was marked.

6.After considering the pleadings, material on record and evidence, the trial Court has dismissed the suit with the finding that the very partition deed / Ex.A1 has not been proved in a manner known to law and it was also held that the suit is hit by the principle of non-joinder of necessary party and also barred by partial partition.

7.Aggrieved with the order of the trial Court, the plaintiff / appellant has filed an appeal in A.S.No.6 of 2016. The first Appellate Court



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reversed the judgment and decree of the trial Court, and found that when the defendant had purchased the property from Esakki Thevar, he indirectly admits Ex.A1/ partition deed, and ultimately decreed the suit.

8. Aggrieved with the said finding of the first Appellate Court, the defendant filed this Second Appeal.

9. After hearing either side, this Court has admitted the Second Appeal, on 10.11.2017, on the following substantial questions of law:

*“1) Whether the plaintiff / respondent herein fails to prove the alleged partition deed dated 04.01.1971 (Ex-A1) in the manner known to law, whether the first Appellate Court is correct in accepting the recitals in the subsequent sale deed (Ex-A2 & A3) and granting partition decree to the plaintiff?*

*2) When PW1 (plaintiff) admitted that the defendant had not signed the alleged partition deed dated 04.01.1971 (Ex-A1) and failed to produce the original deed, whether the first Appellate Court is correct in accepting the factum of partition projected by the plaintiff?*



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3) *When admittedly suit schedule properties are either self acquired properties of Late.Lakshmiammal or ancestral properties of the family, non-joinder of other legal heirs in the alleged partition deed dated 04.01.1971 cuts the root of the case put forth by plaintiff and as such whether the first Appellate Court is correct in decreeing the suit for partition as prayed for?*

4) *When PW1 admitted that the house in Door No.3/137, Easwary Amman Kovil Street, Muneerpalayam in which he is residing was belonged to Late.Lakshmiammal and the same was not included in the present suit, whether the First Appellate Court is correct in decreeing the suit for partition by overlooking the Doctrine of partial partition?"*

10.The learned counsel for the appellant / defendant would vehemently submit that the entire case revolves around the proof of Ex.A1 / partition deed. Wherein the defendant had categorically pleaded in the reply notice, as well as in the written statement that he had not signed in Ex.A1 / partition deed. He would further submit that, when the property is the absolute property of his father / Andi Kudumban, all the legal heirs needs to be impleaded, and that all the properties of Andi Kudumban needs



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to be included in the suit. However, admittedly the plaintiff did not include all the legal heirs and all the the properties. It is also contended by the learned counsel for the appellant that the defendant was minor at that time of execution of Ex.A1 / partition deed, and that in Ex.A1 / partition deed, there was some responsibility cast upon the minor and that minor cannot be party to onerous contract. Therefore, contended that, Ex.A1 / partition deed cannot be used against the defendant so as to bind him. Therefore, prayed to allow the second appeal.

11.Per contra, the learned counsel for the respondent / plaintiff would submit that, at the time of execution of Ex.A1 / partition deed, the defendant was major, and that even in the registration copy of Ex.A1 / partition deed, there is a proof that the defendant had signed the document as well as signed in the registers of the Sub Registrar Office. He would also submit that, on the date of filing of the suit, the defendant was aged about 60 years, therefore, naturally on the date of the execution of the partition deed, he must have been major. It is also the submission of the learned counsel for the respondent that the very defence putforth by the appellant herein that the defendant was minor at the time of the execution



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of Ex.A1 / partition deed was never pleaded and has not been raised as substantial of question of law. Therefore, contended that, the very order passed by the first Appellate Court is justifiable and prayed for dismissal of the second appeal.

12.I have given my anxious consideration to the either side submissions and also perused the materials available on records.

13.All the substantial questions of law revolves around the enforceability and validity of Ex.A1 / partition deed. According to the defendant, he was minor then, and never signed in Ex.A1 / partition deed. If that being the case, then the suit must fail.

14.In order to appreciate the said defence, the learned counsel for the appellant / defendant draws the attention of this Court in respect of the admission made by the plaintiff during cross examination. Wherein he has stated as follows:-

“Ex.A.1ல் உள்ள கையழுத்தை மற்றும் தற்போது  
பிரதிவாதி கையழுத்தை வல்லுனர் அனுப்பலாம் என்றால்



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வா.சா.ஆ.11 (sic) தம்பி மைனர் என்பதால் கையழுத்து  
WEB COPY செய்யவில்லை.□

Here, though the above admission denotes about Ex.A11, admittedly, there were only six documents marked in this case. Therefore, it is illogical and no possibility for referring Ex.A11 and the word Ex.A11 denotes only Ex.A1. This aspect has been fairly conceded by either side. As such, according to the above admission of the plaintiff, the defendant was not party to Ex.A1 / partition deed.

15.However, the learned counsel for the respondent would strenuously object the said stand, and would contend that the above admission is nothing but slip short admission, which cannot be given undue weight-age in isolation to the other part of the evidence. In this regard, he drew the attention of this Court in respect of certain endorsements made by the Sub-Registrar in Ex.A1 / partition deed. Wherein, the learned counsel for the respondent would submit that there is reference by the word “கீறல்” in Ex.A1, which denotes the putting up of thumb impression of the individual qua the defendant. While looking at the entry in Ex.A1, as rightly pointed out by the learned counsel for the respondent, there is reference “கீறல் - ஆறுமுகம்”. He would also draw the attention of this



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Court about the endorsements made by the Sub-Registrar at the bottom of  
Ex.A1 wherein the following endorsement is found:-

“(2) A.Murugan இடது பெருவிரல் (குறி) (3) x கீறல்  
ஆறுமுகம் ஆண்டிக் குடம்பன் மக்கள் பயிர் கருங்குளம்  
தெப்பக்குளம் தெரு மேலப்பாளையம் (5) இடது பெருவிரல்  
(குறி) (4) x லெட்குமி அம்மாள் பாரி தெரு ஷயூர் இன்னார்  
என்று நீருப்பித்தவர்□

16.On a perusal of the above endorsement, there is a reference about the existence of the thumb impression of one Arumugam qua defendant. At this juncture, the learned counsel for the appellant invited the attention of this Court in respect of the reply notice which has been marked herein as Ex.A6. Wherein, he draws the attention of this Court about the specific denial as to the affixing of signature in the said partition deed, and he would also submit that, according to the defendant, the very Ex.A1 / partition deed is fabricated one.

17.Therefore, the learned counsel for the appellant / defendant contended that, unless the original document of Ex.A1 / partition deed is produced, the question of reliance on certain endorsements made by the



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Sub-Registrar cannot be given due weight-age. At this juncture, this Court would like to again recollect the admissions made by the plaintiff. Wherein he had categorically admitted that the defendant had not signed in Ex.A1 / partition deed.

18. When the plaintiff himself had admitted that the defendant had not signed in Ex.A1 / partition deed, the question of finding the defendant as a party to the partition deed cannot arise. The above finding further vindicated by the conduct of the plaintiff from avoiding to submit the original of Ex.A1 / partition deed. Had he submitted the original of Ex.A1, this issue could have been sorted out in no time. The non submission of the original of Ex.A1 / partition deed gives serious doubt in the plaintiff's case. Hence, this Court inclined to draw adverse inference against the plaintiff.

19. Therefore, this Court is of the view that, the plaintiff has miserably failed to prove as to whether the defendant is party to the very Ex.A1 / partition deed. Hence, the Ex.A1 / partition deed will not bind the defendant. If that being the case, as rightly submitted by the learned counsel for the appellant, the property which alleged to have been divided



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among the male heirs, ignoring female line of descendants of Andi Kudumban became illegal. If that being the case, as rightly pointed out by the trial Court, the very suit is hit by non-joinder of necessary parties. As such all the substantial questions of law are answered in favour of the appellant.

20.In view of the above detailed discussion, this Second Appeal is allowed by setting aside the judgment and decree dated 07.03.2017 passed by the first Appellate Court in A.S.No.6 of 2016 on the file of the Principal District Court, Tirunelveli, and restoring the order of dismissal of suit dated 30.11.2015 passed in O.S.No.219 of 2012 on the file of the Principal Sub-Court, Tirunelveli. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

**23.08.2023**

NCC : Yes/No  
Index : Yes/No  
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To:-

- 1.The Principal District Court,  
Tirunelveli.
2. The Principal Sub Court,  
Tirunelveli.
- 3.The Section Officer,  
VR Section,  
Madurai Bench of Madras High Court,  
Madurai.



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**C.KUMARAPPAN.,J.**

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Judgment made in  
S.A.(MD)No.476 of 2017

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