



S.A.No.434 of 2018
& C.M.P.No.11939 of 2018 & C.M.P.No.3636 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on : 29.02.2024

Pronounced on: 08.03.2024

Coram:

THE HONOURABLE Mr. JUSTICE P.B.BALAJI

S.A.No.434 of 2018
& C.M.P.No.11939 of 2018 & C.M.P.No.3636 of 2024

Dakshinamurthy ... 3rd defendant/Appellant

/versus/

1. Indira.
2. Chitra. ... 1st and 2nd Respondents/Plaintiffs
3. Mathivanan.
4. Beybi
5. Kalaiyarasi. ... 1st 2nd & 4th Defendants/3rd - 5th Respondents

Prayer: Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree of Additional Sub Court, Mayiladuturai, dated 28.03.2017 made in A.S.No.30 of 2016 confirming the judgment and decree of Additional District Munsif Court, Mayiladuthurai dated 09.12.2014 made in O.S.No.146 of 2010.

For Appellants : Mr.B.Jawahar

For R1 & R2 : Mr.Ram Kumar Natarajan.

For R5 : Mr.Arun Babu

For R3 & R4 : Served – No appearance



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JUDGMENT

The Second Appeal is filed by the 3rd defendant in a suit for partition.

2. The parties are described as per their litigating status before the trial Court.

3. The plaintiffs are daughters of one Thiru.Kaliyamoorthy and Mrs.Beybi. The 1st defendant is the son of said Kaliyamoorthy and Beybi i.e., brother of the plaintiffs. The 3rd defendant is a stranger to the family and he has purchased the suit properties from Kaliyamoorthy, the 1st and 2nd defendants, namely, his son and wife and therefore, the 3rd defendant has been arrayed as one of the parties in the suit. Similarly, the 4th defendant also purchased the 6th item of the suit property from the 1st defendant and hence, the 4th defendant is also arrayed as a party.

4. It is the specific case of the plaintiffs that the suit properties namely, item Nos.1 to 6 are ancestral joint family properties and they are



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entitled to 1/4th share in view of the Hindu Succession (Amendment) Act 39 of 2005. The suit has been filed subsequent to the demise of their father Kaliyamoorthy. The plaintiffs have contended that the sale deed executed in favour of the 3rd and 4th defendants are not binding on them and for an effective adjudication of the suit for partition, the purchasers have also been impleaded.

5. The 1st and 2nd defendants, namely, the brother and mother of the plaintiffs remained exparte. The 3rd defendant, the purchaser filed a written statement contending that both the plaintiffs were married prior to 1989 and therefore, in view of the Tamil Nadu Amendment Act to Section 29 of the Hindu Succession Act, the plaintiffs were not entitled to any share and the suit was liable to fail. The 3rd defendant has also stated that he is a bonafide purchaser for value and the suit has not been valued properly and improper court fees has been paid.

6. The 4th defendant filed a separate written statement stating that the plaintiffs cannot claim any right in the 6th item of the property and after the demise of Kaliyamoorthy, his wife being entitled to the suit property, has settled the property in favour of his son/1st defendant who inturn sold the



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property to the 4th defendant. The 4th defendant therefore prayed for dismissal of the suit.

7. The trial Court, after appreciating the oral and documentary evidence granted a decree for 5/16th share each in favour of the plaintiffs in respect of item Nos.1 to 5. Similarly, 5/16th share in the said item Nos.1 to 5 were also granted in favour of the 1st and 2nd defendants. Insofar as the 6th item, the plaintiffs and the defendants 1 & 2 were declared to be having 1/4th share each.

8. On appeal by the 1st defendant, the First Appellate Court confirmed the findings rendered by the trial Court and dismissed the appeal.

9. The 3rd defendant, aggrieved by the concurrent findings arrived at by the Courts below, has preferred this Second Appeal.



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10. The Second Appeal was admitted by this Court on 12.11.2018

on the following substantial questions of law:-

"1. Whether the Lower Appellate Court was correct in law in holding that items 3, 4 & 5 of the suit schedule property were ancestral despite the finding that these properties have been assigned to the defendants 1 & 2 and the late father under the Government Patta Scheme.

2. Whether the judgments of Courts below are vitiated by non consideration of material evidence available on record, namely recital in sale deed in favour of appellant wherein suit properties are described as a grant from government?"

11. Pending the Second Appeal, the appellant has taken out C.M.P.No.3636 of 2024 for letting in additional evidence namely, certified copy of the sale deed dated 08.07.1980 in Document No.1581 of 1980 and proceedings dated 21.09.2004 on the file of the Tahsildar, Tarangambadi. I will first take up the application in C.M.P.No.3636 of 2024 which has been filed for letting in additional evidence, invoking Order 41 Rule 27 of C.P.C.



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12. In the affidavit in support of the said application, the appellant has stated that it was the specific case of the plaintiffs that the suit properties were ancestral properties. However, he has been able to lay his hands on the sale deed dated 08.07.1980 under which the father, Kaliyamoorthy purchased the 2nd item of the suit property and the appellant was able to get a copy of the sale deed after much effort and therefore, he seeks for the said document being permitted to be received as additional evidence. Insofar as the second document, namely, the proceedings of the Tahsildar, Tarangambadi, he has stated in the affidavit that he has traced the said proceedings which are in the nature of an assignment order and that both the documents namely, the sale deed and the proceedings were unavailable to him to be produced before the trial Court as well as the First Appellate Court. Contending that both these documents are very vital documents to ascertain the status of the suit properties, the appellant seeks an order to receive the said documents as Ex.B.4 and Ex.B.5.

13. The plaintiffs have filed a detailed counter affidavit to the said application, contending that the application is barred by *res judicata* since even



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pending First Appeal, the appellant sought to file an application under Order 41 Rule 27 of C.P.C and the said application was dismissed on 28.03.2017.

Therefore, when an application was filed to receive an additional document before the First Appellate Court and the appellant did not challenge the order of refusal to receive the said documents and the said order having become final, the appellant cannot file a fresh application under Order 41 Rule 27 of C.P.C. The next objection is that the documents are filed only to fill up the lacuna in the appellant's case and further, the application is resisted on the ground that it is belated and no acceptable reasons have been assigned in the affidavit filed in support of the application to receive the additional documents. The last contention taken is that if the documents are received, then it would deny an opportunity to the respondents/plaintiffs to attack/challenge the said documents. The respondents/plaintiffs, therefore sought for dismissal of the said Civil Miscellaneous Petition.

14. With regard to the first objection of the respondents/plaintiffs regarding *res judicata*, I am unable to countenance the said argument of the Learned Counsel for the respondents/plaintiffs, for the simple reason that by filing an application to adduce additional evidence before the First Appellate



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Court, the appellant wanted to exhibit only the release deed dated 13.03.1962.

However, the present documents that are sought to be filed are entirely different and not the said release deed dated 13.03.1962. Merely because an application to file Order 41 Rule 27 C.P.C was dismissed by the First Appellate Court, it cannot give a seal of finality and close all the doors on the appellant to take out another application under Order 41 Rule 27 of C.P.C., so long as the additional documents sought to be produced are not same. Thus, the First objection of the respondents/plaintiffs are rejected.

15. Insofar as the other objections which have been set out herein above, I proceed to deal with the same as they are interrelated. Admittedly, I do not find sufficient reasons set out in the affidavit filed in support of the application. Order 41 Rule 27 of C.P.C is extracted for easy reference:

27. Production of additional evidence in Appellate Court.— (1) *The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if —*
(a) *the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or*



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[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

16. As seen from Order 41 Rule 1 (aa), the party who seeks to produce additional evidence, must establish that the additional evidence sought to be produced was either not within his knowledge or could not be produced by him earlier, despite exercise of due diligence.

17. As rightly contended by the Learned Counsel for the



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respondents the suit was filed in the year 2010 and decreed in the year 2014.

The First Appeal was filed in the year 2016 and it came to be dismissed in the year 2017 and the above Second Appeal came to be filed and admitted, even in 2018. It cannot be stated that the appellant did not have sufficient opportunity or time to produce the said documents which are admittedly public documents. In fact, the appellant claims that the said document which is the sale deed dated 08.07.1980 is a parent document. Therefore, to causally state that his vendors did not give him the document and therefore, he was not in a position to file the same is certainly not acceptable. Further, as a purchaser, it was the bounden duty of the appellant to verify the title of the vendors, even prior to embarking on purchase of the property. Therefore, I do find any justifiable or satisfactory reasons assigned, especially, showing that the appellant could not produce these documents, despite due diligence exercised by him.

18. There is one more reason as to why the above Civil Miscellaneous Petition to let in additional evidence cannot be allowed. As rightly contended by the respondents/plaintiffs, from the memorandum of grounds of Second Appeal as well as the substantial questions of law suggested, I find that there is no specific challenge insofar as items No.1, 2 & 6



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of the suit property. Specific challenge by way of grounds has been raised only insofar as items Nos.3 to 5. However, Mr.B.Jawahar, Learned Counsel for the appellant would refer to the fourth question of law suggested, namely D – [Whether the judgments of the Courts below are vitiated by non-consideration of material evidence on record?] and state that this ground is not item specific and therefore, this can be taken as challenge to item Nos.1 & 2 of the suit property. However, I am unable to accept this line of argument projected by the Learned Counsel for the appellant. Even the said substantial question of law raised a general ground, pertains only to the documents which have already been exhibited before the Courts below. There cannot be non-consideration of material evidence when the documents were not even before the Courts below, but only at this Second Appeal stage, the appellant has come forward with the above Civil Miscellaneous Petition seeking to produce the said two documents and there is absolutely no whisper also with regard to the sale deed dated 08.07.1980 in the pleadings or for the matter in evidence during trial. Thus, I see no ground to admit the documents sought to be produced as additional evidence. Consequently, C.M.P.No.3636 of 2024 is dismissed.

19. Coming to the Second Appeal, the Learned Counsel for the



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appellant would contend that insofar as the 1st item of the suit property Ex.B.1 has been filed to establish that the property was sold even during the lifetime of Kaliyamoorthy along with his brother one Vadivel and therefore, the 1st item of property was not available for partition even on the date of filing of the suit.

20. With regard to the 1st item of suit property, the learned Counsel for the appellant would alternatively state that Ex.A.3 which pertains to 1st item was in the name of Nagarajan and not in the name of plaintiff's father and therefore, the plaintiffs cannot seek partition in respect of the 1st item.

21. Insofar as 2nd item, the learned counsel for the appellant would rely on Ex.A.2 Patta which stands in the name of Kaliyamoorthy and Vadivel who is not a party to the partition suit. Therefore, according to the learned counsel for the appellant, the patta being joint, the suit for partition without impleading the other pattadars, namely, Mr.Vadivelu was not maintainable and liable to be dismissed on the ground of non-joinder.

22. Insofar as the 1st item, as rightly contended by the Learned Counsel for the appellant when the property had been sold under Ex.B.1 even



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as early as on 26.05.1986, by Kaliyamoorthy and his brother Ramachandran, in favour of Mr.Vadivel Pillai, the Courts below have clearly erred in giving a decree in respect of the said item which was not available for partition on the date of the filing of the suit. The Courts below have not considered Ex.B.1 at all and therefore, the decree insofar as item No.1 of the suit property is liable to be set aside.

23. Coming to the 2nd item of the suit property, it is the case of the 3rd defendant that the said item of the suit property was purchased by him for valuable consideration and plaintiffs had to prove that the suit properties were ancestral in nature. The Trial Court as well as the First Appellate Court have concurrently found that items 1 to 5 are ancestral properties. Unfortunately, I find from the memorandum of grounds of Second Appeal, including the substantial questions of law that the appellant has not challenged the said findings of the Courts below with regard to items 1 & 2.

24. Though, the Learned Counsel for the appellant would contend that it is the entire decree that has been appealed against and therefore, the appellant can also canvas the grounds in respect of items 1 & 2, I am unable to



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accept the said submissions of the Learned Counsel for the appellant.

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25. When the appellant has not challenged the finding in respect of items 1 & 2 of the suit properties specifically and had focussed the entire grounds of appeal only on items 3 to 5, the appellant cannot be permitted to address arguments on grounds that have not been raised or findings that are not challenged in the memorandum of grounds of appeal.

26. Though, the Learned Counsel for the appellant would request this Court to also deal with items 1 & 2 of the suit properties, I do not find it justifiable or proper to undertake such an exercise. This Court is deciding the Second Appeal under Section 100 of C.P.C. In an appeal under Section 100 of C.P.C, the appellant is bound to precisely state that substantial question of law involved in the appeal and the appeal shall be heard only on such questions which are formulated and therefore, when the appellant himself has not raised any grounds, much less substantial questions of law relating to items 1 & 2 of the suit property, I am constrained to hold that the findings of the Courts below with regard to the properties being ancestral in nature cannot be meddled with at this Second Appeal stage, that too exercising power under Section 100 of C.P.C. Therefore, insofar as item 1 of the suit property, the judgment and



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decree of the trial court as well as the First appellate Court are confirmed.

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27. Coming to items 3 to 5, the specific defence raised by the 3rd appellant by way of additional written statement was that the items 3 to 5 were allotments made by way of assignment from the Government to Kaliyamoorthy and 1st and 2nd defendants and therefore, they are self acquired properties and not ancestral properties.

28. The plaintiffs having coming to Court with a specific case that these items of properties are also ancestral properties, the burden is only upon them to establish the fact that the properties are joint family properties and consequently, available for partition. The Learned counsel for the appellant would fairly admit that the plaintiffs had not let in any evidence to establish the said contentions. However, he would state that since the items 3 to 5 were acquired only by way of assignments from the Government, the same cannot be treated as self acquired properties of the defendants 1 & 2 and the deceased father. I am unable to countenance the said argument of the Learned Counsel for the appellant. The properties have been allotted under a Government Scheme as free agricultural lands by way of Government order. The said



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allotments in the names of specific individuals are allotments in their names only and they cannot be treated as joint family properties or ancestral properties and therefore, the said Kaliyamoorthy and defendants 1 & 2 have absolute right to dealt with the said property, including by way of sale in favour of the appellant herein. The plaintiffs, having failed to establish that the said items are ancestral properties or joint family properties are not entitled to question the alienations made by their father, mother and brother. Consequently, the decree insofar these items 3 to 5 necessarily has to be set aside. The Courts below have not appreciated the effect of assignment made by the Government and erroneously treated the same as ancestral properties, available for partition.

29. Mr.Arun Babu, Learned Counsel appearing for the 4th defendant/5th respondent would submit that though the 5th respondent has not preferred an appeal, insofar as the 6th item of the suit property, he would pray for his share being declared since the trial Court as well as the First Appellate Court have proceeded to grant preliminary decree only to defendants 1 & 2 who have admittedly parted with their rights and interest in all the items of the suit properties.



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30. In fine, the *Second Appeal is partly allowed*. The substantial questions of law are answered in favour of the appellant and the judgment and decree of the Courts below are set aside and modified as herein under:-

(i) The plaintiffs shall be entitled to 5/16th share each in item 2 alone and the appellant is entitled to a 6/16th share in the said item 2 alone.

(ii) The plaintiffs shall be entitled to 1/4th share each in item 6 and the 4th defendant shall be entitled to remaining 1/2 share.

(iii) The judgment and decree insofar as items 1 & 3 to 5 are set aside and the suit shall stand dismissed insofar as said items 1 & 3 to 5.

31. In the result, the *Second Appeal No.434 of 2018 is Partly Allowed*. Consequently, *C.M.P.No.3636 of 2024 is dismissed* and C.M.P.No.11939 of 2018 is closed. No costs.

08.03.2024

Index :Yes/No.

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Copy To:-

1. The Additional Sub Court, Mayiladuturai.
2. The Additional District Munsif Court, Mayiladuthurai.



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P.B.BALAJI, J.

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Pre-delivery judgment made in
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