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S.A.NO.501 OF 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 19 / 09 / 2024

JUDGMENT PRONOUNCED ON : 19 / 12 / 2024

CORAM:

THE HONOURABLE MR. JUSTICE R.SAKTHIVEL

S.A.NO.501 OF 2017
AND CMP NO.12163 OF 2017

S.Mohana Sundaram

... Appellant /
Appellant /
Plaintiff

Vs.

S.Muthusamy Gounder
(1st Defendant,Died,)

1.M.Thangavel
2.T.Nivethitha
3.Minor T.Jeyanth
Rep. by Guardian Father M.Thangavel
4.M.Subramaniam
5.S.Priya
6.M.Poosappan
7.P.Sakthivel
8.P.Karthi
9.S.C.Periasamy
10.P.Kumarasamy
11.S.K.Venkatachalam

... Respondents /
Respondents 2 to 12 /
Defendants 2 to 12
... Respondent

12.Chellammal



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PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908, praying to set aside the Judgment and Decree dated December 14, 2016 made in A.S.No.86 of 2014 on the file of the I Additional District Court, Erode, confirming the Judgment and Decree dated September 23, 2014 made in O.S.No.375 of 2010 on the file of Principal Sub Court, Erode.

For Appellant	:	Mr.T.Murugamanickam Senior Counsel for M/s.Zeenath Begum
For Respondents 9 to 11	:	Mr.T.Senthilkumar for M/s.M.Guruprasad
For Respondents 1,2,4 to 8, 12	:	Served – No Appearance
For Respondent 3	:	Minor represented by R1

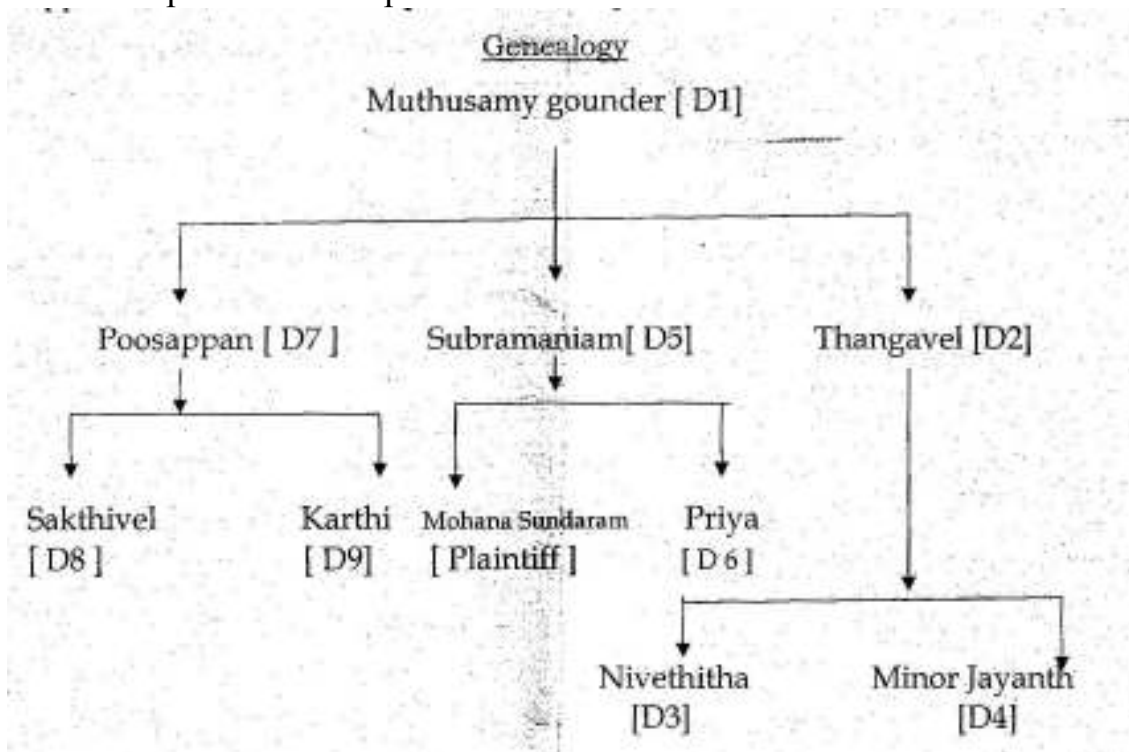
J U D G M E N T

This Second Appeal is directed against the Judgment and Decree dated December 14, 2016 made in A.S.No.86 of 2014 on the file of the 'I Additional District Court, Erode' ['First Appellate Court' for brevity], whereby the Judgment and Decree dated September 23, 2014 made in O.S.No.375 of 2010 on the file of 'Principal Sub Court, Erode' ['Trial Court' for brevity] was confirmed.

2. For the sake of convenience, hereinafter, the parties will be referred to as per their array in the Original Suit.

PLAINTIFF'S CASE

3. The plaintiff is the son of 5th defendant and 6th defendant is his sister. The defendants 2, 5 and 7 are sons of the 1st defendant. The defendants 3 and 4 are the daughter and minor son of the 2nd defendant respectively. The defendants 8 and 9 are the sons of the 7th defendant. The genealogy chart appended hereunder serves for better appreciation of relationship between the parties to the suit:





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3.1. The defendants 10 and 11 are the purchasers of Item No.3 and 2 of Suit 'B' Schedule properties respectively. The 12th defendant is the sale agreement holder in respect of the Item No.1 of the Suit 'B' Schedule properties with the 1st defendant.

3.2. Suit 'A' Schedule properties are ancestral and joint family properties of D1 – Muthusamy Gounder and his family. Out of the surplus income therefrom, he purchased Suit 'B' Schedule properties. D1 does not have any separate income and the entire family is an agricultural family. D1, being the *Karta*, had purchased common 2 Acre 21 ½ Cents Punja land in Survey No.530 of Nanjaiuthukuli Village in his name under Sale Deed dated June 19, 1959, and later, entered into registered Partition Deed dated December 15, 2009 with other co-owners, whereby Item No.1 of Suit 'B' Schedule properties were allotted to him. Further, D1 purchased Item Nos.2 and 3 of Suit 'B' Schedule properties under Sale Deeds dated April 27, 1978, and November 2, 1983 respectively. Similarly, Item No.4 thereof, which is a house property, was also purchased in his name. As stated *supra*, they were all purchased out of surplus income from ancestral and joint family properties. Thus the Suit Properties are all ancestral and



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joint family properties and the plaintiff and the defendants are in joint possession and enjoyment of the same.

3.3. While so, D1 entered into an registered Partition Deed dated May 30, 1988 with D2, D5 and D7, whereby D1 was given life estate in Schedule A1, B1 and C1 properties therein while D7, D5 and D2 were allotted Schedule 'A', 'B' and 'C' properties therein respectively. The same is not valid and binding on the plaintiff due to partial partition as Suit 'B' Schedule properties were not included in it, as well as due to unequal distribution. D5, though he was a party to the said Partition Deed, failed to secure the best interests of his son, the plaintiff, who was a minor then.

3.4. D1 is entitled to common $\frac{1}{4}$ share in Suit Properties while D2 to D8 are entitled common $\frac{1}{12}$ share therein. However, D1 without any legal right, taking advantage of the fact that Suit 'B' Schedule properties are in his name, sold Item No.2 thereof vide Sale Deed dated August 24, 2010 to D11; sold Item No.3 thereof to one Karupanna Gounder, whose legal heirs sold it to D10 vide Sale Deed dated March 14, 2007; and also entered into a Sale Agreement in respect of Item No.1



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thereof with D12. The said transactions do not bind the plaintiff. The plaintiff sought for Oral Partition but D1 was evasive. Hence, the Suit for partition of his 1/12 share.

D1 TO D4's CASE

4. D1 filed written statement denying the plaint averments except those specifically admitted. The same was adopted by D2 to D4. It is stated that there were no income from ancestral properties. D1 was driving bullock cart for hire and out of his blood and sweat, he purchased Item No.1 of Suit 'B' Schedule properties. Then, from the income from driving his bullock cart as well as from said Item No.1 which he cultivated, he purchased the other items of Suit 'B' Schedule properties. Thus all the items of Suit 'B' Schedule properties are his self-acquired properties. Partition of ancestral properties has already been concluded vide Partition Deed dated May 30, 1988. Therefore, they prayed to dismiss the Suit.

CASE OF D10, D11 AND D12

5. Though D10, D11 and D12 filed separate written statements, they are one and the same in substance. Sum and substance of



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their written statements is that the Suit 'B' Schedule properties are self-acquired properties of D1; that D10 and D11 have been in possession and enjoyment of their respective properties after purchase from D1; and that the Suit is bad for improper valuation and incorrect payment of Court Fee.

TRIAL COURT

6. At trial, plaintiff – S. Mohana Sundaram was examined as P.W.1, one C.Ponnusamy was examined as P.W.2 and Ex-A.1 to Ex-A.9 were marked on the side of the plaintiff. On the side of the defendants, D1 – Muthusamy Gounder was examined as D.W.1, D10 - Periyasamy examined as D.W.2, one Jeganathan was examined as D.W.3, D12 was examined as D.W.4 and Ex-B.1 and Ex-B.16 were marked.

6.1. Upon hearing both sides and considering the oral and documentary evidence, the Trial Court concluded that the plaintiff failed to prove the alleged income from ancestral and joint family properties and therefore, his case that Suit 'B' Schedule properties were purchased out of such income is not believable. Further, in the absence of evidence to state that the Suit Properties were enjoyed in common, the plaintiff who attained majority around 2004, ought to have filed the Suit within 3 years from the



date of attaining majority, as per Article 60 of the Limitation Act, 1963.

But he failed to do so and hence, the Suit is barred by limitation. Further held that as the partition was concluded in the 1988 itself *i.e.*, before December 20, 2004, it is saved by the proviso to new Section 6 (1) of the Hindu Succession Act, 1956 ['H.S.Act' for short] and hence, the daughters are not entitled to share in the Suit Properties. Accordingly, it dismissed the Suit.

FIRST APPELLATE COURT:

7. Aggrieved by the dismissal, the plaintiff approached the First Appellate Court, which upon hearing both sides and analysing the oral and documentary evidence, concluded that the plaintiff has neither proved that the Suit 'B' Schedule properties were purchased out of income from Suit 'A' Schedule properties nor has he controverted the evidence of D.W.1 that he was driving bullock cart for hire and purchased Suit 'B' Schedule properties with the income therefrom. Further, without challenging Ex-A.7 – Partition Deed the plaintiff cannot seek partition. Further, the plaintiff failed to file the Suit within 3 years from the date of attaining majority *i.e.*, from 2004 and hence, the Suit is barred by



limitation. Accordingly it concurred with the findings of the Trial Court and dismissed the appeal.

SECOND APPEAL

8. Aggrieved by the Judgment and Decree of the First Appellate Court, the plaintiff has preferred this Second Appeal and the same was admitted on September 7, 2017 on the following Substantial Questions of Law:

a) Whether the Judgments of the Courts below are vitiated in that they have failed to take into consideration the vital admission of the first defendant, that, the suit 'B' schedule properties were purchased out of the income derived from the suit 'A' schedule properties, and, therefore, granted a decree for partition in respect of suit 'B' schedule properties?

b) When certain properties have not been included in a family partition, would it not imply that such properties still remain undivided?

ARGUMENTS:

9. Mr.T.Murugamanickam, learned Senior Counsel for the appellant /plaintiff would argue that it is an admitted fact that Suit 'A' Schedule properties are ancestral properties. Total extent of ancestral properties is nearly 7 Acres. D1's family is an agricultural family. Suit 'A'



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Schedule properties have sufficient irrigational facilities. D1 had no other source of income. There is no sufficient evidence to show that D1 had separate income from running bullock cart on hire. Hence, it is easily discernible that Suit 'B' Schedule properties were purchased out of the surplus income from ancestral properties.

9.1. Further he would argue that, Ex-B.7, which is a notice of demand of vehicle tax issued by Kasipalayam Town Panchayat, is not even related to D1. It lacks description of vehicle and the village mentioned there is different from D1's village. In those days, such vehicle tax notice were issued even in respect of cycles. Even if it is true, it is natural for a farmer to have bullock cart, which actually strengthens the case of plaintiff. Hence the same does not help the case of the defendants in any manner. Therefore, it is clear that Suit 'B' Schedule properties are also ancestral properties.

9.2. He would further argue that in Ex-A.7 – Partition Deed dated May 30, 1988, Suit 'B' Schedule properties were not included and therefore, Ex-A.7 is bad for partial partition. At the same time, merely



because the Suit 'B' Schedule properties were not included in Ex-A.7, one cannot presume that they are self-acquired properties of D1, especially in the absence of recitals in it about presence of other self-acquired properties. The division of properties vide Ex-A.7 is not fair and just, and against the interest of plaintiff, and it was entered with a view to give an unfair advantage to one of the coparcener. Ex-A.7 - Partition Deed would not bind the plaintiff, since the plaintiff's father did not secure the best interest of the plaintiff, who was a minor then. As a coparcener, the plaintiff is entitled to question the unjust and unequal partition. Further, he would refer to the evidence of D.W.1 and argue that D.W.1 has admitted that Suit 'B' Schedule properties are ancestral properties. The Trial Court as well as the First Appellate Court failed to appreciate the evidence in the right perspective, and erroneously dismissed the Suit. Accordingly, he would pray to allow the Second Appeal, set aside the Judgment and Decree of First Appellate Court and Trial Court, and decree the Suit.

10. Mr.T.Senthilkumar, learned Counsel for the respondents 9 to 11 / defendants 10 to 12 would argue that the Suit has been filed collusively only with the view to defeat and defraud the legitimate rights



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of the subsequent alinees from D1. The petitioner has no *locus standi* to

file the Suit. Therefore, the Suit is not maintainable. Moreover, alienees

are put in possession and enjoyment of the Item Nos.2 and 3 of Suit 'B'

Schedule properties for a long period and therefore, the Suit is hit by

Article 109 of the Limitation Act, 1963. Further, the burden of proof to

prove surplus income from Suit 'A' Schedule properties lies on the

plaintiff. Further, the plaintiff has not challenged Ex-A.7 - Partition Deed

and therefore, he cannot question the same. Ex-A.7 shows equal and fair

division of properties among the coparceners. Further, the Suit is bad for

non-joinder of necessary parties viz., D10's predecessors in title. Further,

D1/D.W.1 in his cross-examination, by a slip of tongue, answered a

suggestive question, that Suit 'B' Schedule properties are purchased out of

the income from ancestral properties. His evidence has to be read as a

whole. The Trial Court as well as the First Appellate Court rightly

appreciated the evidence and dismissed the Suit. There is no warrant to

interfere with the same. Accordingly, he would pray to dismiss the Second

Appeal, confirm the Judgment and Decree of First Appellate Court and

Trial Court.



10.1. He would rely on the following decisions in support of his contentions:

- (i) ***Sudarshan's Case*** – Judgment of the High Court of Allahabad in *Sudarshan Prasad and Others Vs. Radha Kishun Ram*, reported in 1982 SCC OnLine All 21;
- (ii) ***Lakshmaiah's Case*** - Judgment of the Hon'ble Supreme in *D.S.Lakshmaiah and Another Vs. L.Balasubramanyam and Another*, reported in (2003) 10 SCC 310;
- (iii) ***Deivanai Ammal's Case*** – Judgment of this Court in *R.Deivanai Ammal (Died) & Another Vs. G.Meenakshmi Ammal and Others*, reported in 2005-1-L.W.343;
- (iv) ***Robinson's Case*** – Judgment of this Court in *Robinson Vs. Ramachandran*, reported in 2014-3-L.W.644;
- (v) ***Kishore's Case*** – Judgment of the Hon'ble Supreme Court in *P.Kishore Kumar Vs. Vittal K.Patkar*, reported in 2024 (1) CTC 547; and
- (vi) ***G.K.Palanisamy's Case*** – Judgment of this Court in *G.K. Palanisamy Vs. Amudhaveni and Others*, reported in (2017) 7 MLJ 841.

DISCUSSION:

11. This Court has heard on either side and perused the materials available on record in light of the Substantial Questions of Law.



12. Case of the plaintiff is that the Suit 'B' Schedule properties were purchased using surplus income from ancestral and joint family properties and therefore, they are also ancestral and joint family properties. Suit 'B' Schedule properties were not partitioned in Ex-A.7 – Partition Deed dated May 30, 1988 and therefore, it is bad for partial partition. It is equally bad for unequal partition. Further case is that the daughters of D1 are also entitled to share in the coparcenary properties.

13. Case of the defendants is that Suit 'B' Schedule properties are self-acquired and separate properties of D1 – Muthusamy Gounder, purchased out of his own exertions using his income from riding bullock cart for hire, without any aid of joint family strength or income, and Ex-A.7 – Partition Deed is valid. Further case is that the plaintiff has no right over the self-acquired properties of D1.

14. It is settled law that the initial burden is upon the plaintiff to prove his case. The plaintiff has to prove that there was surplus income from ancestral and joint family properties using which Suit 'B' Schedule properties were purchased. In this regard it is fruitful to refer to *Deivanai Ammal's Case*, wherein a Division Bench of this Court held as hereunder:



“15.It is a well-established principle of law that where a party claims that any particular item of property is joint family property, the burden of proving that it is so rests on the party asserting it. Where it is established or admitted that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the presumption arises that it was joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family. But no such presumption would arise if the nucleus is such that with its help the property claimed to be joint could not have been acquired. In order to give rise to the presumption, the nucleus should be such that with its help the property claimed to be joint could have been acquired. A family house in the occupation of the members and yielding no income could not be nucleus out of which acquisitions could be made even though it might be of considerable value.”

15. In this case, the plaintiff has not substantiated his assertion that Suit 'A' Schedule properties were yielding surplus income using which Suit 'B' Schedule properties were purchased. Mere pleadings do not amount to proof. The plaintiff / P.W.1 has admitted in his evidence that he was born on November 25, 1986. Considering the fact that the plaintiff was born after Suit 'B' Schedule properties were purchased, and also that D5 is alive, this Court is of the view that the plaintiff is not a



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competent person to depose about manner of acquisition of Suit 'B'

Schedule properties. The plaintiff's father - D5 did not enter the witness box to depose whether Suit 'B' Schedule properties are ancestral and joint family properties or self-acquired properties of Muthusamy Gounder. It is apposite to mention here that P.W.1 in his cross examination has admitted the voter list of the year 2012 and the same is marked as Ex-B.1. From Ex-B.1, it is discernible that the plaintiff and D5 are living under one roof at 72-12, Govindanaikampalayam. The Trial Court inadvertently omitted to mention Ex-B.1 – Voter list in the list of documents. Instead, Registration Copy of Sale Deed dated June 19, 1959 has been mentioned as Ex-B.1, that is to say, two documents were given the same name inadvertently.

16. On the other hand D1/D.W.1 has deposed that he purchased Suit 'B' Schedule properties through the income from running bullock cart for hire; and that he is known as 'Vandikarar Muthusamy Gounder' in his locality. He has marked demand vehicle tax as Ex-B.7. The learned Counsel for the appellant / plaintiff contended that the same does not help the case of the defendants due to the various discrepancies in it and further contended that, D1 / D.W.1 has admitted in his cross-



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examination that the Suit 'B' Schedule properties were purchased out of the income from Suit 'A' Schedule properties. The said argument deserved to be rejected for the following reasons. D1 was about 90 years old at that time and his evidence has to be construed in the context of his written statement and rest of the evidence. One favourable answer to a suggesting question cannot be taken as such in isolation. It has to be seen comprehensively [See **Robinson's Case** (cited *supra*)]. Further, plaintiff should establish his case independently. Moreover, major portion of Suit 'A' Schedule properties were dry lands until the advent of Lower Bhavan Irrigation Project around 1955, and the said fact also makes the plaintiff's case that there was surplus income through agriculture from Suit 'A' Schedule properties for purchase of Suit 'B' Schedule properties, improbable. Further, if really Suit 'B' Schedule properties were ancestral and joint family properties, then the sons of D1 would have definitely sought for partition of the same at the time of Ex-A.7, which is not the case here. None of the family members even contested the case. On perusal of records, there seems to be no evidence in support of the contention of the plaintiff that the Suit 'B' Schedule properties were purchased out of the income from Suit 'A' Schedule properties.



17. Further, on perusal of Ex-A.7 – Partition Deed, it can be evinced that an extent of 2 Acre 31 ½ Cents was allotted to D7, 2 Acre 26 ½ Cents was allotted to D5 and 2 Acre 30 ¼ Cents was allotted to D2. It could further be evinced that the properties were of similar characteristics and were situate adjacent to each other. There appears to be no unequal partition vide Ex-A.7. In fact, it appears to be just and fair. Moreover, as rightly contended by defendants, the plaintiff who has not sought to set aside Ex-A.7 - Partition Deed cannot challenge or question the same. When the plaintiff has failed to discharge his initial burden of proving that the Suit 'B' Schedule properties were purchased out of income from ancestral and joint family properties, when the partition thereunder seems to equal and fair, this Court is of the view that the same is valid and the plaintiff cannot question the same, especially when he not sought any relief to set aside Ex-A.7.

18. Further, the argument that D6 is a coparcener by birth entitled to share in the coparcenary property equal to that of son (plaintiff) is valid. In view of the Tamil Nadu Act No.1 of 1990 as well as the Hindu Succession (Amendment) Act, 2005 (Act No.39 of 2005), D6 is entitled to



claim share in the property allotted to D5 in Ex-A.7 – Partition Deed. She stands on the same footing as the plaintiff.

19. The case of D10 to D12 is that this Suit has been filed with an ulterior motive to deprive D10 and D12 of their legitimate rights over the Suit 'B' Schedule properties which they purchased from D1 and his alinees as well as to defeat and delay the agreement holder mentioned in Ex-B.5. Their further case is that the Suit is barred under Article 109 of the Limitation Act, 1963 as D10 and D11 were placed in possession and enjoyment of the their respective properties purchased from D1 and revenue records were mutated also in their respective names immediately after the Sale. They would place reliance on the original Sale Deeds marked as Ex-B.11 and Ex-B.15 as well as the revenue records in Exs-B.12 to B.14 and Ex-B.16. These revenue records show the D10 and D11 are in possession and enjoyment of Item No.2 and Item No.3 of Suit 'B' Schedule properties respectively. To be noted, D11 purchased Item No.2 of Suit 'B' Schedule properties from D1 – Muthusamy Gounder on August 24, 2010. Then in 2011, he sold the same under Ex-B.15 to D12. The Suit was filed on October 7, 2010. Hence, D11 and D12 has not been in



possession and enjoyment for 12 years or more from the date of plaint.

Since D10 has established his long possession and enjoyment *i.e.*, more than 12 years, the Suit is barred under Article 109 of the Limitation Act, 1963 *qua* D10 [See ***Sathia's Case*** and ***Visvanathan's Case***]. Be that as it may, in view of the findings that the Suit 'B' Schedule properties are self-acquired and separate properties of D1, the plaintiff has no right or share in Suit 'B' Schedule properties.

20. Further, Ex-B.5 - Sale Agreement coupled with Ex-B.6 – Advocate notice issued by D10 would *prima facie* establishes that D1 and D12 have some issue pertaining to a Sale Agreement in respect of Item No. 1 of Suit 'B' Schedule properties. It is also probable that this Suit has been filed collusively with an ulterior motive to delay the Sale Agreement. Though, as evident from Ex-B.1 - Voters list, the plaintiff and his father are all living under the same roof, none of the family members have contested the case, which creates suspicion that the Suit is filed collusively. There is no quarrel with the other Judgments relied on by the learned Counsel for the respondents 9 to 11. Both Courts have arrived at factual findings that the plaintiff failed to establish his case and that the



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Suit is barred under Article 109 of the Limitation Act, 1963 *qua* D10, after elaborate discussions. This Court does not find any reason to deviate from the same. The Substantial Questions of Law are answered accordingly in favour of the defendants.

CONCLUSION:

21. Resultantly, the Second Appeal is dismissed. The Judgment and Decree of the Trial Court as well as the First Appellate Court are hereby confirmed. Keeping in mind the facts and circumstances of the case, there shall be no order as to costs. Consequently, connected Civil Miscellaneous petition is closed.

19 / 12 / 2024

Index : Yes
Speaking Order : Yes
Neutral Citation : Yes
TK

To

1.The I Additional District Court
Erode.

2.The Principal Subordinate Court
Erode.



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R. SAKTHIVEL, J.

TK

PRE-DELIVERY JUDGMENT MADE IN
S.A.NO.501 OF 2017

19 / 12 / 2024