



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 19.02.2024

Judgment Pronounced on : 18.04.2024

CORAM:

THE HONOURABLE MR. JUSTICE P. DHANABAL

A.S.(MD).No. 100 of 2012

and

M.P.No. 7935 of 2022

and

M.P.(MD).No. 1 of 2012

Lakshmi

...Appellant

Versus

1. K. Veerammal

2.C. Santhi

3.Maheswari

4.Muthulakshmi

[Minor respondents 3 and 4 are suo motu
declared as major and guardianship of
their mother (R6), is discharged
vide Court order dated 22.06.2022
made in AS.(MD).No. 100 of 2012]

5. The Manager

Canara Bank, Vadamadurai

Vedasandur Taluk, Dindigul District.

6. Pandiammal

...Respondents



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Prayer: Appeal Suit is filed under Section 96 of the Civil Procedure Code, to set aside the judgment and decree dated 16.07.2012 passed in O.S.No. 22 of 2011 on the file of the Additional District and Sessions Judge, Dindigul.

JUDGMENT

This Appeal Suit has been preferred as against the judgment and decree dated 16.07.2012 made in O.S.No. 22 of 2011 on the file of the Additional District and Sessions Judge, Dindigul, wherein the appellant herein has filed the suit for the relief of partition, separate possession and other reliefs and for costs. The trial Court dismissed the suit as against the judgment and decree, the present appeal has been preferred by the appellant/plaintiff.

2. Brief averments of the Plaint are as follows:-

The father of the plaintiff, deceased Subbiah had two wives and the plaintiff and the defendants 1 and 2 are born to the deceased Subbiah through his first wife. While the first wife was alive, the said Subbiah married one Pandiyammal in the year 1995 as second wife and



the defendants 3 and 4 are born to the said Subbiah through his second wife. The plaintiff and the defendants 1 and 2 are joint family members along with her father deceased Subbiah. Therefore, each are entitled to 1/4 share and they are in common possession and enjoyment of the same. The father of the plaintiff and the defendants 1&2 died on 29.01.2010. Therefore, the plaintiff and the defendants each are entitled to 1/4 share over the properties. The 1/4 share of the deceased Subbiah has to be divided into five equal shares and thereby the plaintiff and the defendants 1 and 2 each are entitled to 1/20 share of the deceased Subbiah, in total each are entitled to 6/20 share over the properties of deceased Subbiah. The deceased Subbiah had Savings Bank account in the 5th defendant and the amounts are also available for partition. The plaintiff issued a notice dated 11.01.2011 for partition and the same was received by the defendants 1, 3 and 4, but they have not sent any reply and the second defendant has not received the notice. Therefore, the plaintiff has filed the suit for the relief of partition of her share 6/20 over the suit properties.

3. Brief averments of the written statement of the first defendant are as follows:-

The plaintiff and the defendants 1 and 2 are the children born to



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Chalammal, who is the first wife of the deceased Subbiah and they are the joint family members and each of them are entitled to 1/4 share over the suit properties. While his first wife Chalammal was alive, the deceased Subbiah married the 6th defendant, namely, Pandiyammal and the defendants 3 and 4 are the sons of deceased Subbiah born to the second wife and they are not joint family members. The first wife of the deceased Subbiah died in the year 2009. Therefore, the plaintiff and the defendants 2 to 4 are entitled to the properties of the deceased Subbiah. The defendants 3 and 4 are entitled to 1/20 share over the properties of the deceased Subbiah. The plaintiff and the defendants 2 and 3 are entitled to 6/20 share over the suit properties. Therefore, the defendants pray to dismiss the above first appeal.

4. Brief averments of the written statement filed by the defendant Nos. 3, 4 and 6 are as follows:-

The plaintiff is not entitled any relief in the original suit. It is admitted that the plaintiff and the defendants 1 and 2 are the children born through the first wife, namely, Chalammal of the deceased Subbiah. It is false to state that the 6th defendant, named Pandiyammal, is the second



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wife of the deceased Subbiah, during the life time of first wife, the deceased Subbiah married the 6th defendant as second wife. In fact, the first wife of the deceased Subbiah left the matrimonial home and the deceased Subbiah divorced his first wife and the first wife executed maintenance release deed dated 09.01.2002. Therefore, the marriage between the deceased Subbiah and the 6th defendant in the year 1992 is valid. After the said marriage, the defendants 3 and 4 born to them. Therefore, the plaintiff and the defendants 1 to 4 and 6th defendant are joint family members and the defendants 2, 3 and 6 they are also entitled to properties of the deceased Subbiah. The suit properties are under the common and joint possession of the parties. It is true that the Subbiah died on 21.10.2010. It is false to state that the plaintiff and the defendants 1 and 2 are entitled to 6/20 share over the suit properties, the defendants 3 and 4 each are entitled to 1/20 share over the suit properties. In fact, the said Subbiah has a sum of Rs.11,493/- in his account in the 5th defendant/Bank. The I and VI items of the suit properties belonged to Subbiah through sale deeds 24.04.1972 dated 24.06.74, 10.02.1975 and 11.02.1991 and 31.03.1993. Therefore, those properties are self-acquired properties of the deceased Subbiah. The said Subbiah, during his life



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time, executed a Will dated 31.05.2000 bequathing the properties to the defendants 3, 4 and 6th defendants. During the life time of the deceased Subbiah, he along with 6th defendant, sold the properties and also the 6th defendant borrowed loan from third parties for the medical expenses of the said Subbiah. The said Subbiah was bed-ridden before one month of his death and he died on 21.09.2010. The 6th defendant only maintained the said Subbiah and did his funeral ceremonies and the plaintiff and the defendants 1 and 2 not even attended the death ceremonies of the deceased Subbiah. Further, the said deceased Subbiah, on 10.04.2003, executed a Will and also settlement deed and bequeathed the properties of 1 to 6 and 11 items in favour of the defendants 3, 4 and 6. After the demise of the deceased Subbiah, the Will came into force and after the settlement deed, the properties were transferred to the 6th defendant and thereby, they are in possession and enjoyment of the suit properties. Thereafter, the deceased Subbiah died on 17.11.2006 who executed a settlement deed in respect of Item Nos. 1, 6 and 11 of the properties and he has also executed Will in respect of other properties in favour of the plaintiff through settlement deed dated 13.07.1982. After the demise of the deceased Subbiah, the plaintiff is in possession and enjoyment of the



properties separately. The other daughters of Chellammal, namely, Shanthi, the first defendant Veerammal were also given properties through settlement deeds dated 07.02.1999 and 05.09.1999 respectively. Now, only to encumber the properties of the defendants 3, 4 and 6 in respect of Item Nos. 1, 6 and 11 of the properties, the 2nd defendant created a sale deed dated 27.06.2000. Therefore, the defendants pray to dismiss the above first appeal.

5. Based on the aforesaid pleadings made in the plaint and written statement filed by both parties, the Trial Court has framed the following issues:-

1. வழக்குரை 1 முதல் 12 இலக்க சொத்துக்களில் வாதி கோரியபடி 6/20 பாகம் தனித்த சுவாதீனம் மற்றும் முதல்நிலை தீர்ப்பாணை கிடைக்கத்தக்கதா?

2. இறந்த சுப்பையா 3, 4 மற்றும் 6 பிரதிவாதிகளுக்கு தாவா 1, 6 மற்றும் 11 இலக்கச்சொத்துக்களைப் பொறுத்து 10.04.2003ம் தேதி உயில் பத்திரம் எழுதி வைத்துள்ளாரா?

3. இறந்த சுப்பையா 3, 4 மற்றும் 6 பிரதிவாதிகளுக்கு தாவா 1, 6 மற்றும் 11 இலக்கச்சொத்துக்களைப்பொறுத்து 17.11.2006ம் தேதி செட்டில்மென்ட் பத்திரம் எழுதி வைத்துள்ளாரா?

4. 2ம் பிரதிவாதி 27.06.2009ம் தேதி ஒரு பழனிச்சாமி எனப்பவருக்கு தாவா 1, 6 மற்றும்



11 இலக்கச்சொத்துக்களைப்பொறுத்து எழுதிக்கொடுத்த
கிரையப்பத்திரம் பொய்யானதா.

5. வாதிக்கு கிடைக்கத்தக்க வேறு பரிகாரம் என்ன?

6. Before the trial Court, on the side of the plaintiff, the plaintiff was examined as PW1 and Ex.A1 to Ex.A19 were marked. On the side of the defendants, they examined DW1 to DW4 and Ex.B1 to Ex.B33 were marked.

7. After considering the evidence adduced on both sides, the trial Court dismissed the suit on the ground that all the properties of the deceased Subbiah were not included and thereby, the plaintiff is not entitled for the partition, against which, the unsuccessful plaintiff has filed the present appeal on the following grounds.

(i). The judgment and decree of the learned trial Judge in non-suiting the plaintiff is contrary to law, weight of evidence and opposed to the probabilities of the case.



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(ii). The Court below failed to see that the appellant as plaintiff has specifically pleaded that the suit properties are joint family properties and the plaintiff is entitled to 1/4 share plus 1/20 share as heir of her father, totally 6/20 share.

(iii). The learned trial Judge ought to have seen that the joint family nature of the suit properties had been amply proved by the fact that the 2nd defendant sold her alleged 1/4 share in favour of one, Palanisamy, from whom the 6th defendant has purchased the same. The said Subbiah has no right to execute a settlement deed in favour of the defendants 3, 4 and 6 regarding suit items 1, 6 and 11 and they are not binding on the appellant/plaintiff.

(iv). The learned trial Judge erred in holding that the plaintiff has not pleaded that items 1 to 11 of suit properties are joint family properties of the said Subbiah and others. The Court below failed to see that the said Subbiah and the 6th defendant have executed a sale deed on 05.09.2005 under Ex.B24 in favour of one Indirani, in which the joint family nature of suit properties had been discussed.



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(v). The learned trial Judge failed to see that the 6th defendant has purchased the property from one Palanisamy, who has purchased it from the 2nd defendant, wherein the joint family nature of suit properties had been referred to.

(vi). The learned trial Judge failed to see that DW1 has admitted that her husband had 3 brothers and they had ancestral properties.

(vii). The learned trial Judge ought to have accepted the evidence adduced on the side of the plaintiff as cogent, clear and convincing and rejected those of the defendants as vague, re-convincing and untrustworthy.

8. During the pendency of the appeal, the appellant has filed CMP.No. 7935 of 2022 to receive the additional documents as additional evidence. The petitioner in the affidavit states that the suit properties are joint family properties and they are in joint possession and entitled to 6/20 share over the properties. The 2nd defendant sold some properties to one



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Palanisamy on 27.06.2000 and he sold the same to the 6th defendant and the same are not valid, since the second defendant has no right to sell the same. The 2nd defendant has also claimed 6/20 share over the suit properties and paid Court fees. The trial Court has also held that the marriage between the deceased Subbiah and the 6th defendant is not valid marriage. However, the trial Court has held that the plaintiff has failed to prove the joint family properties. Now, she has preferred the present appeal as against the judgment and decree. She recently traced out the said documents which are necessary to prove the appellants' case. In order to prove that the properties are joint family properties, the said documents are very essential to prove her case. Those documents are of the year 2022, and the copy of the sale deed was executed in favour of the mother, father and paternal uncle of the plaintiff, dated 14.05.1985. Another document in support is the sale deed executed by the deceased Subbiah and Pandiyammal in favour of Ashokan dated 04.12.2001.

9. The respondents filed counter affidavit stating that the petition is not maintainable. The petitioner and the respondents 1 and 2 are not in joint possession, which properties are the self-acquired



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properties of the deceased Subbiah. The petitioner did not plead in the plaint that the suit properties are the ancestral properties. The petitioner did not dispute the execution of Will and settlement deed executed by the deceased Subbiah in favour of the respondents 3 and 4. The petition is filed only to drag on the proceedings and the petitioner has knowledge about the execution of those documents which are sought to be received. Therefore, the petition is liable to be dismissed. Further, some of the properties were sold during the life time of the deceased Subbiah, those properties were also included in the suit. The properties already given to the plaintiff and the defendants 1 and 2 through Will dated 08.04.1991 bequeathed by the deceased Subbiah have not been included in the suit. Therefore, the trial Court, after analyzing all the evidence, dismissed the suit.

10. The learned Counsel for the appellant contended that the suit properties are ancestral properties of the plaintiff and the defendants 1 and 2 and his father deceased Subbiah is entitled to 1/4 share and the plaintiff and the defendants 1 and 2 each are entitled to 1/4 share over the suit properties. The deceased Subbiah died in the year 2010 and after his



demise, the suit properties are to be divided into four equal shares of 1/4 share of the deceased Subbiah which has to be divided into 1/5 share, since the defendants 3 and 4 are born through the 2nd wife of the deceased Subbiah. While so, the plaintiff has filed the suit for partition to divide her 6/20 share over the suit properties. The trial Court has failed to consider the evidence adduced by the plaintiff and erroneously dismissed the suit. The petitioner/appellant has also filed a petition under Order 41 Rule 27 CPC to receive the documents as additional evidence to show that the properties are the ancestral properties. Therefore, the said documents are essential to prove the case of the plaintiff and thereby, the documents have to be received as additional evidence and the judgment and decree passed by the trial Court are liable to be set aside by allowing this appeal.

11. The learned Counsel for the respondents 3, 4 and 6 contended that the properties are not ancestral properties of the deceased Subbiah and the deceased Subbiah had purchased the suit properties in his name through sale deeds on various dates and the deceased Subbiah was enjoying the properties as his absolute properties and during his life time, he executed a Will in favour of the defendants 3 and 4 and thereafter, he



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has also settled the properties in respect of Item Nos. 1, 6 and 11 of the suit properties in favour of the defendants 3 and 4. The settlement deed was of the year 2006, and the last Will was executed in the year 2003 and after his demise, the deceased Subbiah died in the year 2010 and thereafter, the Will came into force and thereby the properties are not available for partition. Already, the deceased Subbiah executed a Will in the year 1997 by bequeathing the properties available in Kollapatti Village in favour of the plaintiff and the plaintiff has also been enjoying the property and the said property has not been included in the suit. The deceased Subbiah had also settled some properties in favour of the defendants 1 and 2 through settlement deed dated 07.02.1994 and 05.05.1994 respectively. Therefore, during the life time of the deceased Subbiah itself, the properties were settled to the plaintiff and the defendants 1 and 2 and the suit properties were bequeathed through Will and settlement deed in favour of the defendants 3, 4 and 6. The plaintiff suppressed the said facts and filed the suit. Before the trial Court in order to prove the case of the defendants, they examined DW1 to DW4 and Ex.B1 to Ex.B33, were marked. The trial Court, after considering the evidences adduced on both sides, dismissed the suit. Therefore the present



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appeal is liable to be dismissed.

12. Heard both sides and perused the materials available on records.

13. The point for determination in this appeal are as follows:-

(i) Whether the suit properties are joint family properties of the plaintiff and the defendants 1 and 2 ?.

(ii) Whether suit properties are ancestral properties or self acquired properties of the deceased Subbiah ?.

(iii) Whether the suit properties viz., Item Nos. 1, 6 and 11 of the suit properties belonged to the defendants 3, 4 and 6 through settlement deed and Will executed by the deceased Subbiah?.

(iv) Whether the plaintiff is entitled to the relief of partition of her share viz, 6/20 of the suit property?.

(v) Whether the judgment and decree passed by the trial Court is sustainable either in law or on facts?.

(vi) Whether this appeal has to be allowed or not?



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14. Point Nos. 1 to 4:-

In this case, the plaintiff has filed the suit for partition stating that the properties belonged to her father deceased Subbiah and other defendants 1 and 2 born to the deceased Subbiah through his first wife, Chalammal and the defendants 3 and 4 were born to the deceased Subbiah through his second wife Pandiyammal. The said deceased Subbiah married the 6th defendant Pandiyammal, during the life time of his first wife Chalammal and thereby the defendants 3 and 4 are not entitled to any share through the ancestral properties along with the plaintiff. However, the defendants 1 and 2 are entitled to 1/4 share of their father along with the plaintiff and the defendants 1 and 2. The plaintiff has not specifically pleaded in the plaint as to whether the properties are self acquired properties or ancestral properties of the deceased Subbiah.



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15. Per contra, the defendants 3, 4 and 6 in the written statement pleaded that all the properties are self acquired properties of the deceased Subbiah. However, the plaintiff in the plaint pleaded that the father of the defendants 1 and 2 are each entitled to 1/4 share and the plaintiff and the defendants 1 and 2 each are entitled to 1/4 share over the suit properties, thereby, this Court can infer that the plaintiff's intention to file the suit is in respect of ancestral properties. However, there is no specific pleadings and the plaintiff has also not filed any document to prove that the suit properties are the ancestral properties. Moreover, during the course of the trial, the plaintiff who was examined as PW1, deposed that some properties were ancestral properties and some properties were purchased through the income of the ancestral properties. There is no clear cut evidence as to what are all the items of properties that are the ancestral properties and whether any income was derived from the ancestral properties and through that income, what are the properties were purchased by the deceased Subbiah, are all have to be established by the plaintiff, but there is no such evidence adduced by the plaintiff.



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16. Per contra, the defendants have marked the copies of sale deeds purchased in the name of deceased Subbiah for some of the properties. This Court, on a perusal of the documents, finds that the deceased Subbiah had purchased the said properties and there is no evidence that those properties were purchased out of the income derived from the ancestral properties. The plaintiff filed the suit for partition and she has to plead and prove the nature of the suit properties as to whether they are the ancestral properties of the deceased Subbiah or not.

17. Per contra, the sale deeds have been purchased by the deceased Subbiah in his name, which would show that the properties have been purchased by the deceased Subbiah in his name. According to the plaintiff, the said properties were purchased by the deceased Subbiah through the income derived from the ancestral properties. There is no evidence as to what are all the ancestral properties and whether the properties were purchased by way of income derived from the ancestral properties, but there is no pleadings pleaded by the plaintiff in the suit to that effect. According to the defendants, already the properties were given



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to the daughters born through his first wife through Will as well as settlement deeds. The said properties were settled through Will have not been included in this suit.

18. On a careful perusal of the documents filed by the defendants, it clearly shows that so many properties were purchased by the deceased Subbiah and some properties were alone included in the suit and remaining properties were not included in the suit. The second item of the suit properties was sold to one Dhanam by the 6th defendant and the mother of the defendants 1 and 2 viz., Chalammal through sale deed dated 19.11.2008. The said Dhanam has not been included as a party to the suit. Further, the properties purchased by the deceased Subbiah situated at Kollapatti Village were already bequeathed through Will in favour of the plaintiff and the defendants 1 and 2 through Will dated 13.07.1992. Those properties were not included in this plaint.

19. All the suit properties are only pertaining to Vadamadurai Village, Vedasandur Taluk, Dindigul District and all the properties stands in the name of the deceased Subbiah have not been included in the suit



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and the plaintiff has also in his cross examination deposed that she does not know about the Will 13.07.1992 and she has not enjoyed the properties bequeathed through that Will. Further, she deposed that she does not know about the Will executed in favour of the defendants 3 and 4 dated 31.05.2000 and she does not know about the settlement deed and the Will dated 17.11.2003 and the Will dated 10.04.2003 and settlement deed and also she deposed that she had no knowledge about the settlement deeds in favour of her sisters, dated 05.05.1994 and 07.02.1994 respectively. However, she admitted that his father paid a sum of Rs. 2,00,000/- to her and thereafter, the same was returned to her father. Therefore, the plaintiff has not even denied the aforesaid Will and Settlement Deed, but she only deposed that she does not know about those documents.

20. While so, it is the duty of the plaintiff to include the properties of the deceased Subbiah which were referred in the Will, but those properties have not been included in the suit. Before going into the merits of the case, this Court has to decide as to whether the suit can be disposed of effectively without including all the properties of the deceased



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Subbiah and without pleadings, some properties have been purchased from the deceased Subbiah. Since the suit is for partition and separate possession, the plaintiff has to include all the properties available in the name of deceased Subbiah in the suit schedule. The, available evidence, shows that the plaintiff has not included all the properties of the deceased Subbiah. Though the defendants have not particularly pleaded about non-joinder of necessary parties, the available evidence shows that all the properties of deceased Subbiah were not included in the plaint schedule and some parties have not been impleaded as parties and some shareholders of the proportions have not been included. In the above circumstances, this Court decides that the suit can not be decided effectively without including all the properties of deceased Subbiah and without including all the shareholders of the properties. The plaintiff has filed only the properties mentioned in the documents executed in favour of defendants 3, 4 and 6. The plaintiff has also admitted that already the second defendant sold the properties to one Palanisamy and the said Palanisamy, in turn, sold the properties to the 6th defendant, but the plaintiff has not filed any document and no steps have been taken immediately after selling the properties of 6th defendant and the suit was



filed in the year 2011 and the plaintiff has not even pleaded about the nature of the properties as to whether the properties are self acquired properties or joint family properties of the deceased Subbiah. Therefore, the suit cannot be decided effectively without including all the properties belong to Subbiah and impleading all the necessary parties concerned. Hence, this Court without going into the merits of the case, on the ground that non joinder of necessary party, the suit cannot be decided completely and effectively.

21. In this context, the trial Court also, in the judgment stated that the plaintiff has not pleaded about the ancestral properties and only produced the Revenue Records and the same are not proved for claiming title. Further, the trial Court has referred Ex.P24 for the Survey No. 71/1B, 91 cents and S.F.No. 71/3(d), 20 cents. These properties are also shown in the plaint schedule for partition. As per Ex.P23, the 1/2 of the properties in S.F.Nos. 71/1 B, 71/3C, 71/3d and 71/3f have been settled in favour of the 6th defendant and the same were also shown in the plaint schedule. In Ex.P22, Will dated 10.04.2003 in S.F.No. 83/1, 83/2, were also mentioned whereas in the plaint in S.F.No. 83/1, the Will alone has



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been mentioned in the plaint. The property in S.No. 83/1 3 acres 84 cents, have not been shown in the plaint, as the suit properties and what is only shown is S.F.No. 83/1 83 acre 1 cent. The property in S.F.No. 71 purchased through Ex.P6 an extent of 6.5 cents and the properties purchased through Ex.P7 in Kollapatti Village in SF.Nos. 278/4, 277/2 and 625/3, have not been included in the plaint. Further, the properties mentioned in the Exchange Deed executed in favour of the deceased Subbiah and the properties available in SF.No. 71/3F, 277/2 87.5 cents, have not been included in the plaint schedule properties. Therefore, the plaintiff has not added all the properties of the deceased Subbiah and only included the properties settled in favour of the defendants 3, 4 and 6 and thereby, the suit cannot be decided without including all the properties.

22. The aforesaid observations made by the trial Court are correct. In the above circumstances, in order to meet the ends of justice and considering the nature of the suit for the relief of partition, it is appropriate to grant liberty to the plaintiff to file a fresh suit by including all the properties purchased of the deceased Subbiah and to implead all the parties concerned in the manner known to law.



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23. MP.(MD).No. 7935 of 2022, has been filed by the petitioner/plaintiff to receive the documents as additional evidences. This Court in the previous paragraphs came to the conclusion that the suit cannot be decided without including all the properties purchased by the deceased Subbiah and impleadig all the necessary parties concerned, thereby the petition filed by the petitioner is no way helpful to decide this case. This Court granted liberty to the plaintiff to file a fresh suit in the manner known to law, therefore, the plaintiff can file all the documents available with him and thereby, the petition is dismissed.

24. In view of the aforesaid discussions, this Court is of the opinion that the appellant /plaintiff is not entitled any relief by way of this appeal suit and all the points are left open and to be decided in the fresh suit if any filed by the plaintiff.

25. With the aforesaid observations and directions, the Appeal Suit is dismissed, with liberty to file a fresh suit before the competent



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Civil Court by including all the properties purchased by the deceased Subbiah and by impleading all necessary parties concerned in the manner known to law. No costs. Consequently, the connected Miscellaneous Petitions are closed.

18.04.2024

Index: Yes

Speaking order: Yes

Neutral Citation: Yes

MSM

To

1. The Additional District and Sessions Judge,
Dindigul.

2.. The Manager

Canara Bank, Vadamadurai

Vedasandur Taluk, Dindigul District.

3. The Section Officer, High Court, Madras.



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P. DHANABAL, J

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Pre-Delivery Judgment in
A.S.(MD).No. 100 of 2012

Delivered on

18.04.2024