



S.A.(MD).No.76 of 2024

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **28.03.2024**

CORAM:

THE HONOURABLE **MRS.JUSTICE S.SRIMATHY**

S.A.(MD).No.76 of 2024

and

C.M.P.(MD)No.1937 of 2024

C.N.Thiagarajan

...Appellant

/Vs./

Natarajan(Died)

1.Arivukody

2.N.Raja

3.N.Thendral

...Respondents

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree passed in A.S.No.23 of 2022 on the file of the Principal District Judge, Thanjavur, dated 04.07.2023, concurred with the fair and decreetal order passed in I.A.No.319 of 2018 in O.S.No.228 of 2014, dated 21.12.2021, on the file of the Additional Subordinate Judge, Thanjavur.

For Appellant : Mr.V. Chandrasekar

For Respondents : M/s.T.K.Akalya



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JUDGMENT

This Second Appeal is filed against the Judgment and Decree, dated 04.07.2023 passed in A.S.No.23 of 2022 against the fair and decreetal order dated 21.12.2021 passed in I.A.No.319 of 2018 in O.S.No.228 of 2014.

2. The defendant is the appellant herein. The plaintiff died pending First Appeal and the legal heirs are impleaded and the legal heirs of the plaintiff are the respondents herein. For the sake of convenience, the parties shall be referred as plaintiff and defendant as per the ranking in the suit.

3. The suit is filed for preliminary decree for partition allotting $\frac{1}{2}$ share in A and B schedule of properties and pass final decree. The brief facts are that the plaintiff C.N.Natarajan is the younger brother of the defendant C.N.Thiyagarajan. The portion of the 'A' schedule property was ancestral property and the remaining portion is purchased by the father from out of the nucleus from the ancestral property through the registered sale deed dated 25.10.1964 and property tax, patta and other revenue records stand in the name of the plaintiff's father C.Nagarajan. Subsequently on 30.10.1983 the father died intestate leaving his wife and two



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sons (the plaintiff and the defendant). The movable property mentioned in the B schedule belongs to mother who died on 23.11.1992 leaving two sons (the plaintiff and the defendant). Hence the plaintiff and the defendant are the only legal heirs and they are entitled $\frac{1}{2}$ share in A and B schedule of properties. The plaintiff issued suit notice dated 22.08.2014 and the defendant had issued reply notice dated 05.11.2014 with false averments. In the reply the defendant had averred the father had executed Will dated 13.06.1983 and bequeathed $\frac{3}{4}$ th of the suit A schedule property and $\frac{1}{4}$ th to the plaintiff and the same is denied as false. Further the plaintiff had denied the plea of the defendant that the plaintiff had sent letters dated 27.08.2013, 07.10.2013, 06.12.2013 admitting the Will of the father. Further the plaintiff submitted that the father has no exclusive right to execute the Will, since the same is ancestral property. Further allegation that the plaintiff has agreed to sell the $\frac{1}{4}$ th share to the defendant is denied as false and also denied that the defendant alone had taken care of the parents.

4. The defendant had filed written statement stating that the plaintiff's residence stated in the cause title is denied as false. Further stated that the plaintiff had not stated whether the ancestral property would fetch any income, hence the



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theory that the property is purchased from nucleus of ancestral property is false.

The tax assessment and patta stands in the name of the defendant and hence the plaintiff's plea that the same stood in the name of the father is utter false, hence it is evident that the plaintiff has no knowledge about the A schedule property. Further the said property is bequeathed to the defendant through a holographic Will in the presence of witnesses on 13.06.1983 and in the said Will it has been clearly stated that the defendant is entitled to $\frac{3}{4}$ th of the property and the plaintiff is entitled to $\frac{1}{4}$ th of the property. Infact the allegation that the defendant had not discharged the duties as son is denied. Even if the allegation is accepted, the father had executed a Will bequeathing $\frac{3}{4}$ th of the property to the defendant. The plaintiff has knowledge of the Will and has also sent letters on 27.08.2013, 07.10.2013, 06.12.2013 confirming the fact that he is entitled to $\frac{1}{4}$ th share. Since the A schedule property could not be divided for convenient enjoyment, the plaintiff has also agreed to sell the property to the defendant and has also sent a draft sale deed and also agreed to receive Rs.3,50,000/- towards consideration, but subsequently had wriggled out of his commitment. The allegation that the plaintiff and defendant had inherited B schedule property is false and there are no such items available at any point of time. Hence the defendant submitted that the



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plaintiff is entitled to 1/4th share in A schedule property and prayed to dismiss the suit as far as B schedule property.

5. The Trial Court after considering the pleadings, evidence had partly decreed the suit and held that the plaintiff is entitled to 1/4th of the share in the A schedule property, 1/2 share in 3 sovereigns of gold chain and dismissed the suit as far as the remaining items in B schedule is concerned. Aggrieved over the preliminary decree the defendant had preferred Appeal Suit in A.S.No.54 of 2018 on the file of II Additional District Court, Thanjavur and the same was dismissed on 30.11.2017 and the defendant had not preferred any second appeal. Thereafter the plaintiff had filed I.A.No.319 of 2018 before the Trial Court for passing final decree in terms of the preliminary decree dated 04.04.2016. Pending enquiry, the plaintiff died and the legal heirs were impleaded vide order dated 05.01.2021. In the said proceedings the defendant had taken a plea that the A schedule is not divisible and he is ready and willing to pay the market rate for the same. After considering the contention of both sides the I.A. was allowed wherein it was held that in the Advocate Commissioner report the land and tiled house shown in yellow colour is allotted to the plaintiff. Aggrieved over the same the defendant



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had filed appeal in A.S.No.23 of 2022 on the file of the Principal District Court, Thanjavur and the same was dismissed. Aggrieved over the same the present second appeal is preferred.

6. In the second appeal the following substantial question of law are raised:

“i. Whether the Courts below are right in passing a final decree in favour of respondents in respect of the properties which are not the subject matter of the suit for partition?

ii. Whether the quotes below are right in passing a final decree in favour of the respondent without marking the commissioner’s report and also without giving opportunity to cross examine the commissioner on the basis of the objections filed by the appellant?

iii. Whether the approach of the Courts below in appreciating the entire case without looking into the description of property in the preliminary decree and also the direction of the Trial Court regarding the nature of the property which is divisible or not

iv. Whether the Courts below are right in accepting the commissioner’s report without looking into the objections filed by the appellant and to the commissioner’s report in question?”



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7. As far as the first substantial question of law is concerned the contention of the defendant / appellant is that the Courts have granted final decree to a property which are not the subject matter of the suit for partition. It is seen that the plaintiff had relied on the Sale Deed dated 02.10.1964 and sought for partition. In the “schedule of properties” filed along with the plaint, absolutely there is no boundaries etc. It only states old S.No.56/7, New S.No.222/7 (and subsequently amended and added S.No.227/7), in 4.52.0 only 0.07.88 land and had stated terraced house, backyard and garden. When boundaries are not stated, then the sale deed dated 02.10.1964 ought to be relied on. But the Courts below had failed to take the measurement of 0.07.88 and also failed to take the four boundaries stated in the sale deed for identifying the property. Admittedly there is another property covered under sale deed dated 02.09.1967 and the Courts below had failed to take the same into account. Further it is seen that in the sale deed dated 02.10.1964 the measurement is stated as East-West 4 gajam and North-South 67 gajam. Whereas in the sale deed dated 02.09.1967 the measurement is stated as East-West 9 gajam 6 inch and North-South 29 ½ gajam. Further in the sale deed dated 02.09.1967, already purchased property is shown as one of the boundaries. In the said sale deed dated 02.09.1967, the property has Mangalore tiles building



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and this property is mentioned in the Will, wherein it is stated that the defendant / appellant C.N.Thiagarajan had put up construction. The defendant claimed that the said property belongs to him since he has put up construction in the said property and this fact was not taken into consideration by the Courts below. In short, the Advocate Commissioner had allotted the property to the plaintiff which exclusive belongs to the defendant. Therefore, this Court is of the considered opinion that substantial question of law that the property which are not the subject matter of the suit for partition is held in favour of the defendant and consequently the case ought to be remitted back to the Trial Court for proper identification of the property. The property stated in the sale deed dated 02.10.1964 admeasuring 0.07.88 alone is liable for partition and the same ought to be identified for partition.

8. The second and fourth substantial question of law is whether the Courts without marking the commissioner report, without giving opportunity to the defendant regarding the commissioner report and without looking into the objections filed by the defendant had passed the impugned judgment and had approved the report and granted 1/4th share to the plaintiff, whereby the defendant



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exclusively property was allotted to the plaintiff. It is seen that the Commissioner's report was not marked and the order passed in I.A. shows no documents were marked. Further it is seen that the defendant was not allowed to cross examine the commissioner. Furthermore, the court had not taken into account the objections to the commissioner's report filed by the defendant and absolutely no discussion about the objections of the defendant in the impugned order. Therefore, the second and fourth substantial question of law is held in favour of the defendant.

9. The third substantial question of law is whether without looking into the description of property in the preliminary decree and also direction of the Trial Court regarding the nature of the property whether it is divisible or not the impugned order is passed. As held supra there is no boundaries in the suit schedule of properties, in such situation then the boundaries stated in the sale deed dated 02.10.1964 ought to be relied on since the plaintiff claims right over the property through the said sale deed dated 02.10.1964. Therefore, this Court is of the considered opinion that the Courts below had failed to take the boundaries and identify the property.



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10. The further contention of the defendant / appellant in the above said substantial question of law is that the Courts failed to grant the value of the 1/4th share to the plaintiff, if the property is not divisible. It is seen that in the Will itself it is stated that the plaintiff is entitled to “1/4th share **or the value** of the 1/4th share”. The relevant portion is extracted hereunder:

“I have got only a terraced and tiled building with backyard, well, coconut trees etc. The above property is worth of Rs.40,000/-

3/4th of the share should go to my eldest son Thiru C.N.Thiagarajan who is superintendent in TNCSC Regional Office, Madras. The terraced building about 4 years ago has been built by my first son Thiru C.N.Thiagarajan.

*The remaining 1/4th share **or value** should go to my second son Dr.C.N.Natarajan M.A.Ph.D. who is employed as Professor H.O.D. of Sociology Department Madurai College Madurai*

The former has got two male and two female children

The latter Dr.C.N.Natarajan got one male child and one female child”

When the Will specifically states “**or value**” of the share then the Courts below ought to have taken the same into consideration. If the property is not divisible then the value of 1/4th share may be granted to the plaintiff. This issue was not considered by the Courts below. Therefore, this substantial question of law is held in favour of the defendant.



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11. Therefore, the impugned judgment and decree passed by the Appellate Court and the fair and decreetal order passed by the Trial Court are set aside and the case is remitted back to the Trial Court to identify the property as per the sale deed dated 02.10.1964 admeasuring 0.07.88 and to fix the boundaries, thereafter, to consider the claim of the parties.

12. With the above said directions, the second appeal is allowed in above terms. No costs. Consequently, connected miscellaneous petition is closed.

28.03.2024

Index : Yes / No

NCC : Yes / No

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TO:

1. The Principal District Judge, Thanjavur.
2. The Additional Sub Judge, Thanjavur.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J.

Tmg

Judgment made in
S.A.(MD)No.76 of 2024

Dated:
28.03.2024