



A.S(MD)No.18 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Dated: 21.03.2024

CORAM:

THE HON'BLE MR.JUSTICE **P. DHANABAL**

A.S(MD)No.18 of 2016

Muthumary @ Arokiamary

... Appellant/9th Defendant

Vs.

1.Arokiamary

... 1st Respondent/Plaintiff

2.Mariyamuthu (Died)

*(R-2 died, vide Memo, dated 21.03.2024
and the legal heirs of the deceased second
respondent is already on record viz., R-1,
R-3 to R-7)*

3.Jesuraj

4.Leela @ Leela Rosaline

5.Sagayamary

6.Dhainesmary

7.Johnpeter (Died)

8.The Sub Register,
Thanjavur Office,
Sivagangai Poonga,
Thanjavur.



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9.The District Collector,
Panagal Building,
Thanjavur.

... Respondents 2-9/
Defendants 1-8

*(Respondents 8 and 9 are given up in the
above appeal suit as no relief is sought for
as against them)*

10.Vanakkaselvi

11.Kulandai Therasa

... Respondents

*(Respondents 10 and 11 are brought on
record as legal heirs of the deceased
seventh respondent vide Court order, dated
21.03.2022 made in C.M.P(MD)No.2513 of
2022 in A.S(MD)No.18 of 2016)*

Prayer : This Appeal Suit filed under Order XLI, Rule 1 & 2 read with Section 96 of the Code of Civil Procedure, to set aside the decree and judgment, dated 22.07.2015 rendered in O.S.No.135 of 2008 on the file of the II Additional District & Sessions Judge at Thanjavur, by allowing this Appeal Suit and to grant such other reliefs.

For Appellant : Mr.G.Aravinthan

For R-1 : Mr.S.Siva Thilakar

For R-2 to R-4 : No appearance

For R-5 & R-6 : Mr.N.Balakrishnan
for Mr.K.Baalasundharam

R-7 : Died (Steps taken)



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R-8 & R-9 : Given up

For R-10 & R-11 : Mr.M.R.Vijayakumar

JUDGMENT

This Appeal Suit has been preferred as against the decree and judgment passed in O.S.No.135 of 2008 on the file of the II Additional District & Sessions Judge, Thanjavur, wherein, the first respondent herein has filed a suit for partition and the same was decreed. As against the decree and judgment, the ninth defendant has filed this appeal.

2. For the sake of convenience and brevity, the parties herein after will be referred to as per their status / ranking in the Tribunal.

The case of the plaint in brief is as follows:

3. The suit property originally belonged to father of the plaintiff by name Durairaj @ Kulandaisamy and he died intestate on 18.12.1987 leaving behind his wife Mariamuthu the first defendant and his children, namely, the plaintiff and the defendants 2 to 6 as his legal heirs to succeed his estate. The first defendant is entitled to 1/3rd share and the remaining



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2/3rd share, the plaintiff and the defendants 2 to 6 are jointly entitled. So, the plaintiff is entitled to 1/9th share over the suit properties. On 05.06.1988, there was a panchayat in the family to divide the property by allotting 1/7th share each and in the said partition, plaintiff's father's sister was also added. Hence, the plaintiff not agreed for that partition. In the meantime, the defendants 2 & 6 attempted to sell some of the suit properties. Hence, the plaintiff issued notice to the defendants for demanding partition. The defendants failed to amenable for amenable partition. Hence, the suit.

4. The second defendant filed a written statement stating that the suit properties are not belonged to the father of the plaintiff Durairaj @ Kulandaisamy and they originally belonged to Chinnaiya Udayar, who is the grand-father of the plaintiff. The Chinnaiya Udayar died intestate in the year 1984 leaving behind his two daughters and one son. The elder daughter of Chinnaiyar Udayar is Lourthumary Ammal and she filed a suit before the Sub Court, Thanjavur in O.S.No.52 of 1990 and it was ended with compromise by allotting two items of the suit property for her share. The remaining properties were jointly enjoyed by said Durairaj @



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Kulandaisamy and Muthumary Ammal @ Arockiamary. After the death of said Durairaj @ Kulandaisamy, there was a partition on 22.05.2000 between the said Muthumary Ammal @ Arockiamary and the defendants 1, 2 and 6. From the date of said partition, the said Muthumary Ammal @ Arockiamary was in possession and enjoyment of the property. While so, in the year 2007, the said Muthumary Ammal @ Arockiamary gifted her share to her daughter, namely, Rexi. This defendant never agreed for 1/7th share over the suit properties. Originally, the suit properties belongs to Chinnaiya Udayar. Therefore, the daughters of Chinnaiya Udayar have got right over the suit properties.

5. The seventh defendant had filed a written statement stating that he is entitled to register any valid document, if it is in order under the provisions of the Registration Act. It is the bounden duty of the seventh defendant to register the sale, there cannot be any permanent prohibition from registering the document, which is in accordance with the Registration Act. Therefore, the suit is liable to be dismissed.



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6. The defendants 1 and 3 adopted the written statement of the second defendant. The eighth defendant also adopted the written statement of the seventh defendant.

7. Based on the above said pleadings, the Trial Court has framed the following issues:

1) Whether the plaintiff is entitled to a preliminary decree for partition of 1/9th share in the suit properties?

2) Whether the ninth defendant is entitled to a preliminary decree for partition of 1/2 share as prayed for?

3) Whether the plaintiff is entitled to a relief of permanent injunction as prayed for?

4) To what relief the plaintiff is entitled to?

8. Before the Trial Court, on the side of the plaintiff, they examined P.W.1 and P.W.2 and marked Exhibits A.1 to A.10. On the side of the defendants, D.W.1 and D.W.2 were examined and marked Exhibit B.1.



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9. The Trial Court after considering the evidences adduced on both sides and perusing the records, decreed the suit and passed a preliminary decree for 1/9th share of the plaintiff and the suit is dismissed as against the seventh and eighth defendants.

10. Aggrieved by the decree and judgment, the ninth defendant has preferred this appeal on the following grounds:

"1. The decree and judgment passed by the Trial Court is highly vitiated, irregular, erroneous and contrary to law and the procedure.

2. The learned Additional District and Sessions Judge had completely erred in decreeing the suit of the first respondent / plaintiff.

3. The Court below had failed in its duty to appreciate facts for determination.

4. When the appellant has been impleaded as ninth defendant in the suit as per order in I.A.No.344 of 2014, dated 12.11.2014, which is based on the strength of the compromise decree, dated 11.02.1993 made in O.S.No.52 of 1990 by the Principal Subordinate Judge at Thanjavur and the appellant was not given share in the said decree, the Trial Court ought to have granted a share for her.



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5. The Trial Court simply brushed aside the valuable evidence of the appellant, who has examined herself as D.W.2 and marked the unassailable document under Exhibit B.1.

6. The Trial Judge failed in his duty in not framing an issue as to the effect of the compromise decree passed in O.S.No.52 of 1990 on the file of the Subordinate Judge at Thanjavur, which has been marked as Exhibit as Exhibit B.1 in the above suit.

7. Though the learned Additional District Judge framed an issue as to whether the ninth appellant is entitled for 1/2 share, no proper discussion has been made by him and the same resulted in miscarriage of Justice.

8. The Trial Judge ought to have drawn an adverse inference as against the plaintiff as she has not whispered even a single word regarding the earlier proceedings in between her father and his siblings and also the compromise entered into between them, which vitiated the entire proceedings.

9. When the very foundation of the defence of the ninth defendant is based on the earlier final decree, no proper discussion were made on the same by the learned Additional District Judge is contrary to the provisions



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under the Indian Evidence Act.

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10. The learned Additional District Judge, having allotted share in properties to the plaintiff and the defendants 1 to 6 by the preliminary decree, dated 22.07.2015, ought to have allotted a share for the appellant, who is the ninth defendant in the suit.

11. The Court below ought to have allotted a share for the appellant, who has sought for the relief of partition by paying necessary Court Fees."

11. The learned Counsel appearing for the appellant would contend that the plaintiff filed the suit for partition and once the Trial Court came to conclusion that the plaintiff is entitled to 1/9th share over the property, ought to have held that the ninth defendant also entitled to 1/9th share over the property. But the Trial Court failed to allot share to the ninth defendant. The Trial Court failed to consider that as per order in I.A.No. 344 of 2014, dated 12.11.2014, made in O.S.No.52 of 1990 on the file of the Principal Subordinate Judge, Thanjavur and not the appellant was given share in the said decree, the Trial Court ought to have granted a share for her. The Trial Court simply brushed aside the valuable evidence of the appellant, who has examined herself as D.W.2 and also marked



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Exhibit B.1. The Trial Court failed to consider that once the plaintiff is entitled to share over the property, the ninth defendant also entitled because she is also from the same family.

12. The main defence of the ninth defendant is that, based on the earlier final decree some properties were allotted to the appellant and she entitled to share over the other properties and no proper discussion, in respect of the same, when earlier suit is filed for partition. Except the properties allotted to the plaintiffs thereon, the Trial Court ought to have allotted a share to the appellant / ninth defendant. When the Trial Court allotted share in the properties to the plaintiff and the defendants 1 to 6 by the preliminary decree, dated 22.07.2015, ought to have allotted a share for the appellant. But The Trial Court failed to consider the above said aspects and thereby, the judgment and decree passed by the Trial Court are liable to be set aside.

13. The learned Counsel appearing for the respondents would contend that originally, the property belonged to Chinnaiya Udayar and he had one son and two daughters. Lourthumary, daughter of Chinnaiya



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Udayar already filed a partition suit and got her share through partition and thereafter, the properties were enjoyed by Durairaj @ Kulandaisamy and Muthumary Ammal @ Arockiamary, who are the daughter and son of the Chinnaiya Udayar. Thereafter, the properties were partitioned between Muthumary Ammal @ Arockiamary and Durairaj @ Kulandaisamy. Therefore, Muthumary Ammal @ Arockiamary already got share through partition. Now the plaintiff has filed the suit for the remaining properties of Durairaj @ Kulandaisamy. Therefore, the appellant / ninth defendant has no any share over the properties. Already her share was allotted through the partition. The present suit is filed only properties of Durairaj @ Kulandaisamy and the plaintiff being the legal heir of Durairaj @ Kulandaisamy is entitled to 1/9th share over the suit properties. Therefore, the Trial Court has correctly decreed the suit and further the learned Counsel appearing for the respondent fairly conceded that, if any of the properties allotted to the ninth defendant through partition were included in the suit, they have no objection to delete those properties.

14. This Court had heard both sides and perused the records. Upon hearing both sides and perusing the records, the points for determination



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in this appeal are:

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- "1) Whether the suit properties are belongs to Durairaj @ Kulandaisamy?
- 2) Whether the plaintiff is entitled to partition of 1/9th share over the property?
- 3) Whether the ninth defendant is entitled to any share over the property?
- 4) Whether the decree and judgment passed by the Trial Court are sustainable in law and on facts?
- 5) Whether this appeal has to be allowed or not?
- 6) To what relieves the appellant is entitled to?"

Point No.1:

15. According to the plaintiff, the property belongs to Durairaj @ Kulandaisamy and he died intestate on 18.12.1987 leaving behind the plaintiff and the defendants 2 to 6 and after the demise of Durairaj @ Kulandaisamy, the first defendant is entitled to 1/3rd share, remaining 2/3rd share, the plaintiff and the defendants 2 to 6 are jointly entitled. Therefore, the plaintiff is entitled to 1/9th share over the suit properties.



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On 05.06.1998, there was a panchayat in the family to divide the property by allotting 1/7th share each and in the said partition, the plaintiff's father's sister was also added. Hence, the plaintiff not agreed for that partition. According to the defendants, the property originally belonged to Chinnaiya Udayar and he died leaving behind one son and two daughters. The son is Durairaj @ Kulandaisamy and daughters are Lourthumary Ammal and Muthumary Ammal @ Arockiamary. The Lourthumary Ammal already filed a suit for partition and then partition in O.S.No.52 of 1990 and there was a compromise between the parties and compromise decree was passed and some of the properties were allotted to Lourthumary. The remaining properties were enjoyed by Durairaj @ Kulandaisamy and ninth defendant Muthumary Ammal @ Arockiamary. Thereafter, Muthumary Ammal @ Arockiamary and some of the legal heirs of deceased Durairaj, namely, Maria Muthu wife of Durairaj @ Kulandaisamy, Jesuraj and John Peter sons of the Durairaj @ Kulandaisamy have entered into partition deed in respect of their remaining shares derived from Chinnaiya Udayar. In that deed, the branch of Durairaj was allotted some properties and the Muthumary Ammal @ Arockiamary was allotted some properties towards her share. Therefore, the properties of Chinnaiya Udayar already



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partitioned between the parties and thereby, the present properties were allotted to the share of Durairaj @ Kulandaisamy and the suit is only between the legal heirs of Durairaj @ Kulandaisamy.

16. In this context, the plaintiff has also produced the documents, Exhibit A.8 and defendants also produced Exhibit B.1. On perusal of Exhibit B.1, they revealed that already the properties were allotted to the Lourthumary and in the year 2004, the Muthumary was allotted some properties for her share. Durairaj @ Kulandaisamy share was allotted to sons and wife of the Durairaj. The plaintiff is one of the daughter of Durairaj @ Kulandaisamy. The other daughters, namely, 3, 4 and 5 defendants have also not included in the above said partition deed between the ninth defendant and 1, 2, 5 and 6 defendants. Therefore, Chinnaiya Udayar properties were already divided between their daughters and sons. The plaintiff is daughter of son of Chinnaiya Udayar (i.e.,) grand-daughter of Chinnaiya Udayar. She filed the suit in respect of the properties allotted to the heirs of Durairaj through partition deed, dated 22.05.2000. Therefore, the suit properties are belonged to Durairaj @ Kulandaisamy. Thus the point is answered.



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Point No.2:

17. The plaintiff has filed a suit for relief of partition in respect of her 1/9th share over the property and according to the plaintiff, the property belongs to her father and her father died intestate leaving behind her and the defendants 2 to 6. The first defendant is entitled to 1/3rd share and the remaining 2/3rd share belongs to 2 to 6 defendants. Therefore, the plaintiff is entitled to 1/9th share over the property. There is no dispute in respect of the relationship of the parties and the plaintiff and the defendants 1 to 6 are legal heirs of deceased Durairaj @ Kulandaisamy. Therefore, the plaintiff is entitled to 1/9th share over the properties. There is no dispute that the plaintiff and the defendants 1 to 6 are legal heirs of the deceased Durairaj @ Kulandaisamy and thereby, the plaintiff is entitled to 1/9th share over the properties of Durairaj. Already the ninth defendant and some of the legal heirs of Durairaj @ Kulandaisamy have entered into partition on 22.05.2000 and properties were divided between them. Some items allotted to heirs of Durairaj as common and the share of Durairaj was partitioned between his legal heirs. Therefore, the plaintiff is entitled to 1/9 share over the suit properties. Thus the point is answered.



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Point No.3:

18. The contention of the ninth defendant is that she is one of the legal heirs of Chinnaiya Udayar and she is entitled to 1/3rd share over the Chinnaiya Udayar. Already the properties of Chinnaiya Udayar was partitioned between one of the daughters Lourthumary and the son and daughters of the Chinnaiya Udayar. Therefore, 1/3rd share was already allotted to Lourthumary. The remaining 2/3rd shares of Chinnaiya Udayar was under joint possession of Durairaj @ Kulandaisamy and Muthumary Ammal @ Arockiamary. Therefore, Durairaj @ Kulandaisamy are entitled to 1/2 share and Muthumary Ammal @ Arockiamary is entitled to 1/2 share over the property. According to the plaintiff, the share of Lourthumary was already partitioned through suit in O.S.No.52 of 1990 through compromise decree. The remaining share was also partitioned between the legal heirs of Durairaj @ Kulandaisamy and the ninth defendant Muthumary Ammal @ Arockiamary through partition deed, dated 22.05.2000, where the remaining properties of Chinnaiya Udayar after excluding the properties allotted to the Lourthumary were partitioned. In that partition, the property in S.F.No.183/7, 1 acre 66.2/3



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cents was allotted to her. Therefore, she already allotted share and she is not entitled to any share over the properties. During the course of argument, the learned Counsel appearing for the respondent fairly conceded that S.F.No.183/7 for an extent of 5 acre was added in this suit by the plaintiff, thereby, the appellant, who is ninth defendant has claiming his share over the property. But already the property in S.F.No.183/7 with four boundaries was allotted to the ninth defendant and the same was also admitted by the ninth defendant during her cross-examination. The said S.F.No.183/7 is shown as second item of the suit property. The ninth defendant, who entered into partition deed in the year 2000 has suppressed the fact and claiming half share over the entire properties. The D.W.2 in her cross-examination also admitted the signature found in the partition deed, dated 22.05.2000. Particularly in the cross-examination, she stated as follows:

"22.05.2000ல் குழந்தைசாமி மனைவி மரியமுத்து, குழந்தைசாமி குமாரர் ஜேசுராஜ், ஜான் பீட்டர் மற்றும் நான் சேர்ந்து ஒரு பாகப்பத்திரம் தஞ்சாவூர் மாவட்ட பதிவாளர் அலுவலகத்தில் 3605/2004 என்று பதிவு செய்தோம் என்று எனக்கு ஞாபகம் இல்லை. மேற்படி நபர்கள் அன்றைய தேதியில் உயிருடன்தான் இருந்தோம். அதில் உள்ள



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கையொப்பம் என்னுடையதுதான். என்னிடம் காட்டப்படும்
ஆவணத்தில் உள்ள கையொப்பம் மட்டும் வா.சா.ஆ.8.”

19. Therefore, on perusal of Exhibit A.8, it is clear that the ninth defendant already partitioned her share over the property and again she is claiming share over the suit properties. Therefore, she is not entitled to any share over the property. However, in the plaint, the second item of the entire property was mentioned and thereby, an extent of 1 acre 66.2/3 cents within the four boundaries of west by 'B' schedule, east by 'A' schedule north by Savarimuthu Udayar and south by Joseph Udayar as marked in the partition deed, dated 22.05.2000 and 10 Cashewnut trees are to be excluded from the suit property. Since already property was allotted to the appellant / ninth defendant through partition deed, dated 22.05.2000, she is not entitled to any share over the suit properties.

Point No.4:

20. The plaintiff has filed the suit for partition and for permanent injunction. The Trial Court has decreed the suit for partition and the relief of permanent injunction was declined. There is no appeal or cross objection filed as against the relief of permanent injunction by the



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plaintiff. The present appeal is only filed by the ninth defendant as against the refusal of partition for her share. The Trial Court in the judgment elaborately discussed about the entitlement of the ninth defendant over the suit properties and she already entered into partition in the year 2000 itself along with some of the legal heirs of the deceased Durairaj and now, the present suit is only in respect of the share of Durairaj @ Kulandaisamy. The plaintiff is one of the legal heirs of Durairaj @ Kulandaisamy. Therefore, the Trial Court after considering the evidences adduced on both sides, correctly decreed the suit in favour of the plaintiff and decline to grant any relief to the ninth defendant. Therefore, the judgment and decree passed by the Trial Court are in order as per law and warrants no interference.

Point Nos.5 & 6:

21. In the Trial Court, the schedule of property, the extent in S.F.No. 183/7 was described as suit properties. But in the partition deed, dated 22.05.2000, the ninth defendant was allotted share in S.F.No.183/7, an extent of 1 acre 66.2/3 cents with specific boundaries. Therefore, the plaintiff is entitled for partition over the suit properties excluding the



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second item of the property for an extent of 1 acre 66.2/3 cent. This Court already decided in the previous points and as per the discussion made in point Nos.1 to 5, the plaintiff is entitled to share over the properties of schedule mentioned property excluding the second item of property with an extent of 1 acre 66.2/3 cent and the appellant is not entitled to any relief through this appeal. Thus the points are answered.

22. In the result, this Appeal Suit stands partly allowed and the judgment and decree passed by the Trial Court in respect of the partition is modified to the effect that the plaintiff is entitled to 1/9th share over the suit properties excluding an extent of 1 acre 66.2/3 cent in S.F.No.183/7 in the second item of the property. There shall be no order as to costs.

21.03.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes
BTR

To

1.The II Additional District & Sessions Judge,
Thanjavur.



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2. The Section Officer,
Vernacular Record Section,
Madurai Bench of Madras High Court,
Madurai.



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