



S.A.(MD)No.354 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 16.10.2024

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A(MD)No.354 of 2018

and

C.M.P(MD)No.10109 of 2018

SahayaSavarimuthu (Died on 22.09.2014)

1.Pushpam

2.Anto Sabetha

3.Soosai Anthony George

... Appellants / 3rd Parties /
3rd Parties /

LRs of deceased sole appellant

-Vs-

1.S.Siluvai Antony

*(Memo dated 14.02.2024 in USR.No.5878
is recorded to the effect that issuance of
notice to the first respondent is dispensed
with, as he was set ex-parte before the
Courts below, vide order of this Court
dated 04.03.2024 made in S.A(MD)No.
354 of 2018)*

2.Michael Savarimuthu

3.S.George Ammal

4.M.Kuruz Mary Marthal

*(Cause title accepted vide order of this
Court dated 16.06.2017 made in*



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S.A.(MD)No.354 of 2016

***C.M.P(MD)No.5204 of 2017 in
S.A(MD)No.SR 10609 of 2012)***

... Respondents /
Respondents /
Defendants

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, to allow this Second Appeal by setting aside the judgment and decree dated 16.12.2010 in A.S.No.3 of 2010 of the Court of Principal Subordinate Judge, Nagercoil confirming the judgment and decree dated 29.10.2009 in O.S.No.581 of 2006 of the Principal District Munsif Court, Nagercoil dismissing the plaintiff's suit and the plaintiff's suit be decreed with costs as prayed for or in the alternative, the suit remanded to the trial Court for fresh disposal according to law and as such this Second Appeal be kindly allowed.

For Appellants : Mr.V.Meenakshi Sundaram
for Mr.D.Nallathambi

For Respondents : Mr.T.Selvakumaran
for R.2 & R.4

No Appearance for R.3

JUDGMENT

Heard both sides.

2.The suit property belonged to Susaimarian / father of the plaintiff and defendants 1, 2 and 3. The fourth defendant is the wife of the second defendant. The suit property according to the plaintiff measures 3 cents. It was a part of a larger extent. It is not in dispute that during his lifetime Susaimarian had settled 2 cents of property forming a part of the larger



extent in favour of his wife Savariammal. Savariammal had settled the said 2 cents of land in favour of his daughter George Ammal. It is also not in dispute that the first defendant Siluvai Antony had sold his share in the suit property in favour of D.2 and D.4. It also appears George Ammal was satisfied with what was settled in her favour.

3.The plaintiff Sahaya Savarimuthu filed O.S.No.581 of 2006 for partition and separate decision of his 1/3rd share over the suit property. The suit was dismissed vide judgment and decree dated 29.10.2009. Questioning the same, the plaintiff filed A.S.No.3 of 2010 before the Principal Sub Court, Nagercoil. The first appellate Court also confirmed the decision of the trial Court vide judgment and decree dated 16.12.2010. Challenging the same, this Second Appeal came to be filed.

4.In the meanwhile, the plaintiff passed away and his legal heirs are prosecuting the second appeal. The second appeal was admitted with the following substantial question of law:

“Are the courts below right in dismissing the plaintiff's suit for partition which is equitable relief / when his right over the property is not denied by the respondents nor there is any finding against him regarding his right to 1/3rd share over the plaint schedule property?

2.Whether the Courts below were justified in



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dismissing the suit for partition when the contesting defendants conceded the plaintiff's share over the suit property.”

The Courts below dismissed the suit on the only ground that there is some doubt regarding the extent of the property.

5.This could not have been a tenable ground for non-suiting the plaintiff. The contesting defendants, namely, D.2 and D.4 in their written statement nowhere controverted the plaintiff's averments as regards the tracing of title. Applying the rule on non-traverse one can conclude that the suit property originally belonged to Susaimarian.

6.After taking into account the settlement of 2 cents of land in favour of George Ammal, sister of the original plaintiff, according to the plaintiff, 3 cents of land still remained and that he is entitled to 1/3rd share therein. In other words, the plaintiff laid claim over 1 cent of land in the suit property. The only point of controversy was whether the defendants 2 and 4 are residing in the house put up by Savariammal, the mother of the plaintiff and D.1 to D.3. The contesting defendants claim that Savariammal had put up construction and it bears the Door No.12/99 on Alagappapuram Village. They further claim that the said house was in dilapidated condition and that after the demise of Savariammal, D.2 and D.4 after getting permission from the local body put up a new construction. It bears Door No.12/99A.



They have also contended that D.4 purchased the first defendant's share under Doc.No.3495/2006 on 19.09.2006. The written statement ended as follows "Hence it is most humbly prayed that this written statement may be accepted and preliminary decree for partition may be passed in terms of the written statement". D.1 and D.3 remained ex-parte. From that one can conclude that all the contesting defendants wanted preliminary decree to be passed granting 1/3rd share in favour of the plaintiff and 2/3rd share in favour of the defendants 2 and 4.

7.When the defendants themselves have taken such a stand, the trial Court should have simply passed preliminary decree accordingly. It was virtually a case of submitting to decree. Instead it is quite possible that extent of the suit property was slightly more than 3 cents. But that need not have prevented the trial Court from passing the preliminary decree as prayed for.

8.In this view of the matter, the substantial question of law is answered in favour of the plaintiff. The judgments and decrees passed by the Courts below are set aside. The preliminary decrees passed declaring that the plaintiff is entitled to 1/3rd share in the suit schedule property or 1 cent whichever is less. The contesting defendants 2 and 4 shall work out their equities in the final decree proceedings.



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9.This Second Appeal is allowed accordingly. No costs.

Consequently, connected miscellaneous petition is closed.

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16.10.2024

Internet : Yes/No

Index : Yes/No

NCC : Yes/No

MGA

To

1.The Principal Sub-ordinate Judge,
Nagercoil.

2.The Principal District Munsif Court,
Nagercoil.

Copy To

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



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S.A.(MD)No.354 of 2018

G.R.SWAMINATHAN.J.,

MGA

Judgment made in
S.A.(MD)No.354 of 2018

16.10.2024