



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : **25.10.2024**

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CORAM

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

S.A.No.459 of 2004

Stanislas

... Appellant/6th defendant

Vs.

1.Pankiraj (Died)

...Plaintiff/1st defendant

2.Lukkas(Died)

3.Thanislas (Died)

4.Pathalias

5.Alex

6.Mrs.Patrice Rajam

7.Nickolos

8.Louis John

9.Minor Michael Sujin

(Minor rep. by its mother and natural
guardian Maria Pushpha Bai)

10.Maria Pushpha Bai

(Respondents 7 to 10 are brought

on record as LR's of the deceased

1st respondent vide Court order

dated 18.03.2022 made in

C.M.P(MD)Nos.10711, 10713, 10715 to 10721/2021)

11.L.Jeyasingh

12.Annie Darling Bai

(Respondents 11 and 12 are brought on

record as LR's of the deceased

2nd respondent vide Court order dated

18.03.2022 made in C.M.P(MD)No.10711,

10713, 10715 to 10721/21)

13.Louis Mary



14.Stalish S.M.Shijo

15.Stalish S.M.Joshi Theresh

(Respondents 13 to 15 are brought on record
as LR's of the deceased 3rd respondent
vide Court Order dated 18.03.2022 made in
C.M.P(MD)Nos.10711, 10713,
10715 to 10721/21)

.... Respondents

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree, dated 06.04.1999 made in A.S.No.64 of 1997, on the file of the Principal Sub-Court, Nagercoil confirming the judgment and decree dated 10.03.1997 made in O.S.No.1085 of 1992, on the file of the Principal District Munsif, Nagercoil.

For Appellant	: Mr.T.Selvakumaran
For R4 to R6	: No appearance
For R7	: Mr.G.Cenil
For R8 to R15	: No appearance

JUDGMENT

The appellant, who is the sixth defendant, filed the present appeal against the judgment and decree, dated 06.04.1999 made in A.S.No.64 of 1997, on the file of the Principal Sub-Court, Nagercoil confirming the judgment and decree, dated 10.03.1997 made in O.S.No.1085 of 1992, on the file of the Principal District Munsif, Nagercoil.

2. For the sake of convenience, the appellant and the respondents shall be referred to as per their ranks in the plaint, as the defendant and plaintiffs respectively.



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3. The plaintiff, who is the first respondent in the present appeal, filed a suit in O.S.No.1085 of 1992 before the Principal District Munsif, Nagercoil, for partition.

4. On analyzing documentary and oral evidence, the learned Principal District Munsif, Nagercoil has decreed the suit. Aggrieved by the judgment and decree of the trial Court, the defendants 1 to 4 filed an appeal before the Principal Sub-Court, Nagercoil which is taken on file in A.S.No.64 of 1997. Considering the pleadings evidences, judgment and decree of the trial Court, the learned Principal Sub Judge, Nagercoil has dismissed the appeal by confirming the judgment and decree of the trial Court. Aggrieved over the same, the sixth defendant has filed the present appeal.

5. The case set-up by the plaintiff in the plaint is as under:-

(i) The plaint schedule properties belongs to one Gnanaprakasam who is the father of plaintiff and first defendant and the paternal grand father of defendants 2 to 5. The father of defendants 2 to 5 Maria Retna Nayagam and Gnanaprakasam died



and their properties were enjoyed by the plaintiff and defendants in Oodukoor. In the plaint schedule item 1 plaintiff and first defendant has constructed houses and residing there. But till now no metes and bounds partition was effected. The failure of metes and bounds partition makes much inconvenience to the plaintiff for enjoyment and improvements of the properties. Plaintiff several times demanded with the defendants for an out of Court settlement regarding the plaint schedule properties. But the defendants are not amenable for the same. The defendants tried to construct building appropriating more road frontage. Defendants 2 to 4 have already constructed house in separate plot.

(ii) On 20.08.1991 the defendants tried to demolish the family house situated in plaint item 1, numbering 4-16B with a view to construct new structures occupying the road frontage. The defendants tried to demolish the family house and the act of demolition was stopped due to the timely intervention of the plaintiff. The plaintiff is entitled 1/3 share in the family house and utensils. The plaintiff is doing his business at Nagercoil and the defendants may at any time demolish the family house and appropriate the valuable wood in the house.



(iii) The plaintiff is entitled 1/3 share in the plaint schedule properties and house and 1st defendant is entitled for 1/3 share in the plaint schedule properties and house and defendants 2 to 4 together entitled for 1/3 share. Plaintiff is entitled to get his share partitioned by metes and bounds through Court allotting proportionate road frontage to him.

(iv) On 19.08.1991 the defendants have tried to cut 2 jack trees standing in the plaint schedule item 2. The illegal act of cutting and removing trees were prevented by the plaintiff due to his timely intervention. The original records of the properties are with the first defendant. Therefore, he filed a suit for partition.

6. The defence set-up by the defendants 2 to 4 & 6 in the written statement is as under:-

(i) The averments in para 2 of the plaint are false and hereby denied. As a matter of fact the plaint schedule item No.1 and other adjacent properties comprised in old survey No.7255 are having an area of 2 acres 6 cents. Out of this area, about 20 cents were dedicated for the formation of a road. As per the family right declared in O.S.No.62 of 1959, 1/12th share is allotted to the plaintiff and the defendants. Out of the said family right plaintiff is entitled for 1/3



share. In the area allotted to the plaintiff, he has put up terraced house and he leased out to others. As stated above, the properties were already partitioned as per family arrangement and parties are enjoying separately. It is also false to say that the defendants are trying to construct building appropriating more road frontage. It is admitted that we have constructed house in the separate plots allotted to them as per the family arrangement. As per the said family arrangement 5 3/4 cents area in item No.1 has been allotted to the plaintiff and he has constructed compound wall and houses within that area. The excess area available in item No.1 belongs to these defendants which has been adjusted from other family members. The plaintiff has no right over item No.1 except the 5 3/4 cents already allotted. All the remaining portion belongs to these defendants and the same is in possession of these defendants with well defined boundary. Item No.3 of the plaint property has been allotted to the plaintiff as per the said family arrangement and he has put up concrete compound wall surrounding the same. The alleged date of attempt is a false plea of the plaintiff. No such attempt takes place. The plaintiff is not entitled for 1/3 share in the plaint schedule property item No.1. As stated earlier, all the sharers of the suit survey number properties including the plaintiff entered into an oral partition arrangement in respect of the suit survey number properties long ago.



As per that partition arrangement shares have taken their shares in one or two items in lieu of their fractional share. As per that arrangements 5 3/4 cents area in item No.1 has been allotted to the plaintiff. The same has been noted by the commissioner appointed in O.S.No.1121 of 1992. The plaintiff has constructed houses and compound wall and 2 of the houses are leased out to others. All the parties to that partition arrangement has put up boundaries to their respective plots including the plaintiff. Since the properties have been already partitioned the same cannot be reopened and the present suit for the same is not maintainable. The present suit is fraudulently and collusively filed with a view to give unnecessary hardship to these defendants and prayed for dismissal of the second appeal.

7. Before the trial Court, the plaintiff himself was examined as P.W.1 and Ex.P1 to Ex.P.17 were marked. On the side of the defendants, D.W.1 & D.W.2 were examined and Ex.D1 to Ex.D35 were marked and Court documents Ex.C1 to Ex.C3 were marked.

8. On the basis of the rival pleadings made on either side, the trial Court, after framing necessary issues and after evaluating both oral and documentary evidence, had decreed the suit. The learned Principal District Munsif was given a finding that the sale deed in



favour of the present appellant is valid and binding on the parties with respect to their respective shares.

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9. Aggrieved by the judgment and decree of the trial Court, the defendants 2 to 4 filed an appeal before the Principal Sub-Court, Nagercoil which is taken on file in A.S.No.64 of 1997. The first appellate Court, after hearing both sides and upon re-appreciating the evidence available on record, had dismissed the appeal by confirming the judgment and decree of the trial Court. But the appellate Court reversed the finding with respect to the sale in favour of the present appellant. Therefore, challenging the said concurrent judgment and decree passed by the first appellate Court, the sixth defendant has filed the present appeal.

10. At the time of admitting the present second appeal, this Court had formulated the following substantial questions of law for consideration:

"i) Whether the first appellate Court is right in reversing the finding with respect to the sale in favour of the additional sixth defendant by the first defendant and the additional fifth defendant?

ii) Whether the admissions made by the plaintiff with respect to the property purchased and owned by the additional sixth defendant can be overlooked by the first appellate Court?



iii) Whether the sale in favour of the additional sixth defendant is not valid as per law?

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11. The learned counsel appearing for the appellant would submit that appellate Court erred in reversing the finding regarding the sale in favour of this appellant by the second respondent herein, inspite of confirming the judgment and decree of the trial Court. The learned Sub Judge ought to have held that this appellant had purchased only 1/3 share of the second respondent herein of the plaint schedule item No.2. The learned Sub-Judge ought to have held that when the plaint schedule item is only 17 1/2 cents and it is the case of the plaintiff also that he is entitled only to 1/3 share out of 18 cents the purchase made by this appellate with respect to 6 cents from the second respondent herein. First defendant in the suit is absolutely valid. The learned Sub-Judge ought to have held that the learned trial Court Judge was correct in holding that the sale by the first defendant in the suit in favour of this appellant with respect to this 1/3 share is valid. The appellate judge failed to appreciate the fact that a final decree has been passed with respect to the property purchased by this appellant regarding 3/4 cents in S.No.358/26C from the Additional 5th defendant in O.S.No.673/90 by the Principal District Munsif Court, Padmanabhapuram. The learned Judge erred in holding that since the



plaintiff is not a party to O.S.No.673/90 the decree is not binding on the plaintiff. The learned Judge ought to have held that the plaintiff himself admits that plaint schedule item 2 had already been partitioned and that the first defendant and the Additional 5th defendant had sold their respective shares to the Additional 6th defendant. The learned Judge ought to have held that the plaintiff does not seek any relief from the Additional 6th defendant and the plaintiff also admits the fact that mutation of names have been effected subsequent to the purchase by the additional 6th defendant. The learned Judge ought to have held that it is nobody's case that the Additional 6th defendant is not enjoying the 6 3/4 cents purchased by him in plaint schedule item 2. The learned Subordinate Judge erred in decreeing the suit with respect to item No.2 of the plaint schedule property.

12. The learned counsel appearing for the respondents would submit that the trial Court and the first appellate Court after hearing both sides and upon re-appreciating the evidence available on record, had rightly allowed the suit and appeal and there is no interference is required. Hence, he prayed for dismissing the appeal.

13. I have heard the learned counsel for the appellant and the



respondents and also perused the materials on record carefully.

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14. The learned counsel for the appellant would submit that originally the suit was decreed in O.S.No.1085 of 1992 by the Principal District Munsif, Nagercoil seeking for partition of 1/3rd share in the properties. Various properties have been given in the plaint, but trial Court has passed the preliminary decree of 1/3 share in favour of the plaintiff in respect of first three plaint schedule properties and also directed the defendants 1 to 4 to pay costs to the plaintiff. Aggrieved by the same, the defendants 2 to 4 have filed an appeal, in which, the appellate Court has also dismissed the appeal dated 06.04.1999 by confirming the judgment and decree of the trial Court.

15. Aggrieved by the order, the 6th defendant/appellant has filed the present appeal stating that he has purchased 1/3 share of the property from the first defendant and he is entitled to 1/3 share. He claims that the trial Court ought to have allotted 1/3rd share in the plaint schedule item No.2 in his favour. He would submit that the Court ought to have passed the final decree with respect to the property purchased by the appellant regarding 3/4 cents in S.No.



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358/26C from the Additional 5th defendant in O.S.No.673 of 1990 by the Principal District Munsif Court, Padmanabhapuram. But the Court has held that since the plaintiff is not a party to O.S.No.673/1990 the decree is not binding on the plaintiff and the same has to be set aside.

16. As the plaintiff has not sought for any relief from the appellant herein, mutation has been effected subsequent purchase by the 6th defendant/appellant herein and stated that the Courts below have failed to appreciate the fact that a final decree has been passed with respect to the property purchased by this appellant regarding 3/4 cents from the Additional 5th defendant in O.S.No.673 of 1990. It is to be seen that even before the Court in the preliminary proceedings, appellant's case has been considered that he is entitled for 6 3/4 cents out of 7 1/2 cents purchased from the first defendant. In the second schedule property in S.No.358/26C he is entitled to 3/4 cents i.e., 1/5 share. On 03.06.1997 he has partitioned the property and patta has been issued in his favour. Now, he is not concerned with the suit and seek for only 1/3 share. The trial Court can consider the claim of the appellant herein and if at all the first defendant is entitled to 1/3rd share in the said survey 358/26-C, this appellant is entitled to step into the shoes of the first defendant. No other claim can be made by the appellant which has been admitted in the grounds of appeal.



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17. In view of the above, the second appeal is disposed of.
However, there shall be no order as to costs.

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Index : Yes/No
Internet : Yes/No
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To

- 1.The Principal Sub-Court,
Nagercoil.
- 2.The Principal District Munsif,
Nagercoil.
- 3.The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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V.BHAVANI SUBBAROYAN, J.

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Judgment made in
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