



A.S.(MD)No.112 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 01.04.2025

CORAM

**THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
and
THE HONOURABLE MR.JUSTICE M.JOTHIRAMAN**

**A.S.(MD)No.112 of 2018
and
C.M.P.(MD)No.5766 of 2018**

Gurusamy Maniyakarar

... Appellant

Vs.

Mariappan Maniyakarar

... Respondent

Prayer : Appeal Suit filed under Section 96 of Civil Procedure Code, to set aside the judgment and decree dated 02.01.2018 made in O.S.No.34 of 2013 on the file of the II Additional District Court, Tuticorin.

For Appellant : Mr.S.Siva Thilakar

For Respondent : Mr.J.Parekhkumar



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JUDGMENT

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This appeal arises out of a suit for partition. The appellant herein filed O.S.No.34 of 2013 on the file of the II Additional District Court, Thoothukudi claiming half share in the suit schedule properties. The appellant and the respondent herein are brothers. Their father / Muthurakumaniyam was twice married. The appellant and the respondent are the sons born through the first wife / Avudai Parvathi. Apart from the parties herein, there was a daughter by name, Rajalakshmi born through the first wife. Muthurakumaniyam got married to one Asuvathi, who was the sister of Avudai Parvathi. Through the second wife, as many as four daughters were born.

2.The respondent herein who was shown as the sole defendant filed written statement. In the written statement, the defendant expressed his no objection for partitioning the suit first schedule. However, he claimed that the suit second schedule was his self acquired and absolute property.



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3. Based on the pleadings, the Court below framed the necessary issues. The plaintiff examined himself as P.W.1 and Exs.A1 to A3 were marked. The defendant examined himself as D.W.1 and two other witnesses were also examined on his side and Exs.B1 to B4 were marked. Through the witnesses also, certain documents were marked. The trial Judge vide judgment and decree dated 02.01.2018 dismissed the suit. Challenging the same, this appeal came to be filed.

4. The learned counsel for the appellant wanted us to remand the matter to the file of the trial Court.

5. Per contra, the learned counsel for the respondent submitted that the impugned judgment and decree do not warrant interference. He pointed out that the suit first schedule was already partitioned way back in the year 1975. The learned counsel further pointed out that the plaintiff himself admitted this factual aspect. The suit first schedule was partitioned into three. One share was taken by the plaintiff. One share was allotted to the defendant. One share was taken by the father / Muthurakumaniyam. It appears that the share allotted to the father was



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settled by him during his life time in favour of the second wife /
Asuvathi.

6. According to the learned counsel for the respondent, the first suit schedule was not amenable to partition.

7. This argument undoubtedly is having considerable force and substance. Unfortunately, this argument runs counter to the own pleading of the respondent. Having pleaded twice in the written statement that the suit first schedule can be partitioned, it does not lie in the mouth in the respondent to now argue to the contrary before this Bench.

8. That apart, the document whereby the so-called 1/3rd share of the father was settled in favour of the second wife was also not marked before the Court below. If at all, it can only be adduced before us by way of additional evidence.

9. The question that arises for consideration is whether in the absence of pleading, such an evidence can be allowed to be adduced.



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10.As regards the suit second schedule, according to the plaintiff averment, it is a joint family property though it stands in the name of the defendant. As far as suit second schedule is concerned, the Court below had negatived the plea for partition in a single sentence. The Court below had noted that suit second schedule stands in the name of the defendant in view of Ex.B1/ sale deed dated 20.10.1970. After recording that the defendant is in possession as evidenced by the revenue record, the Court below had held that the plaintiff cannot have share in the said property. We are of the view that this contention advanced by the learned counsel for the plaintiff have not been dealt with or adverted to by the Court below.

11.The suit also suffers from the vice of non-joinder of necessary parties. The plaintiff ought to have impleaded his sister / Rajalakshmi as well as the four half sisters. The manner in which the suit had been disposed of is highly unsatisfactory.



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12.In this view of the matter, we set aside the impugned judgment and decree and remand the matter to the file of the trial Court. We grant liberty to the plaintiff to implead his sister and half sisters. We make it clear that the evidence already adduced by the plaintiff will very much hold and it will not be effaced. The parties are at liberty to adduce further evidence.

13.The appeal is allowed accordingly. No costs. Consequently, connected miscellaneous petition is closed.

(G.R.S. J.) & (M.J.R. J.)
01.04.2025

NCC : Yes/No
Index : Yes / No
Internet : Yes/ No
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To:

The II Additional District Court,
Tuticorin.



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The Section Officer,
ER/VR Section,
Madurai Bench of Madras High Court,
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