

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.01.2017

CORAM

THE HON'BLE MR. JUSTICE M.M.SUNDRESH

Second Appeal No.1027 of 2015

Parasuraman

... Appellant/6th Defendant

Vs

1.Balakrishnan
2.Pazhani
3.Raja

... Respondents/Defendants 2 to 4

Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 13.03.2015 passed in A.S.No.14 of 2014 on the file of the Subordinate Judge, Arni, confirming the judgment and decree dated 17.02.2014 passed in I.A.No.216 of 2011 in O.S.No.180 of 1986 on the file of the District Munsif, Polur.

For Appellant : Mr.M.Rajasekhar

For Respondents : M/s.PASS Associates

JUDGMENT

The suit has been laid by the plaintiff, seeking maintenance, partition and mesne profits on the premise that she is the first wife of the first defendant Kuppa Gounder. The appellant, who has been arrayed as the 6th defendant in the suit, is none other than the son of the plaintiff. As the suit was not contested, a preliminary decree was passed for 1/3rd share in favour of the plaintiff. Placing reliance upon the said preliminary decree dated 24.09.1986, the appellant filed a separate suit for declaration as the original plaintiff in the present suit died by that time. Thus, the plaintiff has sought among other things, enlargement of his share. The subsequent suit filed in O.S.No.41 of 2001 was dismissed, holding that inasmuch as no final decree has been passed in the present suit viz., O.S.No.180 of 1986, the appellant can very much work out his remedy under the same. The enlargement of the share of the appellant is not only on the premise that the original plaintiff in the present suit is no more but also on the ground that the

first defendant, who is none other than his father, is also no more. As against the dismissal of the suit filed by the appellant, he filed an appeal in A.S.No.77 of 2008, which was also dismissed by the Sub Court, Arani. Though no further appeal has been filed against the aforesaid decisions, the appellant has filed the final decree proceedings in the present suit. It was dismissed by the Courts below on the ground that the same would be barred by the principle of res judicata. Challenging the same, the present second appeal has been filed.

2.At the time of admission, the following substantial questions of law have been framed:

(1)Whether the appellant is entitled for a final decree based on the preliminary decree passed in O.S.No.180 of 1986 wherein the right of his mother was only for maintenance and to have a charge over the property belonging to the husband?

(2)Whether the final decree passed in I.A.No.216 of 2011 in favour of the mother of the appellant is void since she died even before passing of the final decree?

(3)Whether the appellant is entitled for a final decree ignoring the final decree passed in I.A.No.216 of 2011?

(4)Whether the claim of the plaintiff for passing of final decree is barred by limitation?

3.At the time of hearing the appeal, the following additional substantial question of law has been framed:

Have not the Courts below committed an error of law in dismissing the application filed by the appellant in not treating it as a one seeking a fresh preliminary decree in the light of the death of the parties to the suit?

4.Based upon the above additional substantial question of law, the learned counsel for both sides have been permitted to make their submissions.

5.Learned counsel appearing for the appellant submits that the question of res judicata would not arise in a suit for partition. Therefore, the judgment and decree rendered by the Courts below would require modification.

6.Learned counsel appearing for the respondents submits that the appellant, having not filed an application seeking

fresh preliminary decree, the Courts below have rightly rendered the judgments and therefore, no interference is required.

7.Law is quite settled on two aspects. In a partition suit, every party is deemed to be a plaintiff. Secondly, there is no limit to the number of preliminary decrees to be passed. This can be done either by the operation of law or by subsequent developments on facts. It is the specific case of the appellant that in view of the death of his mother and father, he is entitled for higher shares. This is a matter, which ought to have been adjudicated by the trial Court by treating the application as a one for fresh preliminary decree.

8.This Court does not want to stand on technicalities. However, the appellant himself, having filed an application for final decree, this Court is not willing to convert the application as one for preliminary decree. Therefore, while confirming the judgment and decree of the Courts below, it is hereby observed that the appellant is entitled to file fresh application for preliminary decree within a period of two months from the date of this judgment. As and when such an application is filed within the time granted, the trial Court will have to decide the same on its own merits as all the issues are left open both on facts and law.

9.With the abovesaid observation, the second appeal stands dismissed, leaving all the issues open. It is made clear that the trial Court will have to decide the application to be filed by the appellant for preliminary decree on its own merits without rejecting it on the ground of res judicata as the same would not arise. It is also made clear that the question of bar of limitation can also be raised by the contesting respondent. No costs.

Sd/-

Assistant Registrar(CS II)

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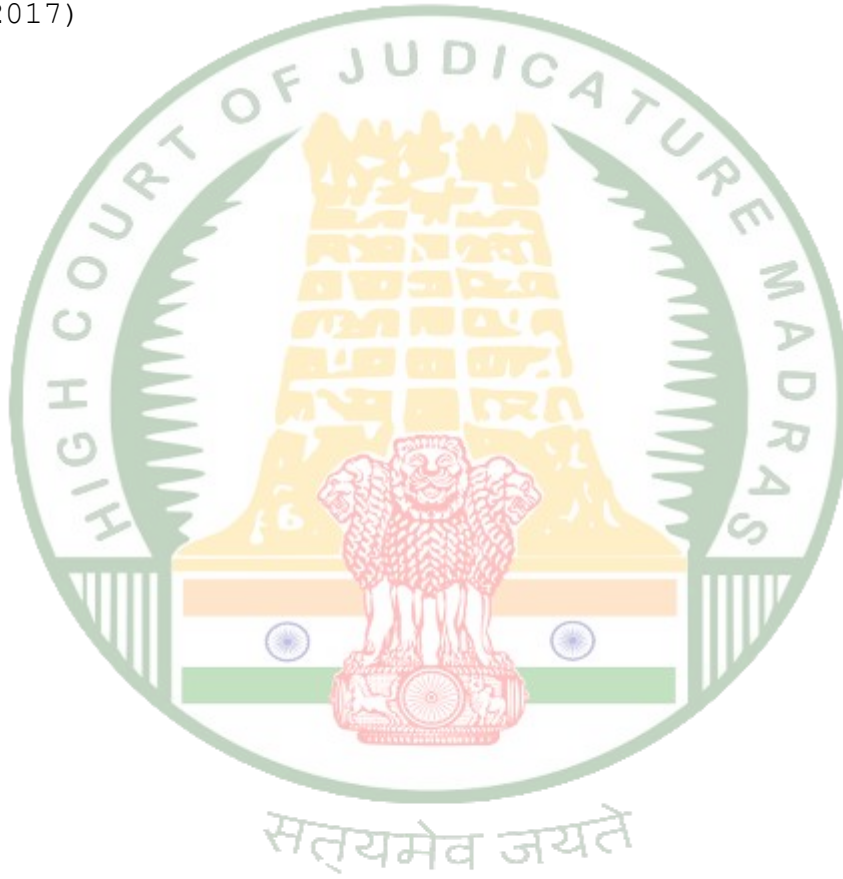
1. The Subordinate Judge,
Arni.
2. The District Munsif,
Polur.

3. The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to M/s.PASS Associates, Advocate, S.R.No.3434
+1cc to Mr.M.Rajasekhar, Advocate, S.R.No.3340

S.A.No.1027 of 2015

KJI (CO)
CA(14/02/2017)



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