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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :08.10.2021

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THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.S.No.281 of 2014

1.V.Arumugam @ Sundaramurthy

2.Nagammal

3.Saroja

...Appellants/Plaintiffs

Vs.

1.V.Vimalavathy

2.P.Kalivaradhan

3.Thamizhselvan

4.Pugazhendi

5.Vetriselvi

6.Balaji

7.P.Karthikeyan

8.K.Loganathan

...Respondents/Defendants

Prayer: Appeal Suit filed under Section 96 of the Code of Civil Procedure against the Judgment and Decree dated 29.10.2013 made in O.S.No.10 of 2012 on the file of the II Additional District Judge, Pondicherry.

For Appellants

:Mr.S.Mahimai Raj

For Respondents 1 to 7

:Mr.A.Muthukumar

For Respondent 8

:No Appearance



JUDGMENT

The unsuccessful plaintiffs in a suit for partition are the appellants before this Court. The suit appears to be a third suit filed in respect of the very same properties. The facts necessary for disposing of the instant appeal are set out herein below.

2. The properties which are the subject matter of the instant suit originally belonged to one Iyyakannu Kounder. The said Iyyakannu Kounder had seven sons, namely, Palanisamy Kounder, Perumal Kounder, Varadarasu Kounder, Kaliaperumal Kounder, Krishnan Kounder, Sengani Kounder and another son whose name is not set out.

3. The dispute in this suit is inter se between the legal heirs of Varadarasu Kounder. Varadarasu Kounder had two sons and two daughters, namely, Purushothaman @ Kanniappan, Arumugam @ Sundaramurthy, Lakshmi and Nagammal. The suit has been filed by Arumugam, Nagammal and Saroja D/o Lakshmi against the legal heirs of Purushothaman.

4. It is their case that the suit properties belonged to their father Varadarasu Kounder, who died intestate and on his death each of his children became entitled to his estate. The plaintiffs would further state that their father had received his share in the ancestral property left by his father Iyyakannu Kounder and had been in possession and enjoyment of the suit property after a partition had been effected between him and his brothers.

5. It is the case of the plaintiffs that some of the properties had been exclusively allotted to the said Varadarasu Kounder and in some other properties he was given a undivided share. Therefore, in respect of some of the properties he had a joint patta, whereas, in other properties he enjoyed an exclusive patta. The properties acquired as his share in the ancestral property are the suit properties.

6. The plaintiffs would contend that the properties that were purchased after the partition entered into between Varadarasu Kounder and his brothers were purchased in the name of deceased Purushothaman Kounder, the father of defendants 2 to 7 and the husband of the 1st defendant, he being the eldest male member of the family. The plaintiffs would contend that there was no partition between the plaintiffs and Purushothaman Kounder and all of them were living together and enjoying a common mess



along with their father.

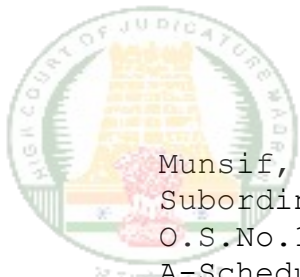
7. The plaintiffs would contend that the properties purchased in the name of the said Purushothaman Kounder were acquired through the joint labour and efforts of all the members of the family of Varadarasu Kounder and the income from the ancestral property had been used for the acquisition of the property in the name of the 1st defendant.

8. It is the case of the plaintiffs that after the death of Varadarasu Kounder on 18.04.1986, Purushothaman Kounder started behaving and conducting himself in a manner, which seriously impeded the joint enjoyment of the properties by sharers. The plaintiffs would therefore submit that this prompted the 1st plaintiff along with his sister the 2nd plaintiff and Lakshmi, the mother of the 3rd plaintiff to file a suit O.S.No.133 of 1992 on the file of the I Additional Subordinate Court, Puducherry, for a partition of the ancestral properties as well as the properties purchased in the name of the said Purushothaman Kounder. Pending the proceedings, the said Lakshmi died and her legal heir, namely, the 3rd plaintiff was brought on record as the 4th plaintiff and the son as the 4th defendant. The 4th defendant was also the son-in-law of Purushothaman Kounder.

9. In the suit O.S.No.133 of 1992, the plaintiffs had prayed for a partition of their 1/4th share each in the suit A, B and C schedule properties and also to make provision for paying the mortgage debt due to the 2nd defendant.

10. After the Trial, the learned I Additional Subordinate Judge, Puducherry, passed a preliminary decree on 20.01.2006. The decree held that each of the children of the Varadarasu Kounder was entitled to a 1/4th share in the properties except for Item Nos.1 to 3 and 4 (a) of the A-Schedule property. The plaintiffs would submit that as against the said Judgement and Decree, the legal heirs of Purushothaman Kounder and the 3rd defendant in the said suit had filed an appeal in A.S.No.307 of 2006 before the II Additional District Judge, Puducherry. This appeal came to be dismissed on 22.12.2009.

11. The plaintiffs would submit that as regards Item Nos.1 to 3 and 4 (a) of the A-Schedule property in the suit O.S.No.133 of 1992, Purushothaman Kounder had pleaded that his father Varadarasu Kounder was one among the seven sons born to Iyyakannu Kounder and since Purushothaman Kounder had purchased 1/7th share of his paternal uncle Sengeni Kounder he had filed O.S.No.484 of 1978 for partition before the I Additional District



Munsif, Puducherry. Thereafter, the learned I Additional Subordinate Judge, Puducherry had while passing a decree in O.S.No.133 of 1992, held that Items Nos.1 to 3 and 4 (a) of the A-Schedule property could not be partitioned as it had to await the result of the suit O.S.No.484 of 1978.

12. The plaintiffs would further contend that Purushothaman Kounder had obtained preliminary decree in O.S.No.484 of 1978 and had filed final decree proceedings in I.A.No.717 of 2006. However, he allowed the same to be dismissed for default on 09.04.2007. The plaintiffs would submit that they had approached the said Purushothaman Kounder and defendants 1 to 7 to arrive at an amicable partition with reference to the properties described as Item Nos.1 to 4 in the suit property which did not work out. They would submit that Item Nos.5 and 6 are properties that have been left out in the earlier suit for partition. The plaintiffs would therefore submit that it is in this backdrop that they have come forward with the present suit for partition of those items of properties that had been left out and those properties in respect of which no decree had been granted in the earlier suit O.S.No.133 of 1992.

13. The 2nd defendant had filed a written statement, which is adopted by defendants 1 and 3 to 7. In the written statement, the 2nd defendant had denied the claim of the plaintiffs that the properties had been acquired in the name of Purushothaman Kounder by using the income from the ancestral property. They would submit that the properties purchased in the name of their father Purushothaman Kounder was only from out of his self earnings and the contention that the properties had been purchased through joint labour and efforts of other members of the family of Varadarasu Kounder was totally incorrect.

14. The defendants would submit that the properties purchased in the name of Purushothaman Kounder were his exclusive properties, in which the plaintiffs did not have any right. They had also taken out a plea that the suit was barred by principle of res judicata as these properties were also the subject matter of the suit for partition instituted earlier. They had also taken a plea of non-joinder of necessary parties, since the other legal heirs of Iyyakannu Kounder had not been impleaded as parties in this suit.

15. The learned II Additional District Judge, Pondicherry on perusing the records, pleadings and evidence had framed the following issues:

"1. Whether the plaintiffs 1 and 2 are entitled



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to 1/4th share and plaintiff 3 and defendant No. 8 are entitled to 1/4th share in the scheduled properties?

2. Whether defendants 1 to 7 are entitled to render accounts of the income from the suit properties from 1990 onwards?

3. Whether suit is barred by resjudicata?

4. Whether the suit is bad for non-joinder of necessary parties?

5. What are the other reliefs, plaintiffs are entitled?"

16. The 1st plaintiff had examined himself as P.W.1 and marked Ex.A.1 to Ex.A.3. The defendants did not choose to cross examine the plaintiffs or enter the box to give evidence. Ultimately, the learned Judge had dismissed the suit on the ground that the suit was barred by res judicata and for non-joinder of necessary parties.

17. The plaintiffs have challenged this Judgement and Decree by way of this appeal.

18. The point for consideration that arises in this appeal is "Whether the suit is barred by res judicata as well as non-joinder of necessary parties?"

19. Mr.S.Mahimai Raj, learned counsel appearing on behalf of the plaintiffs / appellants would strenuously contend that in the earlier proceedings, the said Purushothaman Kounder was the 1st defendant and he had admitted that the plaintiffs were entitled to a share in the properties belonging to Varadarasu Kounder. He had as D.W.1 admitted as follows, "It is also true that we are entitled to equal shares in the ancestral properties i.e., the 'A' Schedule of properties".

The learned counsel would submit that this clear and categoric admission was enough to decree the suit. The learned counsel would submit that the right to file a suit for partition has been recognised by this Court in the Judgement and Decree in S.A.No.926 of 1991, wherein, the Court observed that Purushothaman Kounder had right to file a suit for partition as he had purchased a share from defendants 1 to 4 in the suit O.S.No.484 of 1978.

20. The learned counsel would further submit that in the earlier suit O.S.No.133 of 1992, there is a clear finding that the plaintiffs are entitled to a 1/4th share in the suit property. He would further submit that, since the said Purushothaman Kounder had allowed the final decree proceedings to be dismissed



for default, the plaintiffs with a view to protect their right have come forward with the instant suit.

21. Per contra, Mr.A.Muthukumar, learned counsel appearing on behalf of the defendants / respondents would submit that this suit is clearly barred by principles of res judicata, since in the earlier suit O.S.No.133 of 1992, the learned Judge has clearly held that the plaintiffs herein were entitled to a share in the suit A, B and C therein but had not granted partition of their 1/4th share in respect of the suit schedule property Item Nos.1 to 3 and 4 (a) of the A-schedule property therein. Item No.1 to 3 and 4 (a) of the A-Schedule property in the suit O.S.No.133 of 1992 are the very same properties covered under the instant suit.

22. The learned counsel would submit that the relief for partition was not granted in respect of these items of property on the ground that there was an earlier comprehensive suit O.S.No.484 of 1978, which had been filed by the said Purushothaman Kounder for a partition of the ancestral properties. These properties being the subject matter of the suit O.S.No.484 of 1978 also, the learned Judge had given the said finding.

23. The learned counsel would submit that the plaintiffs have not come forward with any subsequent evidence, which would give them a right to file this suit for the very same relief which has been turned down in the earlier round on the ground that it had to await result of the final decree in the suit O.S.No.484 of 1978.

24. The learned counsel would further submit that since the properties are undivided shares, the plaintiffs ought to have impleaded the legal heirs of the Iyyakannu Kounder and the Court below has rightly rejected the suit on the ground of non-joinder of necessary parties.

25. Heard the learned counsels and perused the records.

26. The legal heirs of Varadarasu Kounder are before the Court from the year 1978. The deceased Purushothaman Kounder had purchased a 1/7th share of his paternal uncle Sengeni Kounder in respect of all their properties. He had therefore filed a suit for partition of all the properties in O.S.No.484 of 1978. A preliminary decree had been passed and this was taken up on appeal and thereafter formed the subject matter of S.A.No.926 of 1991. The Judgement of this Court in the Second Appeal had held



that the plaintiff therein, namely, Purushothaman Kounder was entitled to a partition of the property purchased by him.

27. The plaintiffs herein had thereafter filed a suit O.S.No.133 of 1992 for partition and separate possession of the suit properties which had been described in detail in schedules A to D therein.

28. The learned Judge granted a decree for partition in respect of the A-schedule of property except for Item Nos.1 to 3 and 4 (a) of the A-schedule property, since these items were already the subject matter of the suit O.S.No.484 of 1978, as a part of the A-Schedule property. The learned Judge had observed that, in the light of the above, the property could not be partitioned at that stage without passing final decree. The learned Judge has observed as follows:

"Hence, those items of the properties which are shown in 'A' schedule in O.S.No.484 of 1978, which finds place in this suit 'A' schedule property, cannot be partitioned at this stage without passing the final decree in the previous suit. Hence, as far as those items are concerned this Court has to identify the same. Both the parties agreed that the item No.1, 2, 3 and 4 (a) are the four items, which finds place in the other suit in O.S.No.484 of 1978. Except those four items, the preliminary decree can be passed with regard to the other items. This issue is answered accordingly."

29. It is also seen that the said Purushothaman Kounder had filed proceedings for grant of final decree in I.A.No.717 of 2006 in O.S.No.484 of 1978. Further, the said petition was dismissed as steps had not been taken by order dated 09.04.2007. Therefore, the situation contemplated in the suit O.S.No.133 of 1992 continues to date as the final decree is yet to be passed in the suit O.S.No.484 of 1978. Therefore, it is clear that the suit is barred by the principle of res judicata.

30. As regards the issue of non-joinder in the suit O.S.No.133 of 1992, the Court had observed that the properties which was shown as the A-Schedule property in the said suit which included the suit schedule properties were the properties of Varadarasu Kounder. Therefore, there was no necessity to implead all the legal heirs of the said Iyyakannu Kounder. Therefore, it cannot be said that the suit is bad for non-joinder of necessary parties. I therefore answer the point for consideration regarding res judicata against the appellants and non-joinder in



favour of the appellants. The First Appeal is therefore dismissed.

31. However, the plaintiffs / appellants are at liberty to work out their remedies in the final decree proceedings I.A.No.717 of 2006 in O.S.No.484 of 1978 which has been instituted by the deceased Purushothaman Kounder, by filing necessary application for restoring the same, which was dismissed for default on 09.04.2007. With these observations, the First Appeal is dismissed. No costs.

Sd/-

Assistant Registrar(I)

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Sub Assistant Registrar

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To

1.The II Additional District Judge,
Pondicherry.

2.The I Additional District Munsif,
Pondicherry.

+1cc to Mr.A.Muthukumar, Advocate SR.No.53582

+1cc to Mr.Mahimai Raj, Advocate SR.No.53286

A.S.No.281 of 2014

BS (CO)

CB(16/03/2022)