



S.A.No.26 of 2018

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.04.2023

CORAM

THE HONOURABLE MRS. JUSTICE **R.HEMALATHA**

S.A.No.26 of 2018

Thangavelu

...Appellant

Vs.

1. Sumathi

2. Jawahar Prasad

3. Minor Ragunathan @ Yaswanth

Rep. by Guardian mother Sumathi

... Respondents

Prayer : Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 31.08.2015 passed in A.S. No.65 of 2013, on the file of the I Additional District Judge, Coimbatore, upholding the decree and judgment dated 29.09.2011 passed in O.S. No.91 of 2011, on the file of the Additional Sub Judge, Tirupur.

For Appellant : M/s. L.P. Varsha Vimanthan
for Mr. M. Velmurugan

For Respondents : Mr. Sharath P. Nair
for Ms. R. Sonia Glory



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JUDGMENT

The appellant is the defendant in O.S. No.91/2011 on the file of the Additional Subordinate Judge, Tiruppur. The respondents/plaintiffs filed the suit in O.S. No.91/2011 on the file of the Additional Subordinate Judge, Tiruppur, for partition of the suit property into three equal shares and to allot two such shares to the respondents 2 and 3 who are then minors represented by the 1st respondent and also for granting a decree of maintenance at Rs.1,000/- per month.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at appropriate places, their rank in the present appeal would also be indicated.

3. The case of the plaintiffs is that the suit property originally belonged to Udaya Gounder, who is the grand father of the defendant. After his death, there was a partition between his son Devanna Gounder and his grandson (defendant) through a registered partition deed (Ex.A2)



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dated 18.11.1999. The 2nd and 3rd plaintiffs were added as parties to the said partition deed. The defendant has been in possession and enjoyment of the suit property. Since he did not maintain the plaintiffs, they filed a suit O.S. No.696/99 before the Sub Court, Tiruppur for partition and maintenance in which the defendant agreed to maintain the plaintiffs. Thereafter, the said suit was allowed to be dismissed for default by the plaintiffs. Since the defendant did not keep up his promise, the plaintiffs filed the present suit in O.S. No.91/2011 on the file of the Additional Subordinate Judge, Tiruppur, for the abovestated relief.

4. The defendant in his written statement had averred that the suit property was already partitioned among the plaintiffs 2 and 3 and the defendant and therefore, the plaintiffs 2 and 3 are each entitled to 2/3 shares in the suit property. He had further averred that the 1st plaintiff already filed a petition before the Family Court, Coimbatore, claiming maintenance from the defendant and the said petition was allowed by directing the present appellant/defendant to pay a sum of Rs.750/- each per month to the plaintiff's 2 and 3 and the same was dismissed as



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against the 1st plaintiff as she was earning Rs.3,000/- per month.

Moreover the earlier suit filed by the plaintiff was dismissed for default and therefore, the present suit is hit by the principles of Res Judicata as per Section 11 of the Code of Civil Procedure

5. On the basis of the above pleadings, the trial Court framed the following issues :

- i. "Whether the 2nd and 3rd plaintiffs are entitled for a preliminary decree of partition as 2/3 share jointly in the suit property?
- ii. Whether the 1st plaintiff is entitled for a claim of maintenance as prayed for?
- iii. Whether the 2nd and 3rd plaintiffs are entitled for the maintenance amount as prayed for?
- iv. To what other relief?
- v. Whether the suit is hit by Section 11 CPC due to the dismissal of the earlier suit in O.S. No.696/99 on the file of Sub Court, Tiruppur, for default on 21.03.2005?



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6. In the trial Court, the 1st plaintiff examined herself and marked Ex.A1 to Ex.A4. The defendant examined himself and marked Ex.B1.

7. After full contest, the learned trial court judge, partly decreed the suit in favour of the plaintiffs and passed a preliminary decree for partition dividing the suit property into 3 equal shares and to allot 2 such shares to the plaintiffs 2 and 3, vide her decree and judgment dated 29.09.2011. However, the suit was dismissed with regard to the claim of maintenance made by the plaintiffs.

8. Aggrieved over the decree and judgment passed by the trial Court, the defendant filed an appeal in A.S.No.65 of 2013 before the I Additional District Court, Coimbatore. The learned I Additional District Judge, Coimbatore, after analysing the oral and documentary evidence adduced on both sides, dismissed the appeal filed by the defendant vide his decree and judgment dated 31.08.2015.



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9. Now the present second appeal is filed by the defendant.

Notice of motion was issued to the respondents and after several adjournments, the case was posted for hearing today. In the Memorandum of Second Appeal, the appellant has raised the following substantial questions of law. -

- i. " Whether the Lower Appellate Court had rightly invoked the provision of law under Order IX rule 9 C.P.C.?
- ii. Whether the Lower Appellate Court had rightly decided that the suit schedule property is an ancestral property?
- iii. Whether the Lower Appellate Court had rightly confirmed the judgment and decree of the Trial Court in O.S. No.91 of 2011 dated 29.09.2011?
- iv. Whether the Lower Appellate Court had rightly appreciated the exhibits filed along with the plaint?

10. Heard Ms. L.P. Varsha Vimanthan, learned counsel for the appellant and Mr. Sharath P. Nair, learned counsel for the respondents.



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11. Ms. L.P. Varsha Vimanthan, learned counsel for the appellant argued that the appellant/defendant in his written statement had specifically contended that since the property was already divided into three equal shares, the suit itself is not maintainable and that since already a suit in O.S. No.696/1999 was filed by the plaintiffs for the very same relief, the subsequent suit filed by the plaintiffs is hit by Order IX Rule 9 CPC.

12. Per contra Mr. Sharath P. Nair, learned counsel for the respondents would contend that since the earlier suit was filed against some other parties seeking a different relief, the present suit cannot be said to be hit by Order IX Rule 9 CPC and that there was no pleading in the written statement in this regard.

13. The learned counsel for the appellant contended that since this is a legal plea it can be taken up in the present second appeal.



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14. Pertinent it is to point out that the defendant in his written statement had contended that the earlier suit filed by the plaintiffs was dismissed for default and hence the present suit is hit by Res Judicata. There is no pleading to the effect that the present suit is not maintainable as the earlier suit was not restored to file under Order IX Rule 9 CPC. No issue was therefore framed on this aspect. Both the courts below, therefore, had mainly adverted their attention to the Principles of Res judicata and held that since the earlier suit was not decided on merits, the present suit is not barred by Res Judicata.

15. A perusal of records shows that the plaintiffs had filed a Reply Statement stating that the earlier suit though was filed for partition, was against different persons and that subsequent to the filing of the said suit the present defendant and his father partitioned their family properties on 18.11.1999 through a Registered Partition Deed. Therefore, the plaintiffs filed the present suit for partition of the properties allotted to the share of her husband (the defendant). The defendant as D.W.1 also admitted during the course of cross examination



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that the present suit properties were allotted to him and his minor children Plaintiffs 2 and 3 through the partition deed dated 18.11.1999. In the circumstances, it cannot be held that the present suit for partition is hit by Order IX Rule 9 CPC as the earlier suit was filed on different cause of action.

16. As far as the claim for maintenance is concerned, both the courts below had held that the 1st plaintiff's prayer for maintenance was dismissed as maintenance was awarded to the 2nd and 3rd plaintiff in M.C. No.56/06 on the file of the Family Court, Coimbatore, and the same was confirmed by this Court vide its orders dated 31.08.2009, in Crl.Rc. No.419/2009. Therefore, the claim of maintenance made by the plaintiffs cannot be sustained. The first appellate court upheld the findings recorded by the trial court. All the observations made by the trial court and the first appellate court are based on oral and documentary evidence. Since there is no substantial question of law involved in the present appeal, the same is liable to be dismissed.



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17. In the result,

- i. the Second Appeal is dismissed. No costs.
- ii. The decree and judgment dated 31.08.2015 passed in A.S. No.65 of 2013, on the file of the I Additional District Judge, Coimbatore, and the decree and judgment dated 29.09.2011 passed in O.S. No.91 of 2011, on the file of the Additional Sub Judge, Tirupur, are upheld.

28.04.2023

Index: Yes/No

Internet: Yes/No

Speaking/Non-Speaking order

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To

1. The I Additional District Judge, Coimbatore.
2. The Additional Sub Judge, Tirupur.
3. The Section Officer, VR Section, High Court, Madras.



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R. HEMALATHA, J.
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