



C.M.S.A.No.9 of 2004

IN THE HIGH OF JUDICATURE AT MADRAS

DATED : 07.07.2023

Coram

The Hon'ble Mr.Justice Krishnan Ramasamy

C.M.S.A.No.9 of 2014

and

M.P.No.1 of 2014

K.Periasamy

... Appellant

Vs.

1. K.Sundaraswamy
2. Veerathal (died)

Sole appellant and R-1 have already been recorded in this Appeal as legal heirs of the deceased R-2, vide order, dated 08.11.2019, made in this appeal and as per memo, dated 08.11.2019, (presented-in-court) are recorded.

...Respondents

This Civil Miscellaneous Second Appeal is filed under Section 100 of C.P.C., against the judgment and decree, dated 13.11.2013 passed in CMA.No.52 of 2012, on the file of the Principal District Court, Tiruppur, in confirming the fair and decretal order, dated 24.11.2010, passed in



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I.A.No.422 of 2010, in O.S.No.74 of 2005, on the file of the Subordinate Court, Udumalpet.

For Appellant : Dr.R.Gouri

For Respondent-1 : Mr.M.Guruprasad

Respondent -2 : Died

JUDGEMENT

This Civil Miscellaneous Second Appeal is filed against the judgment and decree, dated 13.11.2013 passed by the learned Principal District Judge, Tiruppur, in CMA.No.52 of 2012, whereby, the fair and decreetal order passed by the learned Subordinate Judge, Udumalpet in I.A.No.422 of 2010, in O.S.No.74 of 2005, dated 24.11.2010, is confirmed.

2. The appellant filed a suit for partition in O.S.No.74 of 2005, against his brother/first defendant and mother/second defendant in O.S.No.74 of 2005, on the file of the Subordinate Court, Udumalpet, (hereinafter, referred to as Trial Court) in respect of 'A' and 'B' schedule properties.



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2.1 The Trial Court, vide judgment and decree, dated 31.08.2006, passed a preliminary decree holding that the plaintiff is entitled to 1/2 share in respect of 'A' schedule property and 1/3rd share in respect of 'B' schedule property.

2.2 Against the said preliminary decree passed by the Trial Court, plaintiff preferred an appeal, in A.S.No.135 of 2006, on the file of the Principal District Judge, Coimbatore (hereinafter, referred to as First Appellate Court).

2.3 The First Appellate Court, vide judgment and decree, dated 14.07.2009, allowed the First Appeal.

2.4 Pursuant to a decree passed by the First Appellant Court, the first respondent herein filed an Interlocutory Application in I.A.No.422 of 2010, seeking to pass a supplementary decree, and the Trial Court, vide fair and final order, dated 24.11.2010, allowed the said Application.



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2.5 Against the fair and final order passed in I.A.No.422 of 2010, dated 24.11.2010, the plaintiff/appellant herein filed a Civil Miscellaneous Appeal in C.M.A.No.52 of 2012 before the Principal District Court, Tiruppur, and Principal District Judge, vide judgement and decree, dated 13.11.2013, dismissed the Appeal.

2.6 Challenging the dismissal order passed in CMA.No.52 of 2012, the present Civil Miscellaneous Second Appeal is filed.

3. Dr.R.Gouri, learned counsel appearing for appellant submits that the appellant filed a suit for partition in O.S.No.74 of 2005, against his brother/first defendant and mother/second defendant in respect of both 'A' and 'B' schedule properties. The Trial Court, vide judgment dated 31.08.2006, passed a preliminary decree holding that the plaintiff is entitled to 1/2 share in respect of 'A' schedule property and insofar as 'B' schedule property is concerned, 1/3rd share was allocated to appellant/plaintiff, first respondent/first defendant and second respondent/second defendant respectively. Challenging the said preliminary decree passed in respect of



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'A' schedule property, appellant herein preferred an Appeal Suit, in A.S.No.135 of 2006. The learned counsel contended that 'A' schedule property is purchased from and out of his own earnings, and therefore, he is entitled to 50% of the share. However, the First Appellate Court, while deciding the tenability of the preliminary decree passed by the Trial Court, proceeded to decided a larger issue and held that since the second respondent is not a legally wedded wife of the appellant's father, Kalliapa Gounder, she is not entitled to inherit the property belonged to her husband, inasmuch as, the suit properties are ancestral in nature and only the appellant and first defendant/first respondent, being his (Kalliapa Gounder) sons are entitled to equal share in the suit properties.

3.1 Learned counsel appearing for appellant submits that since the findings rendered by the First Appellate Court in A.S.No.135 of 2006 has attained finality, as there is no appeal over the same, the first respondent, taking advantage of the same, filed I.A.No.422 of 2010 to pass a supplementary decree, claiming to allot $\frac{1}{2}$ share in respect of 'A' schedule and $\frac{1}{3}$ rd share in 'B' schedule property and the Trial Court also swayed



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away by an impression that I.A.No.422 of 2010, was filed consequent to the judgment passed in A.S.No.135 of 2006, since the said Appeal Suit was preferred only against the preliminary decree passed in respect of 'A' schedule property, since no appeal was filed against 'B' schedule property, and persuaded by a thought that the text of the judgement made in A.S.No.135 of 2006, cannot be applied to 'B' schedule property, arrived at a wrong conclusion and thereby, allowed the application.

3.2 The learned counsel submitted that, the Trial Court failed to consider the important factor that the judgment passed by the First Appellate Court would be binding on 'B' schedule property as well and though the appellant, in the counter affidavit filed in I.A.No.422 of 2010, taken a plea for equal division of the properties in respect of 'B' schedule property as well, the Trial Court rejected the same and came to the conclusion that A.S.No.135 of 2006 was filed only with regard to preliminary decree passed by the Trial Court, in respect of 'A' schedule property, and therefore, the judgment and decree passed in First Appeal would get confined only in respect of 'A' schedule property and by holding



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so, passed a supplementary decree as sought for by the first respondent.

Against the order passed in I.A.No.422 of dated 24.11.2010, the appellant preferred C.M.A.No.52 of 2012, however, the same came to be dismissed on 15.02.2011.

3.3 It is the contention of the learned counsel for the appellant/plaintiff that both the Courts below have miserably failed to consider the entitlement of the parties over the suit properties and submitted that now, the second respondent/second defendant, viz., the mother of the appellant passed away, in which case, both sons are entitled to claim shares in respect of their mother's share equally, and therefore, she prayed for appropriate orders.

4. On the other hand, Mr.M.Guruprasad, learned counsel appearing for the first respondent/first defendant would submit that suit was filed for partition, wherein, preliminary decree was passed by the Trial Court passed. Against the preliminary decree passed with regard to 'A' schedule property alone, only appellant preferred Appeal in A.S.No.135 of 2006 and the First



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Appellate Court passed a judgement and decree only in respect of 'A' schedule property and therefore, supplementary decree can be passed only to the extent of 'A' schedule property, and therefore, both the Courts below rightly decided the issue with regard to 'A' schedule property. Further, the learned counsel would submit that with regard to 'B' schedule property, appellant's mother executed a Will in favour of first respondent on 20.06.2023, and therefore, fair and final order passed by the Trial Court in I.A.No.422 of 2010 in O.S.No.74 of 2005, which was confirmed in C.M.A.No.52 of 2012, warrants no interference.

5. In reply, learned counsel for the appellant would submit that the Will is a fabricated one. Once the second respondent's/mother's right over the property in respect of 'A' schedule property has been decided by the First Appellate Court and held that she is not entitled to inherit any share over her husband's property, as, she was not a legally wedded wife, the same yardstick has to be applied for 'B' schedule property as well, even though no appeal was preferred against the preliminary decree passed in respect of 'B' schedule property. However, the Courts below failed to consider the said



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aspect.

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6. I have given due consideration to the submissions made by Dr.R.Gouri, learned counsel for appellant and Mr.M.Guruprasad, learned counsel for first respondent and perused the materials on record.

7. The crux of the matter is that, mother of the appellant, viz. the second respondent herein (since deceased) is the third wife of the appellant's father and when a challenge was made with regard to division of the property in respect of 'A' schedule property in A.S.No.135 of 2006, it is decided by the First Appellate Court that the second respondent, (being mother of the appellant and first respondent) is not entitled to any share over the suit properties, as she is not legally wedded wife of the appellant's father, Kaliappa Gounder, and held that the appellant and first respondent alone are entitled to equal share with regard to 'A' schedule property. It is no doubt true that right/entitlement of the parties has been decided in respect of 'A' schedule property, inasmuch as, First Appellate Court decided the issue that the mother is not entitled to inherit any share in the property of



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her husband as far as 'A' schedule property is concerned. Based on the judgement passed by the First Appellate Court, the first respondent herein filed an Application before the Trial Court in I.A.No.422 of 2010, for passing supplementary decree, and. in the said application, though a plea was made by the appellant with regard to the equal division of the properties in respect of 'B' schedule property as well, the said request was not acceded to by the Trial Court and it is held that since the right of the appellant's mother, who was a third wife of appellant's father was decided only with regard to 'A' schedule property by the First Appellate Court, and as regards 'B' schedule property, no appeal is filed, and the findings of the First Appellate Court attained finality, the judgment passed thereunder would be binding only in respect of 'A' schedule property and in these circumstances, application was filed by the first respondent to pass supplementary decree in respect of both 'A' and 'B' schedule property, and The Trial Court also allowed the application for supplementary decree and rejected the plea taken by the appellant, in his counter affidavit, which was also confirmed by the First Appellate Court, in C.M.A.No.52 of 2012, aggrieved against which, the present appeal is filed.



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7.1 I am of the view that, at any costs, now the second

respondent/mother has passed away and hence, right with regard to 'B' schedule property has to be decided and for which purpose, the parties have to approach the Trial court by way of filing separate Application for supplementary decree as regards the issue as to whether the mother of the appellant is entitled to any share by virtue of her contribution made, either directly or indirectly, to purchase the properties, in which case, it would be appropriate for the Trial Court to decide her entitlement over the property, because, in the present case, said aspect has to be decided since the first respondent is claiming equal right with regard to his mother's share as well, since according to him, Will was executed in his favour by mother/second respondent. Therefore, in these circumstances, this Court is of the view that, it would be appropriate for the parties to approach the Trial Court by way of filing separate application for supplementary decree to decide the rights of the parties respectively. If any such application is filed, the Trial Court shall decide the matter on merits and while deciding the issue, the Trial Court shall take into consideration the judgment and decree passed by the First Appellate Court, in A.S.No.135 of 2006, dated 14.07.2009.



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WEB COPY 8. In the result, this Civil Miscellaneous Second Appeal is disposed of. Consequently, the interim order granted by this Court in M.P.No.1 of 2014 is vacated and the Miscellaneous Petition stands closed. No costs.

07.07.2023

To

1. The Principal District Judge, Tiruppur.
2. The Subordinate Judge, Udumalpet.



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Krishnan Ramasamy,J.,
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