



S.A(MD)No.1156 of 2008

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 14.02.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A(MD)No.1156 of 2008

T.Subramonian Asari

...Appellant

-Vs-

1.Parvathy

2.S.Sivathanu

3.S.Vasanth

4.S.Thanumoorthy

5.S.Krishnan

6.S.Kala

7.S.Iyyappan

8.Valliammal

9.Ramalingam

10.T.Krishnan

11.T.Padmanabhan



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12.T.Thankamma

13.T.Rajamma

14.T.Neelakantan

... Respondents

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the decree and judgment of the learned Subordinate Judge, Padmanabhapuram, dated 03.07.2007 made in A.S.No.128 of 2006 confirming the judgment and decree dated 19.04.2006 of the learned Additional District Munsif, Padmanabhapuram, made in O.S.No.892 of 1990.

For Appellant : Mr.K.N.Thampi

For R1 to R7
and R10 to R14 : Mr.V.M.Balamohan Thambi

For R8 : No appearance

JUDGMENT

The plaintiff in the suit is the appellant. The suit is for partition claiming 1/8th share in suit item-I and 1/6th share in suit item-II. The suit was dismissed in respect of suit item-I. However, the trial Court granted decree for



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partition in favour of the appellant for 57/378 share instead of $1/6^{\text{th}}$ share claimed by him in respect of Item-II. Aggrieved by the same, the appellant herein filed first appeal and the same was dismissed. Aggrieved by the concurrent findings, the appellant is before this Court.

2. According to the plaint averments, the first item of the suit property originally belonged to the Jathivetha Ankappan Asari and he died leaving behind his two sons, namely, Ankappan Asari and Thanuvan Asari. Ankappan Asari died leaving behind his only son Ramakrishnan Asari, who died unmarried. Hence, the entire property devolved on Thanuvan Asari. Hence, his share devolved on Thanuvan Asari. Thus, Thanuvan Asari and his heirs entitled to the entire suit item-I. Thanuvan Asari died leaving behind his four sons and two daughters. As per Mitakshara Law that stood on the date of death of Thanuvan Asari, item-I devolved on the four sons of Thanuvan Asari. Thus, each of his son entitled to $1/4^{\text{th}}$ share. Two sons of Thanuvan Asari, namely, Ramaswamy Asari and Krishnan Asari died unmarried and therefore, their $1/2$ share ($1/4 + 1/4$) equally devolved on other two sons, namely, Subramonian Asari and Natesan Asari and two daughters namely, Anantham and Parvathy. Parvathy sold her $1/8^{\text{th}}$ share in



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the suit property in favour of the appellant by the sale deed dated 20.11.1990 and hence, the appellant claimed $1/8^{\text{th}}$ share in the suit item-I. The suit Item-2 was purchased by the four sons of Thanuvan Asari, namely, Ramaswamy Asari, Subramonian Asari, Krishnan Asari and Natesan @ Natarajan Asari and wife of Thanuvan Asari, namely, Valiamma, D/o.Valli and wife of Ankappan, namely, Valliamma, D/o.Ammukutty. Valliamma, D/o.Ammukutty gifted her $1/6^{\text{th}}$ share in favour of 10th defendant in the suit, namely, Anantham. The balance $5/6^{\text{th}}$ share belonged to Ramaswamy Asari, Subramonian Asari, Krishnan Asari and Natesan @ Natarajan Asari, Anantham and Parvathy. Ramasamy Asari and Krishnan Asari died unmarried and their share devolved on Subramonian Asari, Natesan @ Natarajan Asari, Anantham and Parvathy. Thus, the plaintiffs, who purchased the share of Parvathy originally claimed $7/48^{\text{th}}$ share in the suit item-II, which was subsequently enhanced by the death of some of the parties to $1/6^{\text{th}}$ share.

3. The respondents 1 to 7 herein filed a written statement, wherein it was contended that on the death of Ramaswamy Asari and Krishnan Asari their $1/2^{\text{th}}$ share in the suit properties devolved on his brothers Natesan Asari and Subramonian Asari by survivor-ship and hence, their sisters Anantham and



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Parvathy did not get any right over the suit properties. It was further contended that the 10th defendant in the suit, namely, Anantham already filed a suit in O.S.No.53 of 1976 for partition claiming share in the suit properties and the same was dismissed. The vendor of the appellant herein, namely, Parvathy was party to that suit. Therefore, the judgment in the said suit would operate as *res judicata* against the present suit. It was also contended that Parvathy the vendor of the appellant had no right over the suit property and even if she had any right, the same was lost by the principles of estoppel and acquiescence as Subramonian Asari put up buildings without any objection by anybody. Thus, by denying the right of the plaintiff to seek partition as purchaser of aforesaid Parvathy, the suit was sought to be dismissed.

4. The trial Court, on consideration of oral and documentary evidences, came to the conclusion that in the earlier suit for partition in O.S.No.53 of 1976 filed by the 10th defendant in the suit Anantham, to which the vendor of the appellant Parvathy was a party, it was found that the suit property was devolved on sons of Thanuvan Asari on his death and his daughters, namely, Anantham and Parvathy had no right over the same. Therefore, the said judgment would



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operate as *res judicata* against the prayer in the present suit in respect of item-I of suit property. Therefore, the trial Court partly decreed the suit in respect of item-II of the suit property by granting a decree for partition of 57/378th share in favour of the appellant. Aggrieved by the same, the appellant filed an appeal in A.S.No. 128 of 2006 on the file of Sub Court, Padmanabhapuram. The first appellate Court affirmed the findings of the trial Court and dismissed the suit. Aggrieved by the same, the appellant is before this Court.

5. The learned counsel for the appellant assailed the judgments of the Courts below mainly on the ground that the findings rendered by the Courts below as if the present suit filed by the appellant was barred by *res judicata* in view of the judgment and decree rendered in O.S.No.53 of 1976, cannot be sustained in the absence of pleadings of the parties in the earlier suit. The learned counsel further submitted that unless the pleadings of the respective parties are produced before the Court, the Court cannot come to the conclusion as to whether the decision in the earlier suit would operate as *res judicata*. In support of the said contention, the learned counsel relied on the judgment of the Hon'ble Apex Court in the case of ***V.Rajeshwari Vs T.C.Saravanabava*** reported in ***(2004) 1 SCC 551***.



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6. The judgment and decree passed in O.S.No.53 of 1976 had been marked as Ex.B1 and B2. A perusal of decree passed in the earlier suit in Ex.B2 would make it clear that the present suit property was the subject matter of the earlier suit. The earlier suit was filed by Anantham, sister of Parvathy, under whom, the present appellant is claiming title. The vendor of the appellant/plaintiff, namely, Parvathy is arrayed as first defendant in the present suit. The sister of appellant's vendor, namely, Anandam is arrayed as 10th defendant in the present suit. The earlier suit in O.S.No.53 of 1976 on the file of the Sub Court, Padmanabapuram was filed by the 10th defendant in the present suit, namely, Anandam against his brother and sister Parvathy, first defendant in the present suit. A perusal of the judgment passed in the earlier suit in O.S.No.53 of 1976 would make it clear that the sister of the appellant's vendor, namely, Anantham filed a suit for partition claiming share in the very same suit property. The said suit was dismissed by holding that on death of Thanuvan Asari, the properties devolved on his male heirs by survivor-ship and consequently, Thanuvan Asari's daughter Anantham, 10th defendant (plaintiff in the earlier suit) had no right to claim partition in the suit property.



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7. The vendor of the appellant, namely, Parvathy was one of the defendants in the said suit. Therefore, the findings rendered in the earlier suit that the daughters of Thanuvan Asari had no right over the suit properties, is equally binding on the vendor of appellant also. In such circumstance, the sale made by Paravathy, sister of Anantham in favour of appellant would not convey any title to the appellant to claim share in the suit property. The trial Court rendered the findings that the judgment and decree passed in O.S.No.53 of 1976 would operate as *res judicata* against the present suit. In fact, in the Judgment rendered in O.S.No.53 of 1976, a reference was made to the earlier land acquisition proceedings in L.A.O.P.No.361 of 1969 on the file of Sub Court, Nagercoil, (marked as Ex.B8 in the earlier suit). It was held that even in the said order, the daughters of Thanuvan Asari held to be not entitled to any share. After holding that the suit was barred by *res judicata*, nevertheless the trial Court passed a decree for partition in respect of second item of the suit property and the same has not been challenged by the respondents by filing any appeal. The said decree has attained finality. However, in view of the findings rendered by the Courts below that the suit is barred by *res judicata* as per the judgment and decree marked as



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Ex.B1 and Ex.B2, the appellant, who is claiming under one of the party to the suit earlier litigation, is not entitled to maintain the present suit for partition again.

8. The learned counsel for the appellant/plaintiff by relying on the judgment of the Hon'ble Apex Court reported in **(2004) 1 SCC 551** in the case of **V.Rajeshwari Vs T.C.Saravanabava** forcefully submitted that in view of the failure of the respondents to produce the pleadings in the earlier suit, the said judgment cannot be treated as *res judicata*. The relevant observation of the Hon'ble Apex Court in the above decision is as follows:-

15.Reverting back to the facts of the present case, admittedly the plea as to res judicata was not taken in the Trial Court and the First Appellate Court by raising necessary pleadings. In the First Appellate Court the plaintiff sought to bring on record the judgment and decree in the previous suit, wherein his predecessor-in-title was a party, as a piece of evidence. He wanted to urge that not only he had succeeded in proving his title to the suit property by the series of documents but the previous judgment which related to a part of this very suit property had also upheld his predecessor's title which emboldened his case. The respondent thereat, apprised of the documents, did not still



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choose to raise the plea of res judicata. The High Court should not have entered into the misadventure of speculating what was the matter in issue and what was heard and decided in the previous suit. The fact remains that the earlier suit was confined to a small portion of the entire property now in suit and a decision as to a specified part of the property could not have necessarily constituted res judicata for the entire property, which was now the subject matter of litigation.

16. We cannot resist observing that if at all the plea of res judicata was to be availed and applied then that should have been for the benefit of the plaintiff inasmuch as his predecessor-in-title had succeeded in proving his title to part of the property in the earlier suit. We fail to understand how the judgment in the previous suit can in any way help the defendant-respondent in the present proceedings. We are clearly of the opinion that the plea of res judicata has neither been raised nor proved. There is no res judicata. The issue as to title was rightly determined by the Courts below on the basis of evidence adduced in this case. That finding has to be restored.

9. In the above said judgment, the plea of *res judicata* was not at all raised before the Courts below and it was sought to be raised only in the second



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appellate stage. Further, on facts, it was held that the earlier suit was only in respect of the portion of the property, but however the later suit was in respect of a larger area. Therefore, the decision rendered in respect of smaller portion, cannot operate as *res judicata* in respect of larger portion. But, in the case on hand, a perusal of the decree in the earlier suit, which was marked as Ex.B2, would make it clear that the subject matter of the earlier suit for partition and the subject matter of the present suit for partition, are one and the same. The present plaintiff is claiming under the 5th defendant in the earlier suit, namely, Parvathy. In such circumstances, the earlier suit also filed for the same relief of partition by the sister of appellant's vendor. The Court held that the daughters of Thanuvan Asari, namely, plaintiff therein and vendor of appellant were not entitled to any share in the suit property. Therefore, all the ingredients of Section 11 of the Code Civil Procedure are satisfied in the present case and hence, even though the pleadings of the party in the earlier suit were not brought before the Court, still the judgment and decree, which were marked as Ex.B1 and Ex.B2, clearly establish that the findings in the earlier suit would operate as *res judicata* on the present suit. Hence, the decision relied on by the learned counsel for the appellant may not be applicable to the facts of the present case.



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10. Therefore, I have no hesitation in confirming the judgments and decrees passed by Courts below. I do not find any substantial question of law muchless any question of law in the second appeal. Accordingly, the second appeal deserves to be dismissed.

11. Though the principles of *res judicata* is equally applicable to the second item of the suit property, which was also the subject matter of the earlier suit, the decree for partition passed by the trial Court in respect of item-II of the suit property was not at all challenged by the respondents by way of appeal and the same had become final. Therefore, I do not want to disturb the decree passed by the Courts below in respect of Item-II of the suit property.

12. In view of the discussion made earlier, the Second Appeal is dismissed. The concurrent Judgments and decrees passed by the Courts below are confirmed. In fact and circumstance of the case, there will be no order as to cost.

14.02.2023

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

- 1.The Subordinate Judge, Padmanabhapuram.
2. The Additional District Munsif, Padmanabhapuram,
- 3.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

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