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S.A.No.959 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.06.2024

CORAM:

THE HONOURABLE MR.JUSTICE V.SIVAGNANAM

S.A.No.959 of 2012

and

M.P.No.1 of 2012

Bhuvaneswari

... Appellant

(sole appellant declared as major &
guardianship discharged vide
order of this Court, dated 09.12.2023,
made in M.P.Nos.1 & 2 of 2013)

Vs.

1. J. Kaliaya Perumal

2. Sasikumar

3. Tamilarasi

4. Arjunan

... Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 20.03.2012 made in A.S.No.36/2010 on the file of the Sub Court, Kallakurichi, confirming the decree and judgment



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dated 16.04.2010 made in O.S.No.240 of 2006 on the file of the II Additional District Munsif Court, Kallakurichi.

For Appellant : Mr. M. Devendran

For Respondents : Mrs. K.S.Sundar,
for Mr.K.Veeramani

J U D G M E N T

Second Appeal has been filed against the judgment and decree passed in A.S.No.36 of 2010, dated 20.03.2012 on the file of the Sub Court, Kallakurichi, confirming the judgment and decree passed in O.S. No.240 of 2006, dated 16.04.2010, on the file of the II Additional District Munsif Court, Kallakurichi.

2. For the sake of convenience, the parties are referred to as per their rankings in the Trial Court.

3. The plaintiff in the suit in O.S.No.240 of 2006 on the file of II Additional District Munsif Court, Kallakurichi, is the appellant in this Second Appeal.



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4. The fact of the case is that the plaintiff is the daughter of the second defendant and the grand daughter of the first defendant. The suit properties consists of ancestral properties and also properties purchased out of the income from the ancestral properties. Hence, the defendants 1 and 2 are entitled to 1/2 share each. The plaintiff is entitled to 1/4 share in the half share of the 2nd defendant. The marriage between the plaintiff's mother/next friend, viz., Kalaiselvi and the 2nd defendant was dissolved by an order of the learned Subordinate Judge, Kallakurichi in HMOP No.32/99 dated 18.07.2003 and the same was also confirmed in the appeal, which was filed by the Kalaiselvi, in CMA No.17 of 2024 before the Fast Track Court, Kallakurichi. The 3rd defendant is the sister of the 2nd defendant and daughter of the 1st defendant and she has no right or share in the suit properties. But in order to avoid any technical difficulty, she was impleaded as party to the suit. During the pendency of the suit, the 4th defendant claims to have purchased suit items 1 to 3 from the 2nd defendant under the Sale Deed dated 28.03.2008. The said sale has been made collusively with an ulterior motive and the same is not valid and it will not bind the plaintiff. It is also hit by *lispendence*. In order to have



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a binding decree, the 4th defendant is impleaded as a party to the suit.

On 01.03.2006, though the plaintiff's mother/next friend orally demanded the defendants to divide the suit properties by metes and bounds and to allot the plaintiff's share thereon, the defendants gave evasive replies. Hence, the plaintiff is constrained to file the suit and the plaintiff is also entitled to future income of her share in the suit properties.

5. The 2nd defendant filed written statement and additional written statement and contested the suit stating that the averments made in the plaint are false except those are admitted by the defendant. The plaintiff's mother/next friend, Kalaimathi, already filed a case for maintenance and received a sum of Rs.44,000/- as maintenance and also received a sum of Rs.1,60,000/- as life maintenance for herself and the plaintiff. Out of which, Rs.1,00,000/- fixed deposit was made in the name of the plaintiff. In CMP No.1100 of 2004 , both the plaintiff and her mother/next friend, Kalaimathi, filed a memo stating that they will not file any suit. However, later they filed the suit only with an intention to harass the 2nd defendant and his family members and prays for dismissal of the suit.



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6. The written statement and the additional written statements filed by the 2nd defendant was adopted by the defendants 1, 3 &4.

7. On the basis of the above said pleas set out by the respective parties, the following issues were framed by the trial Court for consideration:

1. Whether the suit property is an ancestral property and it was purchased out of the income derived from the ancestral property ?
2. Whether the plaintiff is entitled for partition as prayed for ?
3. To what other reliefs the plaintiff is entitled to?

8. Before the Trial Court, in support of the plaintiff's case plaintiff examined herself as P.W.1 and 15 documents have been marked as Ex.A1 to Ex.A15 . On the side of defendants, the second defendant examined himself as DW1 and first defendant examined himself as DW2 and one Murugesan, and Venkatesan were examined as DW3 and DW.4 and 11 documents have been marked as Ex.B1 to Ex.B.11.

9. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, by a judgment and decree dated 30.09.2009, the Trial Court came to a



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conclusion that the plaintiff is entitled to 1/3 share in the suit 1 to 3 schedule properties and dismissed the suit in respect of other reliefs. Aggrieved over the same, the plaintiff had preferred an appeal in A.S.No.36 of 2010 before the Sub Court, Kallakurichi. Before the First Appellate Court, the plaintiff marked 3 documents as Ex.A16 to Ex.A.18. The First Appellate Court, after considering the entire materials, vide judgment and decree dated 20.03.2012, dismissed the appeal. Now, challenging the same, the present Second Appeal has been filed by the plaintiff.

10. The second appeal has been admitted on the following substantial question of law :

1. Whether the lower appellate court has rendered contradictory and conflicting finding regarding the nature of item 10 of the suit properties to decline the relief of partition sought for by the plaintiff in respect of the said item ?
2. Whether the lower appellate court has failed to consider the discrepancy in the finding recorded by the Trial Court as the total extent held to be allotted to the defendants 1 to 3 in respect of items 1 to 3 and 10 of the suit properties do not tally with the total extent ?



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11. The 1st defendant is the grand father, the 2nd defendant is the father, 3rd defendant is the aunty of the plaintiff and 4th defendant is purchaser of the property.

12. The learned counsel for the appellant submitted that the plaintiff, who is the daughter of the second defendant, represented by her mother Buvaneswari, filed the suit against the defendant for partition claiming $\frac{1}{4}$ share in the plaint schedule properties as all the properties are ancestral and joint family properties. After trial, the Trial Court passed preliminary decree with regard to the schedule item nos. 1 to 3 alone. With regard to the remaining items dismissed the suit. Aggrieved by this, the plaintiff had filed an appeal in A.S.No.36 of 2010 on the file of Sub Court, Kallakurichi. The learned First Appellate Judge in paragraph 16 of the judgment observed that the plaint item 4 to 15 of the properties though stands in the name of the first defendant and his wife, whether it was purchased from the income of the ancestral property or it is ancestral property, that is not open to the plaintiff to claim partition while her father/2nd defendant and his father i.e. Grand father of the plaintiff/1st



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defendant are alive. Only after partition between the first defendant and the second defendant, the plaintiff can claim partition. Therefore, the First Appellate Court confirming the finding of the Trial Court for declining the right over the suite schedule item nos. 4 to 15 and granted partition of 1/3rd share with regard to the suit schedule item nos.1 to 3.

13. The learned counsel further contended that on 08.01.1999, under Ex.B.4 partition took place between the defendants 1 and 2. Hence, the plaintiff is entitled to claim partition for all the properties. The learned counsel conceded that the father and the grand father of the plaintiff are alive and reiterated the other grounds raised in the grounds of appeal and thus, pleaded to allow the appeal.

14. The learned counsel appearing for the respondents/defendants supported the judgment of the Trial Court as well as the First Appellate Court and contended that the plaintiff is not entitled to claim partition and he has no right to claim any share in the ancestral property when the father and the grandfather are alive. According to the respondents, the remaining properties are self acquired properties of the first defendant



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and his wife and not ancestral properties. Therefore, the Trial Court and the First Appellate Court rightly held that the plaintiff is not entitled to claim over the plaint schedule item nos.4 to 15 and entitled to partition of 1/3 share in plaint schedule item nos. 1 to 3 alone and thus there is no ground for interference with the finding of the Courts below and no substantial question of law involved in this Second Appeal and pleaded to dismiss the second appeal.

15. I have considered the matter in the light of the submissions made by the learned counsel on both sides and perused the materials available on records carefully.

16. On perusal of the records, it is noticed and also admitted by the parties that the first defendant/grand father and second defendant/father of the plaintiff are alive Under these circumstances, the plaintiff being the daughter of 2nd defendant have no right arising to claim partition over the joint family properties of her father while father and grand father are alive as there were no partition between the father and the grandfather. Therefore, the Trial Court as well as the First Appellate Court have not



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discussed as to whether it is self-acquired properties or ancestral properties or the properties were purchased from the income of the ancestral property.

17. Admittedly, with regard to the plaint schedule item nos. 1 to 3 of the properties, a partition took place between the defendants 1 and 2 on 08.01.1999, which is evidenced by Ex.B.4. Therefore, the Trial Court rightly granted partition and passed preliminary decree with regard to plaint schedule item nos.1 to 3 of the properties alone since the properties are joint family properties of second defendant and she is having right to claim partition over the property. Therefore, the Trial Court declared that the plaintiff is entitled to 1/3 share over the plaint schedule item nos.1 to 3 properties, which is confirmed by the First Appellate Court rightly. There is no illegality in the findings of the Courts below with regard to the plaint schedule item nos. 4 to 15 of the properties since the right is not accrued to the plaintiff to claim over the schedule properties, which is dismissed by the Trial Court as well as the First Appellate Court.



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18. Further on perusal of the evidence on record, it is noticed with regard to the nature of the 10th item of the suit properties since it is not covered under partition deed, Ex.B.4. The Trial Court though observed that he is entitled for 10th item of the property, finally, not granted the 10th item of the property as it was not partitioned as per Ex.B.4, which took place between the first defendant and the second defendant on 08.01.1999. Already, Lower Appellate Court in paragraph 16 observed that the 10th item of the property is also a joint family property. Therefore, there is no contradiction with regard to the nature of the property. In the findings, the Trial Court in paragraph 27 observed that the suit schedule item nos.1 to 3 and 10 of the properties are ancestral properties and other item of the schedule properties are not ancestral properties, however, finally, not granted partition over the 10th item of the property since the said property was not partitioned between the defendants 1 and 2. Therefore, the Trial Court and the First Appellate Court not observed this, but any how the final finding of the Trial Court that the plaintiff is entitled for partition item nos.1 to 3 alone. Therefore, there is no discrepancies in the finding and it cannot be called as a suspicious one.



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19. In the light of the abovesaid factors, it is found that the Courts below, on a proper appreciation of the materials placed on record, both oral and documentary evidence adduced by the respective parties and the principles of law governing the same, had correctly decided the issues and the findings of the Courts below are legally valid and I find no merit in this Appeal and the substantial questions of law formulated in the second appeal is, accordingly, answered against the plaintiff/appellant.

20. For the aforesaid reasons, the second fails and accordingly, is dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

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mrp

Internet: Yes

Index: Yes/No

Speaking/Non speaking order

NCC: Yes/No



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1. The Sub Court, Kallakurichi.
2. The II Additional District Munsif Court,
Kallakurichi.



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V.SIVAGNANAM, J.

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