



S.A. No. 1014 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.09.2024

CORAM

THE HONOURABLE MR. JUSTICE N.SENTHILKUMAR

S.A. No.1014 of 2013
and
M.P.No.1 of 2013

Tmt. Premavathi

... Appellant

Versus

1.Somasundaram

2.Akalya

3.Kavitha

... Respondents

Prayer : Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the Judgment and Decree dated 29.01.2013 made in A.S.No.48 of 2011 on the file of the Subordinate Judge, Bhavani as confirmed the Judgment dated 01.06.2011 made in O.S.No.263 of 2010 on the file of the II-Additional District Munsif Court, Bhavani and allow the above Second Appeal.

For Appellant : Mr. V.V. Sathya

For R2 & R3 : Mr. R.P. Rubanchandramurthy,
for Mr. S. Kaithamalai Kumaran.



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For R1 : Died, Legal heirs are on record.

JUDGMENT

The plaintiff in the original suit is the appellant herein. She has filed this appeal challenging the concurrent findings of the Courts below.

2. Originally, the suit in O.S.No.263 of 2010 was filed before the learned II-Additional District Munsif Court, Bhavani, to direct the defendants to partition the suit property into four shares and for separate possession of 1/4th share in the suit property, to appoint a Commissioner to divide the suit property into four equal shares and also for permanent injunction restraining the defendants from alienating the property in favour of anyone till the disposal of the suit and for costs.

3. The first respondent Mr. Somasundaram died on 27.01.2019, during the pendency of this appeal. The second and third respondents are the daughters and legal heirs of the first respondent. As they are already on record, the second appeal is proceeded with, even after the death of the first respondent.

4. For the sake of convenience, the parties are referred as



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plaintiff and defendants as referred in the suit.

5. As per the plaint averments, the plaintiff is the wife of the first defendant. The second and third defendants are daughters of the plaintiff and the 1st defendant. Apart from the second and third defendants, a son by name Rajkumar was born to the plaintiff and first defendant. However, due to illness, the said Rajkumar died when he was 8 years old. Due to matrimonial discord, the first defendant had driven the plaintiff out of the matrimonial home in the year 2001.

6. The plaintiff being the legal heir of her deceased son Rajkumar, is claiming his share in the suit property. According to the plaintiff, the defendants cannot deny the 1/4th share to be allotted in favour of her predeceased son Rajkumar and such a share of Rajkumar has to be allotted to her as she is the legal heir of her deceased son. The plaintiff further contended that, on 11.05.2009, a partition took place among the defendants as well as the sister and brothers of the first defendant in



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which, a share in the property was not allotted to the deceased son Rajkumar. Further, the defendants are attempting to alienate the suit property in favour of third parties and therefore, she has filed the suit in O.S.No.263 of 2010 on the file of the learned II-Additional District Munsif Court, Bhavani.

7. The suit was resisted by the first defendant by filing a written statement. According to the first defendant, his son Rajkumar has no right in the suit property, even if the deceased son Rajkumar was alive at the time of partition dated 11.05.2009, he would not have been allotted a share. The first defendant had also denied the allegation that the plaintiff was treated cruelly and driven out of the matrimonial house after the birth of the said Rajkumar.

8. The first defendant contended that the plaintiff has no right to claim any share in the suit property. According to the first defendant, the suit property is not an ancestral property and it is a self-acquired property his father, namely, one Mr. Karuppanna gounder. By virtue of the partition



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deed dated 11.05.2009, the first defendant has become the absolute owner of the suit property. Accordingly, the first defendant prayed for dismissal of the suit.

9. The Trial Court considered all the above facts and framed the following three issues on the basis of the averments in the plaint and the written statement:

“(i) Whether the plaintiff is entitled for the relief of preliminary decree for partition and for separate possession?”

(ii) Whether the plaintiff is entitled for the relief of permanent injunction as prayed for?

(iii) To what other relief the plaintiff is entitled?”

10. Before the Trial Court, the plaintiff examined herself as P.W.1 and Exs.A1 to A3 were marked. On the side of the defendants, the first defendant examined himself as D.W.1 and Exs.B1 and B2 were marked.



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11. The Trial Court while considering the first issue, had considered the exhibits marked on the side of the plaintiff and defendants. Ex.A1 is the original marriage invitation, Ex.A2 is the school record sheet of her predeceased son Rajkumar, which shows the date of birth of Rajkumar as 09.03.1991. Ex.A3 is the certified copy of the Partition Deed dated 11.05.2009 executed between the defendants 1 to 3 and four others. Ex.B1 is the certified copy of the Sale Deed dated 05.02.1973, which shows that the father of the first defendant had purchased the property to an extent of 3.34 acres in S.No.588 and 0.66 acres in S.No.591 in Vempathi Village. Ex.B2 is the original Patta passbook dated 25.12.1977, standing in the name of Karuppanna Gounder, S/o. Komara gounder.

12. The Trial Court held that the claim of the plaintiff is barred under Sec. 8 of the Hindu Succession Act, since the plaintiff's deceased son, the grandson of Karuppanna Gounder has been specifically excluded from inheriting the property of his grandfather. Therefore, the contention of the plaintiff, who claims right over the suit property through the deceased grandson of Karuppanna Gounder is not sustainable.



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13. The Trial Court negatived the claim of the plaintiff by holding that mere mentioning of the term co-parcenary or the character of the property as ancestral and self-acquired in the partition deed marked as Ex. A3, will not change the nature or character of the property. The Trial Court has come to the conclusion that the plaintiff has no right over the suit property and dismissed the suit. Challenging the said judgment and decree in O.S.No.263 of 2010 passed by the II-Additional District Munsif Court, Bhavani, the plaintiff filed an appeal in A.S.No.48 of 2011 before the learned Subordinate Court, Bhavani.

14. Pending appeal before the First Appellate Court, the plaintiff filed an I.A.No.63 of 2001 under Order XLI Rule 27 of CPC, for receiving additional documents.

15. The First Appellate Court clarified that an interlocutory application filed under Order XLI Rule 27 of CPC, to receive additional documents as evidence can be entertained only if the Court is satisfied on



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the following:

“1. It should be shown that such evidence was refused to be admitted by the lower court on earlier action.

2. It should be shown that such documents wherein existence but was not within his knowledge.

3. It should be shown that after exercise of due diligence the same could not be produced before the lower court of relevant time.”

16. The First Appellate Court dismissed the said application as devoid of merits and proceeded with the main appeal. The First Appellate Court dismissed the appeal by holding that the deceased Rajkumar cannot claim any right over the properties of his grandfather during the life time of his father, the first respondent herein. Therefore, the appellant cannot claim any share over the suit property. Challenging the Judgment and Decree of the First Appellate Court, the plaintiff has filed the present second appeal.

17. This Court while admitting the Second Appeal on



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19.09.2013, had framed the following substantial questions of law:-

“(i) Whether the Courts below are right in dismissing the suit filed by the appellant for partition of 1/4th share of her deceased son, when the property in the hands of the first defendant (father of the deceased) is a joint family properties?

(ii) Whether the Courts below are right in dismissing the suit for partition, without considering the cogent reading of Sections 6 and 8 of the Hindu Succession Act, 1956?”

18. Learned counsel for the appellant would contend that the Courts below have failed to consider the recitals in Ex. A3, which clearly shows that the suit property is an ancestral property and the appellant's deceased son Rajkumar is entitled to 1/4th share in the suit property along with the other respondents. The appellant, being the class -I legal heir of her deceased son, is entitled to the relief of partition as sought for.

19. Learned counsel for the respondents would contend that the appellant has no right over the suit property. The suit is instituted by the



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appellant for partition of 1/4th share in the suit property, which is claimed to be the share of her predeceased son Rajkumar. However, there was a partition between the respondents on 11.05.2009, and the 1st Respondent, who is the father of the said Rajkumar had obtained the suit property, which is the self-acquired property of the 1st respondent's father. Therefore, the said Rajkumar is not entitled to 1/4th share in the suit property at any point of time and the plaintiff cannot claim a share through her deceased son Rajkumar.

20. I have heard the submissions made on either side and perused the materials available on record.

21. It is seen from the records that, though the appellant has claimed right over the suit property by stating that it is an ancestral property, she has failed to establish the same through evidence. Whereas, the 1st Respondent has produced Ex. B1 sale deed to prove that his father Karuppanna Gounder has purchased the suit property as a self-acquired property. The Courts below have held that the suit property is a self-



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acquired property of 1st Respondent's father based on the evidence produced by both the parties. Therefore, the suit property cannot be considered as an ancestral property. As the appellant failed to prove that the suit property is an ancestral property, she has failed to establish the rights available to her deceased son Rajkumar, through whom the appellant is claiming the said 1/4th share in the suit property.

22. Section 6 and 8 of the Hindu Succession Act, 1956 clearly explains the devolution of interest in coparcenary property and the rule of succession. It is useful to extract Section 8 of the Hindu Succession Act, hereunder:-

“8. General rules of succession in the case of males:-

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;

(c) thirdly, if there is no heir of any of the



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*two classes then upon the agnates of the deceased;
and*

*(d) lastly, if there is no agnate, then upon
the cognates of the deceased.”*

23. In this case, admittedly, a partition took place between the defendants, the sister and brothers of the first respondent in respect of the self-acquired property belonged to the father of the 1st respondent. When such a partition was effected on 11.05.2009, the deceased son of the plaintiff and first defendant Rajkumar was not alive. Further, as per Sec 8 (a) of the Hindu Succession Act, 1956, the right, if any, to the grandson will arise only after the death of his father namely, the first respondent herein.

24. Admittedly, the first respondent was alive at the time of partition on 11.05.2009 and therefore, when the first respondent was alive, no right would accrue to his pre-deceased son Rajkumar. Consequently, the appellant cannot claim any right over the suit property in favour of the predeceased son and through the predeceased son, she cannot assert a right



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over the 1/4th share in the suit property. Thus, the Courts below have rightly denied the claim made by the appellant herein.

25. The property in question was a self-acquired property and agricultural property of the first respondent's father. On the death of his father, the first respondent, inherited the suit property along with his brothers and sisters, in which, the defendants 2 and 3 were also given a share. The legal heirs of the 1st respondent's father are free to alienate their property to anyone as per their wish. In this case, instead of alienating the suit property to the third parties, the first respondent, his brothers and sisters had partitioned the suit property and the first respondent has given a share to the defendants 2 & 3. Therefore, the appellant cannot claim right over the suit property, unless the appellant has entered into partition with the respondents.

26. In view of the above, both the Substantial Questions of law are answered in favour of the Respondents and against the appellant.

27. Learned counsel for the appellant now contends that, in view



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of Section 8 of the Hindu Succession Act, the appellant has a right over the share of her deceased husband i.e., the first respondent herein, which is well open to be claimed as the wife of the first respondent. Learned counsel for the respondents would contend that, it is a different cause of action which has to be agitated by the appellant in a different suit and the appellant cannot claim the share of the first respondent who died during the pendency of the appeal which arose out of the suit instituted prior to his death.

28. Learned counsel for the Respondents would contend that the partition effected in the year 2009 will not confer any right in favour of the appellant. Further, there is no specific contention or pleading, issues or findings before the Trial Court and the First Appellate Court with respect to the claim of first respondent's share in the suit property. While so, such a plea cannot be agitated by the appellant at the stage of second appeal.



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29. I find force in the said submission of the learned counsel for the respondents. The appellant, at the stage of second appeal, seeks for a share in the suit property as a legal heir of the 1st respondent, after his death. Whereas, the suit has been filed for partition of suit property and allotment of 1/4th share which is claimed to be the share of her pre-deceased son Rajkumar. Having filed such a suit, the claim made by the appellant in the present stage would totally alter the nature of the suit and the findings rendered by the Courts below. Therefore, the relief now sought for by the appellant to confer her a share in the suit property upon the death of her husband, first respondent herein cannot be countenanced.

30. In view of the same, the Second Appeal is dismissed. The judgment and decree in A.S. No. 48 of 2011 dated 29.01.2013 passed by the learned Subordinate Judge, Bhavani is hereby confirmed. No costs. Consequently, the connected miscellaneous petition is also closed.

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Index :Yes/No



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Speaking/Non-Speaking Order
Neutral Case Citation : Yes/No
To:

1. The II-Additional District Munisf Court, Bhavani.
2. The Subordinate Court, Bhavani.
3. The Section Officer, V.R.Section, High Court of Madras.

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N.SENTHILKUMAR, J.

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