



S.A.No.1123 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.01.2024

CORAM

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

S.A.No.1123 of 2013

and

M.P.No.1 of 2013

P.Gurusamy

... Appellant/Appellant/Defendant no.1

Vs.

1.Nagammal

2.Velusamy

3.Prakash

4.Gomathy

5.Parameswari

6.Srikaladevi

... Respondents/Respondents/Plaintiffs

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and decree of the learned Principal Subordinate Judge, Tirupur, dated 24.11.2012 made in A.S.No.45 of 2010 confirming that of the District Munsif, Tirupur, dated 27.08.2010 made in O.S.No.70 of 2008.



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For Appellant : Mr.P.Manish for
Mr.I.Abrar Mohammed Abdullah

For Respondents :Ms.T.R.Gayathri for
M/S.Sarvabhauman Associates.

JUDGMENT

This is an appeal which arises against a suit for partition in O.S.No.70 of 2008 on the file of District Munsif, Tirupur, filed by the daughters and legal heirs of a pre-deceased daughter of one Ponnusamy. The defendants 1 to 3 are the sons of Ponnusamy. The relationship between the parties is not in dispute.

2. It is the case of the plaintiff that the property was purchased by Ponnusamy in the year 1966. He had been in possession and enjoyment of the property for nearly four decades and he passed away on 26.11.2000. The plaintiffs and the defendant, being the legal heirs, are entitled to succeed to the estate. The first defendant is in possession and enjoyment of the property. On the death of the said Ponnusamy, the plaintiffs and the defendant became entitled to the property equally. Hence, the suit.



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3. The first defendant resisted the suit on the ground that the deceased Ponnusamy had executed a Will on 14.09.1994 in favour of his wife Banumathi and two children namely, Prathiba and Vignesh.

4. Before the trial Court, the first plaintiff Nagammal examined herself and marked Ex.A1 to Ex.A8. The first defendant Gurusamy examined himself and marked no document.

5. The trial Court came to the conclusion that Ponnusamy, having left behind 7 children, each of his legal heirs are entitled to 1/7th share. The plaintiffs 1, 5 & 6 are entitled to 1/7th share and plaintiffs 2, 3 & 4, being the legal heirs of the pre-deceased daughter Deivanai, are jointly entitled to 1/7th share. This was taken on appeal before the appellate Court in A.S.No.45 of 2010. The learned Principal Subordinate Judge, Tirupur, by way of judgment dated 24.11.2012, was pleased to confirm the same. Against the concurrent findings, the present second appeal has been presented.



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6. The learned counsel for the appellant submitted that on 18.11.2013, this Court had ordered notice of admission and had granted interim order on all further proceedings in the final decree.

7. The learned counsel for the appellant mainly contended

i) that the second appeal has to be allowed on the ground of non-joinder of necessary parties namely Ponnusamy's wife Banumathi and his children Prathiba and Vignesh.

ii) He would urge that as the elder brother, he had spent money towards the marriage of his sisters and they are not entitled to claim any share. He also suggested following the substantial questions of law:

a) Whether the Lower Appellate Court was right in not considering all the aspects with respect to a suit for partition despite the specific stand of the appellant that he had spent for the marriage expenses of the plaintiff?

b) Whether the Lower Appellate Court was right in not considering the aspect of non-joinder of parties inspite of the specific plea taken by the appellant?

c) Whether the Lower Appellate Court was right in confirming the judgment of the Trial court without assigning any reasons for agreeing with the findings of the Trial Court?



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8. Per contra, Ms.T.R.Gayathri, the learned counsel appearing for the respondents submits that the first defendant had not marked any documents in order to substantiate this case and mere *ipsi dixit* of the defendant regarding the “Will” is insufficient for the parties seeking to dismissal of the suit.

9. Heard Mr.P.Manish, the learned counsel appearing for the appellant and Ms.T.R.Gayathri, the learned counsel appearing for the respondents and have carefully gone through the records.

10. It is admitted by both sides that the properties belong to Ponnusamy and that he died leaving behind the plaintiffs and the defendants as legal heirs. As the 3rd daughter Deivanai had pre-deceased him, her legal heirs, namely Velusamy, Prakash and Gomathy, have been impleaded as plaintiffs to the suit. Therefore, all the proper and necessary parties in the suit for partition had been brought on record.

11. Insofar as the alleged right of the wife and children of the first defendant are concerned, no steps had been taken by them to get themselves impleaded in the suit nor the first defendant had taken any



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step to produce the alleged Will before the Court. The Court can hold that the proper and necessary parties are before it, if and only if, *prima facie* some proof is let in for the same.

12. As rightly pointed out by the learned counsel for the plaintiffs, the defendant has not marked any document to substantiate this case. A mere fact that he has issued reply notice on 23.01.2008 claiming that his father has left behind a “Will” and that he had also spent money towards the wedding of his sisters (i.e Ponnusamy's daughters) is not sufficient to hold that his wife and children have share in the property. The least that the defendant could have done is mark the Will dated 14.09.1994. If such a Will had been filed then, the plaintiffs could have taken steps to implead legal representatives. A mere defence is insufficient for the purpose of holding that the suit has to fail on the ground of non-joinder of necessary parties.

13. Insofar as the second argument Stridhana is concerned, yet again no evidence has been let in by the first defendant in order to substantiate the case. In other words, the necessary evidence not having been let in, the defence necessarily has to be rejected. Consequently, the second appeal has to be dismissed and is accordingly dismissed.



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14. The Supreme Court in the case of *Shub Karan Bubna Vs. Sita Saran Bubna* reported in (2009) 9 SCC 689 : (2009) 3 SCC (Civ) 820 : 2009 SCC Online SC 1531 at Page 696 held as follows:

“17. Once a court passes a preliminary decree, it is the duty of the court to ensure that the matter is referred to the Collector or a Commissioner for division unless the parties themselves agree as to the manner of division. This duty in the normal course has to be performed by the court itself as a continuation of the preliminary decree.”

15. The learned District Munsif, Tirupur, is directed to follow the above judgment of the Supreme Court and take up the suit for passing final decree without waiting for a petition to be filed by the plaintiffs. The proceedings for final decree shall be completed within a period of six months from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed.

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Index : Yes/No
Speaking Order : Yes/No
Neutral Citation : Yes/No
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To:

- 1.The District Munsif,
Tirupur
- 2.The Principal Subordinate Judge,
Tirupur.
- 3.The Section Officer,
Vernacular Section,
High Court of Madras.



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V.LAKSHMINARAYANAN, J.

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