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S.A.No.824 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.03.2024

CORAM

THE HONOURABLE Ms. JUSTICE P.T.ASHA

S.A.No.824 of 2021
and
C.M.P.No.15916 of 2021

B.Santhi

... Appellant

-Vs-

1. Kumari
2. Valli
3. Manoharan
4. Kishya

... Respondents

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908, to set aside the judgement and decree dated 06.01.2020 made in A.S.No.7 of 2018 on the file of the Subordinate Court, Gingee, by confirming the judgement and decree dated 27.11.2017 made in O.S.No.154 of 2010 on the file of the Principal District Munsif Court, Gingee.

For appellant : Mr.R.Agilesh

For R1 and R2 : Mr.C.Munusamy

For R3 and R4 : Mr.D.Babu Varadharajan



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JUDGMENT

The plaintiff is the appellant before this Court.

2. The facts of the case are briefly set out hereinbelow and the parties to the proceedings are being referred to in the same ranking as before the Trial Court.

FACTS OF THE CASE:

2.1. The plaintiff has filed a suit for partition and separate possession of her 1/5th share in the suit schedule properties. The plaintiff has filed the suit in O.S.No.154 of 2010 on the file of the Principal District Munsif Court, Gingee, for the reliefs claimed *supra*. It is her contention that the suit schedule properties and other properties originally belonged to the joint family of Balakrishna Gounder and his brothers *viz.*, Kannan, Sagadevan and Perumal, which were their ancestral properties.

2.2. In the year 1965, the brothers had orally partitioned the



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aforesaid properties and in that partition, the suit schedule properties were allotted to the share of Balakrishna Gounder. Balakrishna Gounder had taken possession of the same and was in possession and enjoyment of the same till his death in the year 1989. The said Balakrishna Gounder had died intestate. Balakrishna Gounder had married three wives. After the demise of the first wife, he had married the second wife and after her demise, he married the plaintiff herein as his third wife. The defendants 1 and 2 are the children born to Balakrishna Gounder through his second wife. The defendants 3 and 4 are the children born to Balakrishna Gounder through the plaintiff. The first wife did not have any issue. Therefore, it is the contention of the plaintiff that on the demise of the said Balakrishna Gounder, his properties devolved upon her and the defendants 1 to 4 herein with each being entitled to 1/5th share.

2.3. It is also contention of the plaintiff that she and the



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defendants 3 and 4 had filed a suit in O.S.No.546 of 1989 on the file of the Principal District Munsif Court, Gingee, for a declaration of their right and title over the 'A' schedule property and for injunction restraining the defendants therein who were the defendants 1 and 2 herein and one Elumalai Gounder from interfering with their possession of the same. Likewise, the defendants 1 and 2 herein had filed a suit in O.S.No.557 of 1989 once again for a declaration of their title and right to the suit properties and for permanent injunction. They have impleaded the plaintiff and the defendants 3 and 4 as defendants in the said suit. By judgment and decree dated 27.04.2004, the said suits were dismissed and the Court had directed the parties to file a suit for partition.

2.4. The plaintiff would submit that she has been requesting the defendants to partition the properties and grant her separate possession of her 1/5th share. It appears that the defendants 1 and 2



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had filed a suit for partition in O.S.No.18 of 2005 only against the defendants 3 and 4 without impleading the plaintiff. In the said suit, a preliminary decree has been passed on 16.07.2007 granting the defendants 1 and 2 their $2/4^{\text{th}}$ share and the remaining $2/4^{\text{th}}$ share was to go to the defendants 3 and 4. However, they have not impleaded the plaintiff in the said suit, despite the fact that she has a $1/5^{\text{th}}$ share in the suit schedule properties. Therefore, the plaintiff has come forward with the suit in question.

2.5. The first defendant has filed a written statement which was adopted by the second defendant, in which, they had taken a plea that the plaintiff is not a legally wedded wife of the deceased Balakrishna Gounder and that it was only their mother, Unnamalai Ammal, who was the first wife of Balakrishna Gounder and thereafter, he had married one Poorani Ammal. However, in the later part of their written statement, the defendants would concede that Balakrishna Gounder had died intestate, leaving behind the



plaintiff and the defendants as his legal heirs.

2.6. The defendants would also submit that in the earlier suits in O.S.Nos.546 and 557 of 1989, the Court had directed the defendants 1 and 2 to file a suit for partition and had not directed the plaintiff to file a suit for partition. The defendants 1 and 2 have filed a suit for partition, in which, the plaintiff's children *viz.*, defendants 3 and 4 are parties, but, they had not chosen to enter appearance. They would further submit that there was no earlier claim made by the plaintiff for partition. That apart, the final decree proceedings have been initiated in the earlier suit in O.S.No.18 of 2005. Therefore, they would submit that the suit has to be dismissed.

TRIAL COURT:

3. The learned District Munsif, Gingee, had framed the following issues.



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“1.Whether the plaintiff is entitled to 1/5th share over the suit properties?

2.Whether the plaintiff is entitled to the decree for partition of preliminary as well as final as prayed for?

3.To what other relief the plaintiff is entitled for?”

4. The plaintiff has examined herself as P.W.1 and marked Exs.A1 to A13. The first defendant had examined herself as D.W.1 but, has not come forward to file any document. In fact, though they had pleaded about the earlier suit for partition, the defendants had not marked either the pleadings or judgments in the said proceedings.

5. The learned Principal District Munsif had observed that since, already partition had been granted, a fresh suit with the very same cause of action cannot be entertained, especially, when there is no relief claimed to set aside the decree in the earlier suit. The



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learned Judge had also held that the suit was bad for non-joinder of necessary parties as all the sharers have not been impleaded. However, non-joinder has not been raised as a issue by the learned Judge, though the learned Judge has observed that no explanation has been offered by the defendants 1 and 2 as to why they have not impleaded the plaintiff as party to the proceedings. Ultimately, the learned Judge has dismissed the suit.

LOWER APPELLATE COURT:

6. Challenging the same, the plaintiff has filed an appeal in A.S.No.7 of 2018 on the file of the Subordinate Court, Gingee. The learned Judge had also confirmed the judgment and decree of the Trial Court and dismissed the appeal.

7. Aggrieved by the same, the plaintiff is before this Court.



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8. Heard the learned counsel on either side and perused the materials available on record.

9. Based on the arguments advanced by either side, the only substantial question of law that arises for consideration is as follows:-

“Whether the Courts below have justified in non-suiting the plaintiff on the ground that the earlier suit for partition had already been decreed, totally overlooking the fact that the plaintiff has not been made a party to the proceedings, despite her having 1/5th share in the suit schedule properties?”

10. Mr.R.Agilesh, learned counsel appearing for the appellant would draw the attention of this Court to the judgment passed in O.S.No.557 of 1989 which has been marked as Ex.A1. A perusal of the same would clarify that six months after the death of the second wife Poorani Ammal, the said Balakrishna Gounder had married the plaintiff herein and through her, the defendants 3 and 4



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were born to him. The defendants 1 and 2 herein who were the plaintiffs in the suit in O.S.No.557 of 1989 had projected the Will dated 30.08.1988 which is said to have been executed by Balakrishna Gounder in favour of the plaintiffs therein, in and by which, he had bequeathed the properties to the defendants 1 and 2 herein. The plaintiff herein and the defendants 3 and 4 had filed a written statement and taken a definite stand that Balakrishna Gounder had died intestate without making any arrangement in respect of the properties inherited by him.

11. Therefore, it is the case of the plaintiff herein that Panchayat was held and in the mediation that has been undertaken by the Panchayadars, the plaintiffs therein had agreed to receive 0.67 cents of land and that they would pay a sum of Rs.5,000/- as their share towards the debts incurred by Balakrishna Gounder. The learned Judge had tried both the suits in O.S.Nos.546 and 557 of 1989 together. The learned Judge had disbelieved the Will and



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held that the defendants 1 and 2 herein have failed to prove the same. The learned Judge, therefore, held that since the Will and the partition pleaded have been disbelieved and as the properties belong to Balakrishna Gounder, both the parties have to enter into partition of the properties of Balakrishna Gounder and observed that both the parties are not entitled to any relief and dismissed both the suits. It is based on this common judgment, the plaintiff has come forward with the present suit.

12. Further, the defendants 1 and 2 had filed a suit for partition in O.S.No.18 of 2005 without impleading the plaintiff herein, who, admittedly, has a share in the properties of Balakrishna Gounder. He would submit that deliberately, the defendants 1 and 2 have impleaded only the defendants 3 and 4. He would submit that the decree in that suit is not binding on the plaintiff, who has a share in the properties.



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13. Mr.C.Munusamy, learned counsel appearing on behalf of the respondents 1 and 2 would submit that the plaintiff had knowledge about the earlier suit for partition, but, had not participated in the suit proceedings and after a long time, she has come forward with another suit for partition. He would, therefore, submit that the present suit is not maintainable and the Courts below have rightly dismissed the said suit.

DISCUSSION:

14. It is an admitted fact that the suit properties belong to Balakrishna Gounder since the defendants 1 and 2 have themselves had filed a suit for partition with reference to the suit schedule properties. Therefore, this Court can safely come to the conclusion that the properties belong to Balakrishna Gounder. It is also an admitted fact that Balakrishna Gounder had died intestate and that the plaintiff herein is his third wife and the defendants 1 to 4 are his children. Since Balakrishna Gounder had died intestate, all the



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five of them *viz.*, the plaintiff and all the four defendants, would be equally entitled to the properties of the said Balakrishna Gounder.

15. The defendants 1 and 2 had contended that they had filed a suit in O.S.No.18 of 2005 on the file of the Principal District Munsif Court, Gingee, for partition. They have deliberately kept away the plaintiff herein from the proceedings and such stand has been taken despite the fact that the plaintiff herein had earlier filed a suit for a declaration and permanent injunction in O.S.No.546 of 1989 along with the defendants 3 and 4 herein against the defendants 1 and 2 herein and as a counter blast, the defendants 1 and 2 herein had filed the suit in O.S.No.557 of 1989 against the plaintiff and her two sons. The judgment in that suit which has been marked as Ex.A1, would clearly show that the learned Judge had observed that both the parties had not come to the Court with clean hands and only relief left to them was to enter into partition



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in respect of the properties of Balakrishna Gounder.
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16. Despite the fact that the plaintiff had also claimed a share in the properties, she has been kept away in the subsequent suit for partition by the defendants. The defendants appeared to have colluded together and obtained a decree for partition without impleading the plaintiff who has 1/5th share in the suit schedule properties. The defendants have not marked the judgment and decree in O.S.No.18 of 2005 and therefore, this Court is unable to appreciate the reason why the plaintiff herein had not been impleaded as a party to the proceedings. This decree is not binding on the plaintiff and therefore, the Courts below have committed a grave error in non-suiting the plaintiff on the ground that there has been an earlier suit for partition, in which, the plaintiff has not participated. Therefore, the substantial question of law is answered in favour of the plaintiff and the judgment and decree of the Courts below are set aside and a preliminary decree for partition of a 1/5th



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share in the property subject matter of the suit O.S.No.154 of 2010 on the file of the Principal District Munsif Court, Gingee, of the plaintiff is granted.

Accordingly, this second appeal stands allowed.

Consequently, connected C.M.P. stands closed. No costs.

26.03.2024

Internet : Yes
Index : Yes/No
Speaking order/Non-speaking order
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To

- 1.The Sub Judge, Gingee.
- 2.The Principal District Munsif, Civil Judge (Junior Division), Gingee.
- 3.The Section Officer, V.R.Section, High Court, Madras.



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P.T.ASHA, J.,

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