IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23-12-2005

Coram

The Honourable Mr.Justice N.PAUL VASANTHAKUMAR

Second Appeal No.300 of 1993

1. Thangammal
2. Santhana Mary
3. Arokiasamy ... Appellants (Defendants 1 to 3)

Vs.

1. Papathi
2. Anthoni Ammal
3. Santhanasamy
4. Uthiriya Mary
5. Annammal
6. Antonysamy
7. Maria Selvi
8. Susai Mary (minor)
   (rep. by next friend & Guardian
   Annammal, 5th respondent)
9. Jaya Mary
10. Arokiaraj
11. Antony Raj
12. Amalarpara Mary
13. Santhana Mary
14. Arokiyasamy
15. Our Lady of Health Shrine
    Bascillica Velankanni
    rep.by its Parish Priest ... Respondents

(Since Respondents 3,7, 9, 12 & 13 remained exparte before the Lower Court, they are given up in this appeal)

Second Appeal filed under Section 100 of Code of Civil Procedure, against the decree and judgment of the District Judge, Nagapattinam in A.S.No.32 of 1990 dated 3.5.1991, confirming the decree and judgment of the Sub-Judge, Nagapattinam in O.S.No.18 of 1987 dated 25.11.1989.

For Appellants : Mr.A.S.Narasimhan
For Respondents 1&2 : Mr.R.Thirugnanam
For 15th respondent : Mr.K.Francis
RR-3,7,9,12 & 13 : Given-up

J U D G M E N T

Defendants 1 to 3 in O.S.No.18 of 1987, a suit for partition, on the file of the Subordinate Judge, Nagapattinam, have filed this second appeal aggrieved by the concurrent findings of the Courts below.

2. Appellants herein are defendants 1 to 3 and respondents 1 and 2 are Plaintiffs in the suit.

3. The brief facts giving rise to filing of the original suit are as follows:

(a) The suit property to the extent of 16 cents in S.No.12/5 in Velankanni Village originally belonged to the family of one Pitchaikannu, predecessor of the plaintiffs. He had two sons by name Arumainathan and Manickam. Arumainathan had one son by name Sebastian (since dead) and two daughters Papathi and Anthoniammal, who are plaintiffs herein. The wife of Sebastian by name Thangammal, daughter Santhanamary and son Arokiasamy are defendants 1 to 3 in the suit.

(b) The other son of Pitchaikannu by name Manickam had three sons and two daughters and one of the son by name Santhanasamy is 4th defendant. The legal representatives of another son of Manickam by name Periyanayagasamy, are defendants 6 to 9. The wife and two sons and two daughters of Theethriyasamy, another son of Manickam are defendants 10 to 14.

(c) The case of the plaintiffs is that Arumainathan and Manickam possessed 8 cents each in the suit property and there was no division between them during their lifetime. As there was an attempt by the heirs of Manickam to oust the branch of Arumainathan, the legal heirs of Arumainathan including the plaintiff, filed a suit in O.S.No.62 of 1981 on the file of the District Munsif, Nagapattinam, for partition of their half share in the suit property and in that a preliminary decree was passed on 10.3.1982 as prayed for. The appeal filed against the said decree was dismissed and hence the said preliminary decree became final. According to the plaintiffs, as it was felt that the matter could be amicably settled, no final decree application was filed. It is the further case of the plaintiffs that taking advantage of the plaintiffs not having obtained the final decree, defendants 1 to 14 are attempting to sell the whole suit property in favour of 16th defendant, who has interest in the property. As the defendants 1 to 3 are denying the lawful right of the plaintiffs in the suit property, the plaintiffs have filed the suit.

(d) In the written statement filed by defendants 1 to 3, they admit that a preliminary decree was passed in O.S.No.62 of 1981 and the appeal preferred against the same in A.S.No.61 of 1982 was also dismissed. The contention of these defendants is that the plaintiffs should have worked out their remedy in that suit itself by filing final decree application and they should not have filed the present suit. It is also contended that the suit property in O.S.No.62 of 1981 has been valued at Rs.4,800/-, whereas, the same suit property has been valued at Rs.48,000/- in the present suit. The defendants also dispute the relationship of the plaintiffs in that, Arumainathan had only one son by name Sebastian and the plaintiffs are only adopted daughters. The defendants also dispute that the plaintiffs are not in joint possession of the suit property with these defendants.

(e) Defendants 4 to 14 and 16 have filed a separate written statement. According to these defendants, as the legal heirs of Arumainathan and Manickam orally divided their respective shares in the property, no final decree petition was filed in O.S.No.62 of 1981. As per the said partition, 8 cents in the northern portion was allotted to the legal heirs of Arumainathan and 8 cents of southern portion was allotted to the legal heirs of Manickam and since then they were enjoying their respective portions, by putting fence in between. The 16th defendant purchased the southern portion of 8 cents from the legal heirs of Manickam on 29.1.1987 for valid consideration. Hence even assuming the plaintiffs are entitled to 2/3rd share, it is only in the northern portion of 8 cents and not in the entire 16 cents.

4. On the above pleadings, the trial Court framed two issues and conducted trial. On the side of the plaintiffs, no witness was examined, but three documents have been marked as exhibits. On the side of the defendants, two witnesses have been examined and one document was marked. After considering the materials placed before it, the Trial Court passed a preliminary decree as prayed for, allotting 2/6th share in the entire 16 cents in favour of the plaintiffs.

5. Not satisfied with the said decree and judgment, defendants 1 to 3 preferred an appeal in A.S.No.32 of 1990 on the file of the District Court, Nagapattinam. The first appellate Court by its judgment dated 3.5.1991, dismissed the appeal. It is against the said concurrent findings of the Courts below, defendants 1 to 3/appellants are before this Court.

6. When the second appeal came up for admission on 7.4.1993, the following substantial question of law was framed,

"Is the suit maintainable when the parties could have worked out their rights in the earlier suit O.S.No.62 of 1981 ?"

7. The learned counsel appearing for the appellants stress the point that in view of the judgment in O.S.No.62 of 1981 and confirmed in A.S.No.61 of 1982, which are marked as Ex.A-1 (judgment in O.S.62/1981) and Ex.A-3 (decree in A.S.61/1982), the same bind the parties herein, particularly when the subject matter of both the suits is one and the same. In other words, the learned counsel submits that in view of the earlier decree in O.S.No.62 of 1981, the principle of res judicata will come into play. The learned counsel further points out that if at all the plaintiffs have any grievance or right, it can be worked out only in the final decree proceedings in O.S.No.62 of 1981 and a second suit on the very same subject matter is not maintainable. The learned counsel also submits that the Courts below have not even raised and decided the issue as to whether the judgment and decree in O.S.No.62 of 1981 disentitle the plaintiffs from filing the present suit.

8. On the other hand, the learned counsel for respondents 1 and 2 as well as 15th respondent contends that the subsequent suit is maintainable even in spite of the preliminary decree passed in the earlier suit. He also submits that the plaintiffs and their predecessors felt that the matter could be amicably settled between the parties even without obtaining final decree, but as the defendants 1 to 3 are now denying the right of the plaintiffs in the suit property, they filed the present suit.

9. I have considered the rival submissions made by the learned counsel on either side. The point in issue is whether the judgment and decree made in O.S.No.62 of 1981 and confirmed in A.S.No.32 of 1990 settles the rights of the parties and whether the subsequent suit in O.S.No.18 of 1987 is not maintainable on the principle of res judicata. At this stage, it is useful to refer Section 11 of Code of Civil Procedure, which reads thus,

"11. Res judicata.- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

> Explanation I: The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.
>
> ....."

In my opinion, the Courts below have failed to advert to this aspect and simply stated that new parties are added in the suit. In fact there is no new party added, but only the legal heirs/persons claiming through the original parties are added in the subsequent suit. The Apex Court in the decision reported in AIR 1979 SC 551 (Ishwardas v. State of M.P.) in paragraph 6 held as under,

> "... In order to sustain the plea of res judicata it is not necessary that all the parties to the two litigations must be common. All that is necessary is that the issue should be between the same parties or between parties under whom they or any of them claim. ..."

In yet another earlier decision reported in AIR 1977 SC 1680 (State of U.P. v. Nawab Hussain), the Apex Court in para 8 held thus,

> "It is not in controversy before us that the respondent did not raise the plea, in the writ petition which had been filed in the High Court, that by virtue of Cl (1) of Art.311 of the Constitution he could not be dismissed by the Deputy Inspector General of Police as he had been appointed by the Inspector general of Police. It is also not in controversy that that was an important plea which was within the knowledge of the respondent and could well have been taken in the writ petition, but he contended himself by raising the other pleas that he was not afforded a reasonable opportunity to meet the case against him in the departmental inquiry and that the action taken against him was mala fide. It was therefore not permissible for him to challenge his dismissal, in the subsequent suit, on the other ground that he had been dismissed by an authority subordinate to that by which he was appointed. That was clearly barred by the principle of constructive res judicata and the High Court erred in taking a contrary view."

In view of the above, I hold that the reasonings given by the Courts below for decreeing the suit are unsustainable.

10. Let us now consider the following decisions relied on by the learned counsel for the appellants.

(i) In the decision reported in AIR 1963 SC 992 (Venkata Reddy V. Pethi Reddy), the Honourable Supreme Court in paragraph 6 held that even a preliminary decree for partition is a final decision and it is no longer open to question by either party except in an appeal, review or revision petition as provided by law.

(ii) In AIR 1986 MADRAS 367 (A.Jayaraj V. A.Kumaravel), in paragraph 4 of the Judgment this Court held that it is well settled that the rights of the parties in a partition action should be settled in that action only and none of them should be driven to a different action.

11. The learned counsel also placed reliance on the decisions reported in 1999 (1) CTC 529 (K.Subramaniam Naidu V. T.N.Rajendran); 2000 (1) CTC 654 (Siddha Padayachi V.K. v. Indian Bank, Shevapet Branch); and 2000(3) CTC 193 (Hasan Abubucker V. Kottikulam St., Mohideen Pallivasal Therku Mohideen Pallivasal) wherein this Court on earlier occasions categorically held that in case of omission to consider the vital evidence or the relevant provisions of law, the High Court can rectify the mistake committed by the lower Courts, under Section 100 CPC. The said dictum is reiterated in the recent decision of the Supreme Court reported in 2005 (4) Law Weekly 734 (Ramlal & another v. Phagua & others). Relevant para 19 of the Judgment reads thus,

> "19. 1) Mohan Lal vs. Nihal Singh, AIR 2001 SC 2942
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> In the instant case, the trial Court dismissed the suit for the reasons recorded therein on the basis of the record and oral evidence. The lower Appellate Court, as noticed earlier, has not considered oral and documentary evidence properly. The lower Appellate Court which is the final Court of fact mechanically confirmed the findings of the trial Court and upheld the judgment of the trial Court dismissing the suit. The High Court for the cogent and convincing reasons recorded in the judgment has rightly interfered with the concurrent findings of both the Courts. In our view, both the lower courts have concurrently erred in not appreciating the oral and documentary evidence properly and, therefore, the High Court is at liberty to re-appreciate the evidence and record its own conclusion for reversing the orders passed by the lower Court. The judgment of this Court in the case Mohan Lal vs. Nihal Singh (Supra) cited by the learned counsel for the appellant will not be of any assistance to the appellant herein.
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> 2) Thiagarajan and Others vs. Sri Venugopalaswamy B. Koil and Others, (2004)5 SCC 762
>
> In the instant case, the High Court has framed a substantial question of law as extracted in

paragraphs (supra). Learned counsel for the appellants submitted that the High Court has not framed any other substantial question of law at the time of hearing except framed at the stage of admission. Sub-section 5 of Section 100 says that the appeal shall be heard on the question so formulated and the respondent shall at the hearing of the appeal be allowed to argue that the case does not involve such a question. The proviso states that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is specified that the case involves such question. As could be seen from the High Court records, no attempt was ever made by counsel for the appellants to formulate any other substantial question of law at the time of hearing. Therefore, the case of Thiagarajan and Others vs. Sri Venugopalaswamy B. Koil and Others (supra) is not applicable to the case on hand and is distinguishable on facts and law.

3) Manikkoth Narayani Amma and Others vs. P.C.Kalliani Amma and Others, (2003) 9 SCC 245.

4) Makhan Lal vs. Asharfi Lal and Others, (1997) 9 SCC 604.

In view of our foregoing discussions, on facts and on law, we are of the opinion that these two judgments will not be of any aid or assistance to the appellant.

5) Smt. Indira Kaur and Others vs. Sheo Lal Kapoor, (1988) 2 SCC 488

The above judgment was cited by the learned senior counsel appearing for respondent No.1 in regard to the scope of Article 136. In the above judgment, this Court in para 7 held that Article 136 does not expressly forge any fetters on the power of this Court to interfere with the concurrent findings of fact. Though, this power has to be exercised sparingly but if and when the Court is satisfied that grave injustice has been done it is not only the right but also the duty of the Court to reverse the error and the injustice and to upset the finding notwithstanding the fact that it has been affirmed earlier. This Court also held that it is not the number of times that a finding has been reiterated that matters. What really matters is whether the findings is manifestly unreasonable and unjust one in the context of evidence on record. This judgment squarely applies to the case on hand. In the instant case, the High Court has rightly exercised its right

and discharged its duty to reverse the error and removed the injustice done by the courts below. The High Court is right in exercising its duty, rightly so in interfering with an unreasonable and unjust findings by both the Courts below."

12. Applying the above principles laid down by the Honourable Supreme Court and by this Court, I am of the considered view that the judgment in O.S.No.62 of 1981 binds the parties in O.S.No.18 of 1987 and therefore the said suit in O.S.No.18 of 1987 is not maintainable. The earlier decree in O.S.No.62 of 1981 on the file of the District Munsif Court, Nagapattinam having become final, it is binding on the plaintiffs as well as defendants and it is for the parties to file appropriate application for obtaining final decree in the said suit and work out their remedies therein.

13. In view of the above findings, the suit in O.S.No.18 of 1987 is dismissed and the judgment and decree passed by the Courts below are hereby set aside. It is open to the parties to file proper application for obtaining final decree in O.S.No.62 of 1981 and in such event, the same may be considered by the trial Court in the light of pendency of this proceeding and in accordance with law.

14. The second appeal is allowed accordingly. No costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

vr

To

1. The District Judge, Nagapattinam District.
2. The Sub-Judge, Nagapattinam.
3. The District Munsif, Nagapattinam
4. The Record Keeper,
V.R. Section, High Court, Madras

1 cc to Mr.A.S. Narasimhan, Advocate, SR. 50834
1 cc to Mr.R. Thirugnanam, Advocate, SR. 128

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JRG (CO)
kk 7/2