
(1993) 11 SC CK 0015

In the Supreme Court Of India

Case No : Civil Appeal No. 2787 of 1977

Ameena Amma (Dead) through Lrs. and Others

APPELLANT

Vs

Sundaram Pillai and Others

RESPONDENT

Date of Decision : 16-11-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 103, Order 21 Rule 35, Order 21 Rule 97, 11

Citation : (1993) 4 SCALE 420 : (1994) 1 SCC 743 : (1994) 1 UJ 468

Hon'ble Judges : Yogeshwar Dayal, J;Kuldip Singh, J

Bench : Division Bench

Advocate : R. Narasimhan, S. Balakrishnan, P.K. Pillai and N. Sudhakaran, for the Appellant;

Final Decision : Allowed

Judgement

Yogeshwar Dayal, J.—This is an appeal by the plaintiffs by Special Leave against the judgment of the Single Judge of the High Court of Madras passed in Second Appeal No.2050 of 1972 dated 27th October, 1975 whereby the Single Judge set aside the decree of the Court of Subordinate Judge, Nagercoil in Appeal Suit No.33 of 1966 preferred against the decree of the Court of the District Munsif of Nagercoil in Original Suit No.605 of 1962.

2. According to the plaintiffs, on 30th May, 1945 the plaintiffs purchased the suit property i.e. an extent of Acres 0-37 cents with a building situated at Natercoil Town from one Parethuammal under registered sale deed and paid full consideration. One Swaminatha Pillai was in possession of the property, as a lessee under Parethuammal. As the possession was not delivered to the plaintiffs, they filed civil Suit being O.S. No.555 of 1946 on the file of the District Munsif Court, Nagercoil, for the recovery of possession after evicting the lessee Swaminatha Pillai. In this Suit the owner Parethuammal and the lessee Swaminatha Pillai were impleaded as defendants 1 and 2. After the suit was filed, the plaintiffs learnt that Swaminatha Pillai, the lessee, sublet the property to one

Subramania Pillai. Subramania Pillai was impleaded as defendant No.3. Both the vendor and the sub-lessee (D-1 and D-3) remained ex-parte. The suit was contested by the second defendant-lessee. The suit was dismissed on the ground that defendant No. 2 was not paid the amount spent by him for averting the sale of the property.

3. The plaintiffs preferred an appeal being A.S. No.637 of 1961. In the said appeal, the contesting second defendant, the lessee, was only made as a party-respondent. The appeal was allowed and a conditional decree was passed for possession against the contesting second defendant. The condition was that the plaintiffs should pay Rs. 5,895/- to the second defendant with interest at the rate of 6% per annum.

4. The plaintiffs as well as the second defendant preferred separate appeals being S.A. No.315 of 1952 and 345 of 1952 in the High Court of Travancore, Cochin. In the Second Appeal No.315 of 1952 i.e. the second appeal filed by the plaintiffs the decree was modified reducing the interest to 4% and the Second Appeal No. 345 of 1952 filed by the second defendant was dismissed.

5. In the memorandum of Second Appeal No.315 of 1952, the sub-lessee, Subramania Pillai was added as a party to the appeal. He died during the pendency of the second appeal and, therefore, his sons were brought on record as his legal representatives. The sons filed a petition in the High Court to strike them off from the array of parties as the defendant No.3 (sub-lessee) was not made a party in the first appeal, A.S. No.637 of 1961 filed by the plaintiffs. The court struck off their names from the array of parties-respondents. Thus the second appeal filed by the plaintiffs was only against second defendant, lessee-Swaminathan Pillai.

6. As the decree for possession granted to the plaintiffs against defendant No.2 only was a conditional decree, the plaintiffs deposited a sum of Rs. 7,000/-.

7. It appears that on 20th June, 1958 Execution Petition No.588 of 1958 was filed against Subramania Pillai directly under the provisions of Order 21 Rule 35 of the CPC for delivery of possession. Subramania Pillai, defendant No.3, the sublessee, filed an application and raised an objection that as he was not made party to the decree, the decree could not be executed against him.

8. On 24th September, 1958 Execution Petition No.588 of 1958 was accordingly dismissed solely on the ground that the execution petition was not straightaway maintainable against defendant No. 3 as there was no decree for possession against him. The dismissal of the execution petition was not on merit and there was no investigation of the claim of defendant No. 3.

9. On 7th September, 1960, as the decree was only against defendant No.2 - the lessee, Execution Petition being No. 819 of 1960 was filed against him. Delivery of possession was ordered. When the Court 'Amin' went for taking delivery of possession of the property, defendant No.3 - sub-lessee, obstructed the "Amin".

An application was then moved under Order 21 Rule 97 of the CPC to remove the obstruction and delivery of possession.

10. On 9th September, 1961 the Executing Court i.e. the District Munsif Court dismissed Execution Petition No. 819 of 1960 on the ground - (1) that prior order of dismissal in Execution Petition No.588 of 1958 operates res-judicata; and (2) that there was no finding that the obstructer was only a sub-lessee.

11. The plaintiff thus again filed the suit out of which the present appeal has arisen, O.S. No.605 of 1962 on the file of the District Munsif Court, Nagercoil for setting aside the order passed in Execution Petition No.819 of 1960 under Order 21 Rule 103 of the CPC (Old rule prior to 1976 amendment of CPC). In this Suit the plaintiffs impleaded the original lessee as defendant No.2 and the sublessee, the obstructer, as defendant No.1 but the trial court dismissed the suit.

12. The plaintiffs filed an appeal in the District Court being A.S. No.96 of 1965 but it was transferred to the Sub-Court, Nagercoil and renumbered as 33 of 1966.

13. The Sub-Court in the appeal found - (1) that the second defendant i.e. the original lessee did not dispute that defendant No.1, the sub-lessee, was in possession of the property under him; (2) that the present obstructer i.e. the heirs of present defendant No.1 were not parties to the decree passed in O.S. No.555 of 1946 and their names were struck off and the decision in O.S. No.555 of 1946 does not operate res-judicata; and (3) that the present first defendant (sub-lessee) was only in possession under defendant No.2 (lessee). The first defendant in the suit who claimed title independent of second defendant (original lessee) did not get into the witness box to show how he claimed to be in possession of the property independently of second defendant therein. The lower appellate court found that he is only sub-lessee and observed "he cannot simply rest content by saying that the plaintiff alone speaks to the sub lessee and therefore his possession must be taken as adverse. Hence I find the point in favour of the plaintiffs." It is thus clear that the lower appellate court gave a finding that the first defendant in the suit was merely a sub-lessee of defendant No.2 (original lessee) in the suit and had no independent title and was not in adverse possession. The lower appellate court also found that "the plaintiffs have succeeded in the prior suit in respect of their claim that the second defendant was the lessee under their vendor. Therefore, the possession of the second defendant must be deemed to be possession on behalf of the present plaintiffs. This possession is shown to be within 12 years of the present suit. Therefore, this point is also found in favour of the plaintiffs." The lower appellate court accordingly allowed the appeal of the plaintiffs.

14. The sub-lessee filed second appeal in the High Court being Second Appeal No.2050 of 1972. During the pendency of the appeal Swaminath Pillai, lessee, (defendant No.2 in the suit) died and his two sons were brought on record as defendants 7 and 8. The High Court allowed the second appeal by order dated 27th October, 1975 and held that Execution Petition No.588 of 1958 having been

dismissed, the party not having filed an appeal or suit against that order, it had become final and hence, operates as res-judicata.

15. It will be noticed that Execution Petition No.588 of 1958 was filed against defendant No.3 in the first suit and on the face of it since defendant No.3 was not party to the original decree, the application under Order 21 Rule 35 of the CPC was dismissed on 24th September, 1958 solely on the ground that the execution petition was not maintainable against defendant No.3 as there was no decree against him. There was no adjudication on merits or investigation into the claim of defendant No.3 in that Execution Petition. Once this position becomes clear it is obvious that the order dated 24th September, 1958 merely held that the execution petition in the earlier suit could not be filed against defendant No.3 directly. There was no need to challenge that order in appeal or otherwise as that was the correct order. It was only when the second Execution Petition No.819 of 1960 was filed against the original judgment - debtor (defendant No.2) and the defendant No.3 in suit i.e. sub-lessee obstructed the 'Amin', that the present suit was filed under the provisions of Order 21 Rule 103 of the CPC and there was no legal bar to it either of res judicata or otherwise. It is settled law that the general principles of Section 11 of the CPC apply to execution proceedings as well but the basic criteria for applying the principles of res judicata is that the order must be between the same parties and that the matter should have been heard and decided by such court. Execution Petition No.819 of 1960 was not between the same parties as Execution Petition No.588 of 1958. Execution Petition No.588 of 1958 was filed against Subramania Pillai who was not a party to the decree for delivery of possession and it was not heard and decided on merits. It was simply dismissed on the ground that the execution did not lie against the third defendant. Hence the order in Execution Petition No.588 of 1958 did not operate res judicata for the purpose of decision of Execution Petition No.819 of 1960 or the present suit.

16. Though the application of the subsequent transferees as respondents 4 and 5 for intervention was not allowed by order of this Court dated 21st November, 1977, yet the counsel on their behalf addressed us and we heard him as well.

17. For the reasons aforesaid the appeal is allowed, the order of the High Court dated 27th October, 1975 is set aside and the order and decree of the Subordinate Judge, Nagercoil, dated 25th July, 1972 passed in A.S. No.33 of 1966 are restored. The appellants would also be entitled to their costs throughout.