

(2009) 08 MAD CK 0121
In the Madras High Court
Case No : O.S.A. No. 355 of 2008

C.E. Sathyanarayana Reddi APPELLANT
Vs
C.E. Sulochana, C.E. Surayanarayanan, Samyukta RESPONDENT
Paramahamsan and Lakshmibanu Jayaprakash

Date of Decision : 19-08-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (2009) 08 MAD CK 0121

Hon'ble Judges : R. Subbiah, J;M. Chockalingam, J

Bench : Division Bench

Advocate : V.R. Sridharan, for the Appellant; A. Venkatesan, for the Respondent

Final Decision : Dismissed

Judgement

M. Chockalingam, J.—Challenge is made to the judgment of the learned Single Judge of this Court made in O.A. No. 3328 of 2007 in C.S.

No. 129 of 2007. By the said judgment, the order of rejection of C.S. No. 129 of 2007, a suit for partition, was made, by allowing the application

in A. No. 3328 of 2007.

2. The appellant/plaintiff filed the said C.S. No. 129 of 2007 for partition seeking 1/5th share in the plaint schedule property with the following

averments.

The suit properties were purchased by the father of the plaintiff C.E. Reddi in the name of his wife, the first defendant. The properties were

purchased by C.E. Reddi, out of the joint family funds. On his death, they were to be divided among the plaintiff and the first defendant/wife and

the children shown as the other defendants. In view of the misunderstanding among the family members, an oral partition was effected in the year

1987. As per the oral partition, the western portion of the Schedule Item-I along with garage was allotted to the plaintiff, while the eastern part was retained by the defendants 1 and 2. When such a division was orally made, the western portion was allotted to the plaintiff, since he was the eldest son and without the knowledge of the plaintiff, Item-II schedule was allotted to defendants 3 and 4 by the first defendant. While the matter stood thus, the first defendant filed C.S. No. 719/2005 for delivery of vacant possession of the western portion of the property at Item No. 1 from the plaintiff and also for the mesne profits from the plaintiff. Hence, there arose a necessity for the plaintiff to file a suit for partition for 1/5th share in item Nos. 1 and 2 of the plaint schedule properties.

3. The first defendant/mother made an application under Order VII Rule 7 of C.P.C. and read with Order XIV Rule 8 of O.S. Rules for rejection of the plaint alleging that the said suit has been filed by the plaintiff only as a counter-blast to C.S. No. 719 of 2005. The plaint items of properties are nothing to do with the joint family or estate of her husband. In the earlier suit in O.S. No. 8620/1996 on the file of the City Civil Court, the plaintiff put forth the case of oral partition and a specific issue was framed whether the suit property Item No. 1 was a joint family property. On trial, the issue was decided holding that it was not a joint family property but it was self acquisition of the first defendant. When the suit filed by the first defendant was decreed, the plaintiff took it on appeal in A.S. No. 324 of 2000 but the same was withdrawn by him. Thus, the judgment in O.S. No. 8620/1996 would operate as res judicata. Insofar as Item No. 2 was concerned, the first defendant was the owner of the said property and she has settled the property to her two daughters viz., defendants 3 and 4 by two separate registered settlement deeds dated 27.3.1986 and the defendants 3 and 4, pursuant to the same, have also taken possession and they have constructed their houses even before 1990. The plaintiff who is also residing in the other part of the property where the first defendant was residing had never made a claim for partition of Item No. 2 of the schedule. The present suit claiming partition of 1/5th share was brought forth only to harass the 85 years old first defendant. Under such circumstances, it has to be rejected. The learned Single Judge after framing necessary points for consideration, ordered, rejection of the plaint.

4. Advancing the argument on behalf of the appellant Mr. R. Sridharan learned Counsel would submit that the rejection of the plaint by the learned

Single Judge as if the suit was not maintainable in view of the specific finding in O.S. No. 8620/1996 was not correct since the said suit was for a

mandatory injunction between the parties. Even assuming the finding was given, the said finding was confined only to one item of property in C.S.

No. 129 of 2007. It was contended by the plaintiff that in respect of the property there was no finding in that suit that it was the exclusive property

of the first defendant. In fact, it was never a subject matter in O.S. No. 8620 of 1996. Hence, the learned Single Judge should not have rejected

the plaint in view of the fact that in respect of Item No. 2 it is still a contentious matter and the plaintiff/appellant was perfectly entitled to proceed

with a suit, let in evidence and establish that he was entitled to 1/5th share in respect of Item-2 of the suit property. Insofar as Item-2 of the

property is concerned, there was no finding in any proceedings. Under such circumstances, the trial Court should have rejected the suit.

5. It is true that the plaintiff has averred in the plaint that Item-I was subjected to oral partition already but it remains to be stated that the same was

denied by the respondent. Under such circumstances, there arose necessity for filing the suit for partition. It is not correct to state that the plaintiff

has not putforth the plea that Item-2 was a joint family property liable for partition while defending O.S. No. 8620/1996 and the conclusion so

arrived was illegal and uncalled for. In fact Item No. 2 was never a subject matter of O.S. No. 8620 of 1996. It was too earlier even without

letting in evidence, the learned Single Judge has accepted the case of the first defendant as the absolute owner when the said issue could not have

been a matter of dispute in the earlier proceedings in C.S. No. 8620 of 1996. The learned Single Judge has relied on a partition deed dated

5.3.1962 marked as Exs.A7 and A8 in O.S. No. 8620 of 1996. and pressed them into service in determining the application for rejection of the

plaint. It was thoroughly erroneous. The appellant should have been given a chance to test the veracity of the partition deed since he was not a

party in that suit. While rejecting the plaint under Order VII Rule 11 of the Civil Procedure Code, the learned Single Judge has not exercised the

discretion judicially. The learned Single Judge has foreclosed the issue whether Item No. 1 of schedule property was a self acquired property of

the first defendant without determining the same, on evidence and by accepting the contention put forth by the first defendant. While the learned

Single Judge was convinced that the plaintiff should be granted liberty to put forth his claim for partition in the suit filed by the first respondent, it

should not have rejected the plaint and instead should have proceeded with both the suits viz., C.S. No. 129 of 2007 and C.S. No. 719 of 2005

and thus, the order of the learned Single Judge has got to be set aside.

6. The Court heard the learned Counsel for the respondent who put forth the submissions in his sincere attempt to sustain the order of rejection of

the plaint made by the learned Single Judge. The Court paid its anxious consideration on the submissions made.

7. The appellant as Plaintiff filed C.S. No. 129 of 2007 seeking partition of two items of properties mentioned in the schedule alleging that those

immovable properties belonged to joint family. According to the appellant, they were purchased in the name of the first defendant by his father

C.E. Reddi from out of the joint family funds. On the death of C.E. Reddi, the plaintiff and defendants became entitled to the properties. In view of

the misunderstanding, there was a oral partition in the year 1987 among the plaintiff and defendants 1 and 2 and in that partition, western portion of

schedule Item No. 1 along with the garage was allotted to the plaintiff, while the eastern portion was retained by the defendants 1 and 2. Insofar as

second item of property was concerned even without the knowledge of the plaintiff, the first defendant has settled those properties to her daughters

viz., defendants 3 and 4. Even according to the plaintiff, there arose a necessity for filing the instant suit in lieu of the filing of another suit C.S. No.

719 of 2005 at the instance of the first defendant. 8. On the contrary, it was contended by the first defendant that both the properties were not

joint family properties and it has nothing to do with the estate of C.E. Reddi. Those properties belong to the first defendant exclusively and the said

suit has been filed as a counter blast to her suit in C.S. No. 719 of 2005. Even as per the averments in the plaint, it would be quite clear that the

first defendant/mother has filed C.S. No. 719 of 2005 for damages and other reliefs against the plaintiff/appellant and thus, there arose a necessity

for filing the present suit for partition. Hence, this averment made in the plaint would prove that the instant suit was filed by the appellant as a

counter-blast to C.S. No. 791 of 2005 filed by the first defendant.

9. Concededly, a suit was filed by the defendant seeking permanent and mandatory injunction in O.S. No. 8620 of 1996 against the

appellant/plaintiff and the subject matter of the suit was item No. 1 of the plaint schedule property. As averred in the present plaint, the

appellant/plaintiff took a plea that the property belonged to the joint family property. On a fullfledged trial, the Court held that the property was not

a joint family property but self acquired property of the first defendant. Even though the respondent took it on appeal in A.S. No. 324/2000, he

has withdrawn the same. It was contended by the learned Counsel for the appellant that the title in respect of the property was never in issue in that

suit, apart from that, the plea of the plaintiff that there was oral partition made was candidly denied by the first respondent, under such

circumstances, there arose a necessity for filing the present suit for partition. This contention cannot be accepted even for a moment. The plea of

oral partition was put forth by the appellant/plaintiff even in O.S. No. 8620 of 1996 apart from contending that was a joint family property. It

would be more apt and appropriate to reproduce the finding recorded by the trial Court in O.S. No. 8620 of 1996.

I come to the conclusion that the plaintiff has proved her case that the suit property is her absolute property and the Defendant is only a permissive

occupier of the Western half portion of the Suit building and also the Defendant has demolished the disputed compound.

10. While answering the issue whether the suit property was a joint family property, on evidence, the issue was decided and held as above. It

would be too late for the appellant to raise the very same contention that the property belongs to the joint family and on oral partition, he was given

the western part. What is all required for application of doctrine of res judicata as envisaged u/s 11 of the CPC is that when the matter was in issue

directly and substantially in a prior litigation and decided against a party, the decision would be res judicata in a subsequent proceeding. In

Sajjadanashin Sayed Md. B.E.Edr. (D) By Lrs. Vs. Musa Dadabhai Ummer and Others, , the Apex Court has held as follows:

The test to determine whether an issue was directly and substantially in issue in earlier proceedings is collaterally or incidentally, is that if the issue

was ""necessary"" to be decided for adjudicating on the principal issue and was decided, it would have to be treated as ""directly and substantially in issue "" and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case.

11. Applying the above decision of the Apex Court, it can be well stated that the suit is hit by doctrine of res judicata since the appellant has made an attempt to re-agitate on the same issue already decided. Apart from above, even as per the plaint averment there was oral partition which has taken place in the year 1987 and the western portion was allotted to the plaintiff. Needless to say, an application for rejection of the plaint has to be considered based on the averments in the plaint as they are and no external aid could be looked into for the said purpose. Having averred that there was a oral partition in the year 1987 in which the plaintiff was allotted the western portion of item No. 1, the plaintiff has come forward with the present suit for the division of the same property.

12. Equally the plaintiff has come forward with a vexatious claim in respect of Item No. 2 calling it as a joint family property. As the absolute owner of the property, the first defendant has settled the second item on defendants 3 and 4 in the year 1986. It is pertinent to point out that the plaintiff was all along living on the western portion of the property, while the 1st and 2nd defendants are living on the eastern side of the property. The defendants 3 and 4 accepting the settlement got into possession of the property in Item No. 2 and after completing the construction have been living there. Though the plaintiff/appellant has raised that plea even in O.S. No. 8620 of 1996 that the plaint item No. 1 was a joint family property, he has not whispered anything about the second item. Apart from that, he has putforth a plea of oral partition, but he has not stated anything about item No. 2. As rightly pointed out by the learned Single Judge, the plaintiff/appellant was barred by law u/s 11 Explanation 4 which reads as follows:

Any matter which might and ought to have been made ground defence on attack in such former Suit shall be deemed to have been a matter directly and substantially in issue in such Suit.

13. The Apex Court in Patasibai and Others Vs. Ratanlal, has held as follows:

The trial Court should not proceed when there is no controversial issue but the

trial Court failed to perform its duty and proceeded to issue summons without carefully reading the plaint. Since the plaint suffers from that fatal defect, the mere issuance of summons by the trial Court did not require that the trial should proceed even when no triable issue is shown to arise; permitting the continuance of such a suit is tantamount to licensing frivolous and vexatious litigation, which cannot be done.

14. It is also brought to the notice of the Court that the first defendant is aged more than 80 years whose suit in C.S. No. 719 of 2005 against the appellant is pending and the present suit is not only hit by the doctrine of res judicata but also found to have been filed in counterblast to the suit filed by the first respondent and the plaint would also reveal that it was an abuse of process of law, under such circumstances, the learned Single Judge is perfectly correct in making an order of rejection of the plaint. The Court is unable to see any reason to disturb the same.

15. Therefore, the order of the learned Single Judge is sustained. Accordingly, the appeal is dismissed leaving the parties to bear their costs.

Consequently, M.P. No. 1 of 2008 is closed.