

(1987) 11 MAD CK 0019
In the Madras High Court

Chenpaga alias Pankajammal and Others	APPELLANT
Vs	
Thangammal (deceased) and Others	RESPONDENT

Date of Decision : 18-11-1987

Acts Referred:

Citation : (1988) 2 LW 501 : (1988) 2 MLJ 208

Hon'ble Judges : Ratnam, J

Bench : Division Bench

Judgement

Ratnam, J.—Defendants 2 to 5 in O.S.No. 39 of 1977, Sub Court, Chengalpattu are the appellants in the second appeal. That suit was

instituted by deceased Thangammal for a declaration of her title to the A and B Schedule properties and for recovery of possession from the

appellants and others with past and future mesne profits Thangammal claimed the suit properties through her husband Kannan Iyengar. On the

other hand, with reference to A schedule properties, the appellants claimed that their predecessor-in-title, one M.K. Seshadri Iyengar, purchased

the A schedule properties from Kannan Iyengar himself under two documents, Exs.B-1 dated 4.5.1951 and B-2, dated 25.9.1951. Insofar as B

schedule properties are concerned, the appellants pleaded that they were purchased benami in the name of Kannan Iyengar.

2. On a consideration of the oral as well as the documentary evidence, the trial Court found that the A schedule properties absolutely belong to the

deceased M.K. Seshadri Iyengar, through whom the appellants claim and that B schedule properties were not purchased benami in the name of

Kannan Iyengar, but belonged to him and therefore, after his death, his wife Thangammal would be entitled to the same. In view of the conclusions

as arrived at, Thangammal's title to the B schedule properties alone was declared and the suit in respect of A schedule properties was dismissed.

3. Aggrieved by the decree granted in favour of Thangammal with reference to the B schedule properties, the appellants in this second appeal

preferred A.S.No. 27 of 1979 before the District Court, Chengalpattu. The learned District Judge was aware that Thangammal did not prefer any

cross-appeal with reference to the dismissal of her suit relating to A schedule properties. Even so, the learned District Judge felt that the whole

matter was before the lower appellate Court justifying the application of Order 41, Rule 22, Code of Civil procedure, and in that view, in the

appeal preferred by the appellants, granted a decree to decreased Thangammal even with reference to the A schedule properties. It is the

propriety of this that is challenged in this second appeal.

4. Though Thangammal originally laid a claim to the A and B schedule properties, she succeeded only as regards the B schedule properties in

respect of which she was granted a decree and her suit with reference to the A schedule properties stood dismissed. In other words, Thangammal

succeeded in part and also lost in part in her suit. Insofar as the decree dismissing Thangammal's claims with reference to the A schedule

properties is concerned, in appeal or at least preferred a memorandum of cross-objection in the appeal preferred by the appellants in A.S.No. 27

of 1979. It is now admitted that she did neither. It is in this situation that the legality of the decree passed by the lower appellate Court in favour of

Thangammal even as regards A schedule properties has to be considered. The lower appellate Court purported to rely upon Order 41, Rule 22,

Code of Civil Procedure, which has no application at all on the facts and circumstances of this case. Under Order 41, Rule 22, Code of Civil

Procedure, a respondent may support a decree with reference to any issue which ought to have been found in his favour, but actually found against

him. In this case, Thangammal did not obtain any decree with reference to A schedule properties and her suit with reference to those properties

stood dismissed. In other words, this is not a case of Thangammal having obtained a decree in her favour, though some issues in the suit were

found against her. There is, thus, no scope at all for invoking the provisions of Order 41, Rule 22, Code of Civil Procedure.

5. Whether Order 41, Rule 33, Code of Civil Procedure, could be resorted to may next be considered. The scope of this provision has been considered by a Division Bench of this Court, reported in Venukuri Krishna Reddi and Another Vs. Kota Ramireddi and Others, . The circumstances under which a Court may resort to the exercise of the power under Order 41, Rule 33, Code of Civil Procedure, have been set out therein. Three classes of cases are stated as illustrations. The first is where as a result of interference in favour of the appellant, it becomes necessary to re-adjust the rights of other parties. The second is where the question of settling mutual rights and obligations between the same parties is involved. The third is when the relief prayed for is single and indivisible, but it claims against a number of defendants. These classes of cases, as pointed even in the judgment are merely illustrative, but not exhaustive. The facts of the present case do not even fall under any one, the aforesaid illustrations. It is also necessary to bear in mind the caution administered by the Division Bench with reference to the application of the very extensive power under Order 41, Rule 33, C.P.C. At page 1139, the Division Bench has pointed out that despite the extensive nature of the power, one principle has to be taken as well established and that is in a case when a party having a right to appeal fails to do so, relief should ordinarily be refused to him under Order 41, Rule 33, Code of Civil Procedure. In Commissioner of Income Tax, Assam etc. Vs. The Panbari Tea Co. Ltd., , considering the scope of Order 41, Rule 33, Code of Civil Procedure, the Supreme Court pointed out that that provision does not confer an unrestricted right to re-open decrees which had become final and that if in substance there are two decrees which had become final and that if in substance there are two decrees which can stand apart from the other, and one of them is allowed to become final, it would not be open to the other party to the litigation to invoke the powers of the appellate Court under Order 41, Rule 33, CPC and pray for the passing of the order in the appeal in favour of the party not appealing, as to give to the latter, the benefit which has not been claimed. In this case, as seen already, Thangammal never filed any appeal or cross-objection with reference to that part of the decree negating her title to the A schedule properties and that had been allowed to become final. Under those circumstances and on the principles of the Division Bench of this Court and the Supreme

Court, referred to above, there is no scope at all for invoking Order 41, Rule 33, Code of Civil Procedure, in favour of Thangammal, and on this

short ground, the decree of the lower appellate Court, insofar as A schedule properties are concerned, cannot be sustained.

6. With reference to B schedule properties the appellants put forth a case of benami purchase in the name of Kannan Iyengar. The Courts below

have considered the evidence with regard to this plea and had ultimately and categorically found on cogent and acceptable materials that the

appellants have failed to establish that the B schedule properties had been purchased by the deceased M.K. Seshadri Iyengar out of his own funds

benami in the name of the deceased Kannan Iyengar. That conclusion concurrently arrived at by the Courts below is fully and amply supported by

the evidence on records and does not merit any interference. Consequently, the judgment and decree of the lower appellate Court are modified to

the extent indicated above. The second appeal is allowed in part. Each party will bear its own costs through out.