
(1944) 07 MAD CK 0009
In the Madras High Court

Gogineni Bapayya

APPELLANT

Vs

Gogineni Ramakrishnayya and Others

RESPONDENT

Date of Decision : 12-07-1944

Acts Referred:

Citation : AIR 1945 Mad 39 : (1944) 57 LW 470

Hon'ble Judges : Leach, C.J

Bench : Division Bench

Judgement

Leach, C.J.—The appellant filed his suit in the Court of the District Munsif of Repalle for a partition of moveable property belonging to the joint family of which he was a member. The defendants were his four brothers. The plaintiff alleged that a partition of the immovable properties had already taken place and all that remained to be done was to divide the movables. The suit was resisted by defendant 1, who was supported by defendant 3. Defendant 2 supported the plaintiff. Defendant 4 allowed the suit to proceed ex parte. Defendant 1 pleaded that the suit was bad because the plaintiff did not ask for full partition. According to defendant 1, all the immovable, properties had not all been divided and the plaintiff was only seeking partition of some of the moveable properties. The District Munsif held that there had been a complete partition with regard to the Immovable properties and then proceeded to take the evidence with regard to the moveable properties. At the end of the case he came to the conclusion that defendant 1's plea that the plaintiff was only seeking partial partition of the moveables was well founded. Consequently, he dismissed the suit with costs. Although he was not aggrieved by the dismissal of the suit which he had in fact pressed for, defendant 1 filed an

appeal in the Court of the Subordinate Judge of Tenali. He did so because he was dissatisfied with some of the statements in the District Munsif's

judgment with regard to the moveables. The plaintiff himself did not question the correctness of the District Munsif's decision that the suit failed

because only partial partition of the moveables was asked for. The Subordinate Judge dismissed the appeal. Defendant 1 then appealed to this

Court. The second appeal was heard by Chandrasekhara Ayyar J. who set aside the decree of the Subordinate Judge and remanded the case to

the Subordinate Judge for a decision on the merits. The present appeal is from the judgment of Chandrasekhara Ayyar, J.

2. The learned Judge considered that this case fell within the line of cases of which *Krishnachandra Goldar v. Moheshchandra Soha* 9 C.W.N.

584 is an example. The principle established by these decisions is that a defendant has the right to appeal notwithstanding that the suit has been

dismissed as against him, if he is aggrieved by the decree. We find ourselves unable to agree that they have application. In the first place, the trial

Court accepted the plea of Defendant 1 that the suit was not maintainable. He expressly asked for its dismissal and secured its dismissal with an

order for costs in his favour. A party cannot be allowed to blow hot and cold, and defendant 1 having asked the Court to dismiss the plaintiff's

suit, must accept the dismissal. Moreover, there is nothing in the decree which affects defendant 1 adversely. No finding in the judgment of the

District Munsif can operate as *res judicata*. The rights of the parties were left entirely untouched by the dismissal of the suit. It may be that

defendant 1 considers that if he filed a suit for partition he might find the law of limitation operating adversely to him. This cannot, however, be

regarded as a factor in the case. Defendant 1 could have brought his own suit for partition if he had so desired. The appeal will be allowed with

costs against respondent 1 here and in the second appeal. The orders of the District Munsif and the Subordinate Judge on the question of costs will

stand.