

(2013) 09 MAD CK 0203

In the Madras High Court

Case No : C.M.A. No. 1525 of 2010 and M.P. No. 1 of 2010

K. Rajamanickam and R. Sulochana

APPELLANT

Vs

S. Valli

RESPONDENT

Date of Decision : 03-09-2013

Acts Referred:

Citation : (2013) 09 MAD CK 0203

Hon'ble Judges : P.R. Shivakumar, J

Bench : Single Bench

Advocate : P. Mani, for the Appellant; S. Kaithamalai Kumaran, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Shivakumar, J.—Notice before admission was given to the respondent and the respondent has entered appearance through counsel. The arguments advanced by Mr. P. Mani, learned counsel for the appellants and by Mr. S. Kaithamalai Kumaran, learned counsel for the respondent are heard. The appellants 1 and 2 are husband and wife. The respondent Valli is none other than the sister of the first appellant Rajamanickam. The suit properties are admittedly the ancestral properties in the hands of Kaveri Gounder, the father of the first appellant and the respondent herein. The said Kaveri Gounder died intestate on 24.10.1998 leaving behind him the first appellant and the respondent and also his wife Pavaiammal, as his legal representatives. The said Pavaiammal also died on 21.02.2004.

2. Claiming that the respondent along with the first appellant and their father Kaveri Gounder constituted a Mitakshara Hindu Undivided Family and on the death of Kaveri Gounder, the respondent and the first appellant became the surviving coparceners; that on the death of the third legal heir of Kaveri Gounder, namely Pavaiammal, the share that would have gone to her from out of the share of the Kaveri Gounder, also remained intact as the coparcenary property and that the first appellant and the respondent were entitled to equal

shares in the suit properties, the respondent had filed the suit in O.S. No. 207/2008 on the file of the District Court, Salem. Since a portion of the suit properties had been settled on the second appellant by the first appellant, she was also made a party defendant. The case came to be assigned to the Additional District Judge (Fast Track Court No. 1), Salem for trial.

3. The appellants (defendants 1 and 2) entered appearance to contest the case based on the written statement filed by the first appellant, which was adopted by the second appellant. After framing of issues, the case came to be listed for trial on various dates and at last, it stood listed for trial on 01.07.2009. The case was opened and evidence was led on the side of the respondent herein/plaintiff in part. Since the counsel for the appellants/defendants 1 and 2 was not prepared to cross-examine PW. 1 on that date, the case was adjourned to 02.07.2009 for cross-examination of PW. 1 and for examination of further witnesses on the side of the respondent herein/plaintiff. On 02.07.2009, instead of cross-examining PW. 1, the learned counsel for the appellants herein/defendants 1 and 2, reported no instruction, pursuant to which the appellants herein/defendants 1 and 2 were called absent and set ex-parte and the trial court proceeded with the trial, after setting the appellants herein/defendants 1 and 2 ex-parte. It pronounced an ex-parte judgment upholding the claim of the respondent herein/plaintiff and granted a preliminary decree in her favour directing division of the suit properties into two equal shares and allotment of one such share to the respondent herein/plaintiff.

4. The appellants, who suffered the ex-parte preliminary decree, chose to wait till the end of the time prescribed by the Statute and at the fag end of the time prescribed for filing an application to set aside the ex-parte decree, filed an application under Order IX Rule 13 CPC in I.A. No. 1250/2009 in O.S. No. 207/2008 on the file of the Additional District Judge (Fast Track Court No. 1), Salem. In the affidavit filed in support of the application filed under Order IX Rule 13 CPC, the appellants had contended that the case was looked after solely by the first appellant and he fell ill due to jaundice; that pursuant to the advice tendered by a country doctor, who treated him with herbal medicine, to take complete rest, he was not able to come to Salem to conduct the case and that only after his recovery from the illness, he came to know through his advocate on record in the lower court that such an ex-parte preliminary decree had been passed.

5. The said reason assigned by the appellants was stoutly refuted by the respondent in the counter filed by her. It was her contention that the appellants, who deliberately left the case to be decided ex-parte, came forward with the said application with a view to drag on the proceedings after a final decree application was filed by her. The learned trial judge who heard the application, found that though the application was filed in time, the appellants herein/defendants 1 and 2 were not able to prove to the satisfaction of the court that they were prevented by a reasonable cause from appearing on the date on which the original suit

stood posted for trial. The learned trial judge also held that the appellants herein deliberately left the suit to be decreed ex-parte, which was obvious from the fact that the counsel, who was present on the date of opening of the case for trial, chose to report "no instruction" the next day when he was called upon to cross-examine PW. 1, who was examined on the previous day.

6. It is also an admitted fact that a final decree application was filed before the filing of the application under Order IX Rule 13 CPC. The same would show that there was no malafide on the part of the respondent herein/plaintiff and she did not act with an intention of keeping the appellants in dark till the time for filing an application under Order IX Rule 13 CPC would expire. It is not an accidental coincidence that the appellants chose to file the application to set aside the ex-parte preliminary decree on the last day of limitation. The ex-parte decree was passed on 02.07.2009. In the normal course, limitation would have expired on 01.08.2009. Since 01.08.2009 and 02.08.2009 happened to be holidays, the appellants chose to file the application on 03.08.2009. The same will show that the appellants had not only allowed the suit to be decreed ex-parte, but also waited till the last day to file the application to set aside the ex-parte preliminary decree.

7. It is also pertinent to note that the respondent had taken a plea in the plaint that her marriage was solemnized on 07.03.1990. Though the appellants would have chosen to contend in their written statement that the marriage of the respondent was conducted on 10.03.1989 so as to disable her from claiming to be a coparcener by virtue of Hindu Succession (Tamil Nadu Amendment) Act, 1989, they had chosen to leave the suit to be proceeded ex-parte, in which, the respondent has produced her marriage invitation in proof of her contention that her marriage took place on 07.03.1990, subsequent to the amendment introduced to the Hindu Succession Act by the Tamil Nadu Act 1 of 1990. It should also be noticed that the first appellant has chosen to settle a part of the property in favour of his wife, namely the second appellant in 2003 during the life time of his mother Pavaiammal disregarding the interest of the said Pavaiammal and also the respondent herein. Even assuming that she was not a coparcener, she was entitled to a share in the share of her husband. The fact that the first appellant chose to execute a gift settlement deed in favour of his wife (2nd appellant) disregarding the share of Pavaiammal will show lack of bonafide on the part of the appellants. The apprehension that the appellants could not succeed in their defence could have been the only reason for their keeping away from the court when the suit stood posted for trial leading to the passing of the ex-parte preliminary decree, with an intention to protract the proceedings as long as possible by filing an application to set aside the ex-parte decree. By adopting such a method, the appellants are trying to drive the respondent to come to terms with them. The learned trial Judge has approached the problem in proper perspective and rightly decided that the appellants herein were not proved to be prevented by a reasonable cause from appearing on the dates on which the case stood before the trial court for trial and that the ex-parte

preliminary decree could not be set aside. This court does not find any defect or infirmity in the order passed by the trial court dismissing I.A. No. 1250/2009 in O.S. No. 207/2008 filed under Order IX Rule 13 CPC to set aside the ex-parte preliminary decree dated 02.07.2009. There is no merit in the appeal and the same deserves to be dismissed.

Accordingly, the civil miscellaneous appeal is dismissed. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.