
(2011) 02 MAD CK 0232

In the Madras High Court

Case No : Appeal Suit (First Appeal) No. 1073 of 2007 and M.P. No. 1 of 2008

K. Ramachandran

APPELLANT

Vs

K. Ganeshmoorthy, Lakshmiammal, K. Kamala and K. Malathi

RESPONDENT

Date of Decision : 17-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 7 Rule 3, 11, 115

Citation : (2011) 02 MAD CK 0232

Hon'ble Judges : R. Mala, J

Bench : Single Bench

Advocate : S.K. Rakhunathan, for the Appellant; C.A. Diwakar, for RR-1 and 2, for the Respondent

Final Decision : Allowed

Judgement

R. Mala, J.—The first Defendant has filed the present First Appeal (Appeal Suit) challenging the observations made by the trial Court while

dismissing the suit for partition. The trial Court has come to the conclusion that the description of the properties given by the first

Respondent/Plaintiff, was not clear as required under Order 7 Rule 3 Code of Civil Procedure, and Civil Rules of Practice and circular orders, and

the trial Court has also given an opportunity to the first Respondent/Plaintiff to file a fresh suit for partition with a clear description of the properties,

against which, the present First Appeal has been filed by the first Defendant.

2. It is pertinent to note that the first Respondent/Plaintiff is the brother of the Appellant/first Defendant. The first Respondent/Plaintiff has filed the

suit against his brother (first Defendant), mother (second Defendant) and sisters (Defendants 3 and 4), for partition and separate possession of his

1/5 share in the suit properties. He has given the description of the properties in

nine items. The Appellant/D1 has contested the suit stating that the description of the property has not been given in accordance with Order 7 Rule 3 Code of Civil Procedure . Further, he has stated that the properties are separate properties. In the written statement, he has stated that the Plaintiff has not stated as to what are the items of the ancestral property, and what is the extent of each items of the properties. Even though the first Respondent/Plaintiff has given the description of the properties, the trial Court dismissed the suit with observations, after framing eight issues. in issue No. 1, the trial Court decided that the Defendants have clearly pointed out in the written statement that the Plaintiff has not described the properties properly and they have also contended that no executable decree could be passed. It is the further case of the Appellant/D1 that they are not in a position to meet out the case of the Plaintiff, since the Plaintiff has not given description to identify the properties properly. The description of the property given in the plaint is bald, scanty and incomplete. So, the trial Court, after considering the decisions of Courts, dismissed the suit stating that the suit is dismissed for non-furnishing the correct particulars and the description of the properties and gave an opportunity to contravene or contradict the statement of the first Respondent/Plaintiff. At the time of dismissal of the suit, the trial Court made an observation that, "" ... It is open to the parties to file a fresh suit for partition with clear description of the properties as required under Order 7 Rule 3 Code of CPC and the Civil Rules of Practice and the Circular Orders if they are so advised."" Those observations have been incorporated in the decree in Clause (2). In the decree, it is stated as follows:

- (1) that the suit be and the same is hereby dismissed.
- (2) that it is open to the parties to file a fresh suit for partition with clear description of the properties as required under Order 7 Rule 3 Code of CPC and the Civil Rules of Practice and Circular Orders if they are so advised.
- (3) that there be no order as to costs.

Against these observations in the decree, particularly in Clause (2), the present First Appeal has been preferred by the first Defendant.

3. Learned Counsel appearing for the Appellant/D1 submitted that the first Respondent/Plaintiff filed the suit for partition, but he has not furnished the description of the properties in accordance with Order 7 Rule 3 Code of CPC

and so, the Appellant/D1 was unable to identify his property(ies) and put forth his defence. The trial Court framed proper issues and considering the averments of the parties, dismissed the suit for want of correct description of the properties. But, at the time of dismissing the suit, liberty was given to the first Respondent/Plaintiff to file fresh suit with a clear description of the properties as required under Order 7 Rule 3 Code of CPC and the Civil Rules of Practice and it will affect the rights of the Appellant/D1 and since it was incorporated in Clause (2) of the decree, the Appellant/D1 has come forward with this First Appeal and prayed for allowing the same.

4. To substantiate his arguments, learned Counsel appearing for the Appellant/D1 relied upon the following decisions:

(i) Vol.XLVIII MLJ 64 Privy Council (Part II) (Fateh Singh v. Jagannath Baksh Singh):

But as the Judges in the Court of the Judicial Commissioner have observed, some complication was introduced by the language of the Judge who

tried the first case and by his expressing himself as if he had power to give leave to bring a fresh suit. It was contended on behalf of the Plaintiffs

that in so expressing himself he was purporting to exercise the powers given to the Court by O.23, which allows the Court in certain cases to grant

the Plaintiff permission to withdraw from a suit with liberty to issue a fresh suit, in which case the bar against a fresh suit which is otherwise imposed

on a Plaintiff who abandons his first suit is removed.

The same point was raised at their Lordships' bar, but their Lordships agree with the Court of the Judicial Commissioner that it is not a good one.

There was no application for leave to withdraw the suit, nor was it withdrawn: it was dismissed. And the power of the learned Judge ceased upon

this dismissal. It may have been unfortunate for the Plaintiffs that the learned Judge thought that he had a power which he did not possess, but

happily, as the Judges on the appeal observed, it is improbable that there was substance in the claim which they have been prevented from further

prosecuting.

(ii) Ram Saran Mandal and Others Vs. Radha Raman Mandal, :

The suit was tried and determined on the merits, and in the event was dismissed upon the ground that the Plaintiff had failed to prove his title or that

the property was secular property. The learned trial Judge further held that inasmuch as one of the shebait had not been impleaded and the heirs

of another (who had died pendente lite) had not been substituted there was a defect of parties, and upon that ground also the suit failed. The

Plaintiff lodged an appeal and in the course of the hearing before the lower appellate Court the Plaintiff applied for permission to withdraw the suit

with liberty to bring a fresh suit upon the same cause of action. The learned Subordinate Judge acceded to the Plaintiff's prayer and passed an

order allowing

the Plaintiff to withdraw the suit with liberty to bring a fresh suit on the same cause of action against the other shebait (i.e. other than the Plaintiff) in

their character as shebait persons claiming under them as such.

Whether or not, apart from the present suit, the Plaintiff is at liberty to take further proceedings in this matter against the Defendants need not now

be considered. The question is whether this Court has jurisdiction to interfere with the order under review, and, if so, whether it ought to exercise

its powers u/s 115, Civil P.C., in favour of the Petitioners. Now, the object of the legislature in enacting O.23, R.1, as I apprehend, was that

where a suit must fail by reason of some formal defect or some other "sufficient ground" was proved, the Court should be at liberty, in order that

substantial justice might be done, to permit the Plaintiff (on such terms, if any, as it thought fit) to withdraw the suit, and to recommence the

proceedings in a suit duly framed according to law. But, in my opinion, it was never intended or contemplated that after a suit had been tried and

dismissed on the merits the Plaintiff should be permitted to start the proceedings all over again against the successful Defendants merely because

there was also a formal defect in the frame of the suit: *Watson v. Collector of Rajshahye* (1869) 13 M.I.A. 160 : 12 W.R. 43 : 2 Suther 269 : 2

Sar. 500 (PC), *Khorda Co. v. Durga Chandra* (1910) 11 C.L.J. 45 : 5 I.C. 187. Otherwise, much hardship and prejudice might accrue to

Defendants who already had contested the suit, and had succeeded in defeating the Plaintiff's claim on the merits.

Now, in this case, as I read the judgment of the learned Subordinate Judge, he was of opinion that as soon as it became apparent that there was a

formal defect in the frame of the suit he ought to allow the Plaintiff to withdraw

the suit with liberty to bring a fresh suit on the same cause of action, without taking into consideration the fact that the suit had been heard and decided against the Plaintiff on the merits. In my opinion, in adopting that view the learned Subordinate Judge misdirected himself as to the meaning and effect of O.23 R.1, and the order under review cannot stand.

5. Repudiating the said contentions of the learned Counsel for the Appellant/D1, learned Counsel for the Respondent 1/Plaintiff and 2nd

Respondent/second Defendant, submitted that it is true that the Plaintiff has not given the correct description of the properties and the suit was

dismissed with liberty to file fresh suit, but in the suit for partition, the cause of action is continuous one and even if no liberty was given, the first

Respondent/Plaintiff is entitled to file a fresh suit for partition and it is neither barred u/s 11 Code of CPC regarding res-judicata, nor under Order

2 Rule 2 Code of CPC and so, no prejudice will be caused if Clause (2) of the impugned decree is incorporated. To substantiate the same,

learned Counsel for the first Respondent/Plaintiff and second Respondent/D2 relied upon the following decisions:

(a) Baliah Nadar and Another Vs. Rayappan and Others, :

4. There is no substance in the argument that the suits are barred by the principles of res judicata. O.S. No. 233 of 1971 was a suit for partition

which was dismissed for default. There was no decision on merits. Hence, the principles of res judicata will not apply. If the parties are co-sharers,

then they are entitled to maintain a suit for partition so long as there is no division. Just because an earlier suit for partition is dismissed for default

without a decision of the Court that the Plaintiff is not entitled to a share in the properties, the Plaintiff will not cease to be a co-sharer. Hence, a

second suit is maintainable as the cause of action is a continuing one.

(b) (Mylavarapu) Rangayya Naidu Vs. Basana Simon and Others, :

10. ...That case is consistent with the decision in Ramanadan Cheiti v. Pulikutti Servai (1898 (21) Mad. 288) where the rule of procedure that a

party suing for possession must show that on the date of suit he was entitled to relief is followed. Suits for partition are exceptions to the general

rule, In Doraiswami Pillai v. Chinnia Goundan (1918 (7) LW 335) it was held that a suit for redemption was liable to be dismissed on the pleadings

in the plaint, and the Plaintiff during the pendency of the suit obtained a

conveyance which cured his want of title and he was to amend his plaint and obtain a decree for redemption. In that case, the flaw in the Plaintiff's right to redeem was not that his suit was premature in point of time, but that he had not got title from the true owner. The case is not an authority for the proposition that if a suit is premature at the date of institution a decree can nevertheless be granted. In my opinion "the only course where the Plaintiff brings his suit before the cause of action arises is to dismiss the suit with liberty to bring a fresh suit upon a proper cause of action.

6. Learned Counsel for the first Respondent/Plaintiff and second Respondent/D2 further submitted that the first Respondent as Plaintiff, filed the suit for partition after furnishing all the particulars and now, the suit was ripe for trial and if the First Appeal is allowed, the Appellant/D1 would protract the proceedings by way of filing a petition after petition. Hence, learned Counsel prayed for dismissal of the First Appeal.

7. Learned Counsel for the first Respondent/Plaintiff and second Respondent/D1 further stated that earlier, an application has been filed and that has been disposed of and considering the order that has been passed, holding that the right to sharer in filing the partition suit, is a continuing one, and if the parties are co-sharers, then they are entitled to maintain the suit for partition, so long as there is no division. The second suit is maintainable as the cause of action is a continuing one. Hence, learned Counsel prayed for dismissal of the First Appeal.

8. Though the Respondents 3 and 4 were served, they did not choose to either appear in person or through counsel.

9. Considering the rival submissions made by both sides, admittedly, after the dismissal of the suit, the first Respondent/Plaintiff has filed a fresh suit for partition, which is now pending.

10. In the decision reported in Vol.XLVIII MLJ 64 PC (Part II) (cited supra), the suit was dismissed but liberty was reserved to the Plaintiff to file fresh suit for possession. In the said citation, it was stated that the judgment in the prior suit was not a bar to the second suit and that as the case was not filed under Order 23 Rule 1 Code of Civil Procedure , after dismissing the suit, there is no power for the Court to reserve the liberty for the Plaintiff to take the fresh proceedings. The second suit was dismissed. The Plaintiff obtained a special leave to file appeal to His Majesty in Council

and after hearing both sides, the appeal was dismissed.

11. So, the learned Counsel appearing for the Appellant/D1 submitted that even though the right to liberty for filing a fresh suit for possession was

given by the Privy Council, it was held in the above said citation Vol.XLVIII MLJ 64 PC Part II, that once the power of the learned Judge is

ceased upon the dismissal, and when once the suit was dismissed, unfortunately, for the Plaintiffs therein, the learned Judge thought that he had a

power which he did not possess, but happily as the Judges on the appeal observed that it is improbable that there was substance in the claim which

they have been prevented from further prosecution.

12. In the present case, the suit was dismissed only on the ground of not furnishing the correct description of the properties in accordance with

Order 7 Rule 3 Code of CPC and Civil Rules of Practice and the Circular Orders.

13. In the decision reported in Ram Saran Mandal and Others Vs. Radha Raman Mandal, , relied on by the learned Counsel for the Appellant/D1,

the case was remitted to the appellate Court to determine according to law in respect of a direction given under the meaning and effect of Order

23 Rule Code of CPC and in that case, suit was permitted to be withdrawn with liberty to file fresh suit on the basis of the plaint. This citation is

not applicable to the facts of the present case.

14. Admittedly, in the present case, the suit was filed for partition. As per the dictum laid down by this Court reported in (Mylavarapu) Rangayya

Naidu Vs. Basana Simon and Others, , the suit for partition is an exception to the general rule. But as per the dictum of this Court reported in

Baliah Nadar and Another Vs. Rayappan and Others, , in the suit for partition, there is no decision on merits and the principle of res-judicata will

not apply and if the parties are co-sharers, then they are entitled to maintain the suit for partition, so long as there is no division.

15. In the present case, the suit has been dismissed for not giving proper description of the properties, as envisaged under Order 7 Rule 3 Code of

Civil Procedure . The second suit for partition is maintainable as the cause of action is a continuing one.

16. Furthermore, it is pertinent to note that already, fresh suit has been filed, which is pending and now it is posted for examination of witnesses. In

such circumstances, because of the observations in the impugned judgment and

decree, the Appellant/D1 has not lost anything. Further, as per the decision reported in Vol.XLVIII MLJ 64, Privy Council (cited supra), when once the Court dismisses the suit, the power of the learned Judge ceases upon the dismissal and hence, in the present case, the learned Judge had no power to give liberty to the parties to file a fresh suit for partition with clear description of the properties as required under Order 7 Rule 3 Code of CPC and the Civil Rules of Practice and Circular Orders. In such circumstances, the observations made by the trial Court are unwarranted, since as soon as the suit was dismissed, the power of the Court ceases and hence, the said liberty given by the trial Court is liable to be expunged.

17. In the result:

- (i) The First Appeal is allowed in part without costs.
- (ii) The judgment and decree (clause ii) of the trial Court regarding the liberty given to file fresh suit, is deleted/expunged.
- (iii) The miscellaneous petition is closed.