

(1955) 02 AP CK 0015

In the Andhra Pradesh High Court

Case No : Second Appeal No. 2312 of 1950

Kalisetti Subbarayudu and Others

APPELLANT

Vs

Pagadala Balaramayya

RESPONDENT

Date of Decision : 09-02-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 2 Rule 3, 11

Citation : AIR 1955 AP 194

Hon'ble Judges : Subba Rao, C.J

Bench : Single Bench

Advocate : K. Krishnamurthi and T. Veerbhadrappa, for the Appellant; Alladi Kuppuswami and C.S. Prakasa Rao, for the Respondent

Judgement

(1) This is an appeal by the plaintiffs against the decree and Judgment of the Court of the Subordinate Judge of Nellore, confirming those of the District Munsif of Nellore in O. S. No. 258 of 1948, a suit filed by the appellants for recovery of possession of the plaint schedule property from the defendant and for mesne profits. Both the Courts, dismissed the suit on the ground that the suit was barred by res judicata as well as by O.2, R. 2, Civil P. C.

(2) The facts found or admitted by the parties may be briefly stated: One Kalisetti Narasimhalu is propositus. He had five sons. Govindamma, the widow of one or the sons, filed a suit O. S. No. 260 of 1918 on the file of the District Munsif's Court, Nellore, for partition of the family properties against Narasimhalu and his sons. The defendant pleaded that the property, which is the subject-matter of the suit, was the self-acquired property of Narasimhalu.

That suit was compromised and on 23-4-1920, a preliminary decree for partition was passed. Pursuant to the preliminary decree a Commissioner was appointed who divided the properties into six shares. Final decree was passed on 18-9-1924. When an appeal was filed in the Subordinate Judge's Court against that decree, it was confirmed with some modifications. After the preliminary decree, Narsimhalu mortgaged most of the property covered by the partition suit

under Ex. B. 8 dated 12-2-1923, to one Subbaramireddi on the basis that the properties were his self-acquisitions, contrary to the terms of the compromise decree.

After the death of Narasimhalu, Subbaramireddi filed O. S. No. 701 of 1924 on the file of the District Munsif's Court, Nellore, to enforce the said mortgage, impleading as defendants all the sons of Narasimhalu. The present 1st plaintiff was also one of the defendants. The sons remained ex parte and a mortgage decree was passed in that suit. In execution of the final decree made therein, the mortgaged properties were brought to sale and were purchased by one Pattabirama Reddi who sold it to the defendant under the sale deed Ex. B. 11 dated 7-11-1941 and defendant took possession of the property purchased by him including the well.

The 1st plaintiff, his brothers and the grandsons of Narasimhalu filed O. S. No. 725 of 1943 against the defendant claiming that the defendant, who had only 1/6th share in the well, had no right to close the well.

(3) The defendant contended that the acquired exclusive right to the entire property including the well under the sale deed dated 7-11-1941, from the Court auction purchaser in O. S. No. 701 of 1924. The learned District Munsif held that the plaintiffs were entitled to 5/6th share and the defendant was entitled only to 1/6th share on the ground that the court auction purchaser acquired only Narasimhalu's interest in execution of the aforesaid decree.

Both parties preferred appeals to the Subordinate Judge's Court. It was, inter alia, contended before the learned Subordinate Judge that the decree in O. S. No. 701 of 1924 operated as res judicata, and, therefore, the plaintiff in O. S. No. 725 of 1943 could not rely upon the earlier decree in O. S. No. 260 of 1918, wherein Narasimhalu was given only 1/6th share in the joint family properties.

The learned Subordinate Judge held that the decision in O. S. No. 701 of 1924 did not operate as res judicata on the question of title to the property and, on that basis, confirmed the decree of the District Munsif.

(4) The 1st plaintiff, one of the sons of Narasimhalu, and his two sons, plaintiffs 2 and 3 filed the present suit, to recover possession of the plaintiffs schedule property, which was purchased by the court auction purchaser and sold to the defendant as aforesaid. Both the Courts dismissed the suit on the ground that the decree in O. S. No. 701 of 1924 operated as res judicata and also on the ground that, by reason of the decision in O. S. No. 725 of 1943, the present suit was barred under O. 2 R. 2, Civil P. C.

(5) No document have been printed or placed before me and both learned counsel proceeded to argue on the basis of the aforesaid facts.

(6) The learned counsel for the appellants raised before me the same points which his clients have unsuccessfully raised in the two Courts below. It is contended that when there are two decrees between the same parties, in regard

to the same matter, the latter adjudication supersedes the earlier one, and in this view, it is argued that the decree in O. S. No. 725 of 1943 would govern the rights of the parties. From the aforesaid facts, it is apparent that there were three adjudications between the parties or their representatives.

In O. S. No. 260 of 1918, which was a suit between the members of the family Narasimhalu got only 1/6th interest in the joint family properties. In O. S. No. 701 of 1924, though the sons were made parties they were ex parte and allowed a decree to be passed against them on the basis that Narasimhalu had exclusive title to the entire property covered by the mortgage deed. If O. S. No. 725 of 1943 did not supervene, it must be conceded that in any subsequent suit between the parties to O. S. No. 701 of 1924 or their representatives, that decree would operate as a bar on the basis of constructive res judicata. The defendants therein, i.e., the present 1st plaintiff and his brothers might and ought to have raised the plea in that suit that Narasimhalu had only 1/6th interest in the mortgage properties, and therefore, no decree should be passed therein against the other shares of the sons.

But, in O. S. No. 725 of 1943, though that plea was raised it was negatived and the Court held that Narasimhalu had only 1/6th interest in the properties and, therefore, the defendant only acquired his interest therein under the sale deed. This judgment being also inter parties certainly supersedes the earlier decision and the rights of the parties thereafter would only be governed by this judgment.

(7) A Division Bench of the Madras High Court in "Moturi Seshayya v. Venkatadri Appa Rao", AIR 1917 Mad 950 (A) held that in case of judgments inter parties the later adjudication should be taken as superseding the earlier whether or not the earlier adjudication was pleaded as a bar to the trial of the suit in which the later adjudication was made. There, in 1893, in a suit between the landlord and his tenants, a competent Court adjudicated. In the year 1895, another competent Court gave a different finding.

In the later suit, no question was raised by the tenants that the earlier suit would operate as res judicata. In 1912, the landlord filed another suit for rent wherein the question of rate of rent again arose for consideration. The tenants contended that there being two conflicting judgments, neither of them could be pleaded as res judicata, and the Court was bound to try the issue over again.

The learned Judges negatived that contention and applied the principle that in case of judgments inter parties, the later adjudication should be taken as superseding the earlier. I respectfully follow the principle laid down in the aforesaid decision. If so, it follows that, in the instant case, the decision between the parties in O. S. No. 725 of 1943 supersedes that in O. S. No. 701 of 1924 and, therefore, the rights of the parties are governed only by the later decision.

(8) But it is contended that findings on questions of law in a previous suit, though inter parties, will not operate as res judicata except in regard to the subject-matter of that suit. Basing the argument on the aforesaid proposition, it

is said that the finding on O. S. No. 725 of 1943 that the judgment in O. S. No. 701 of 1924 would not operate as *res judicata*, being a finding on a question of law, should be confined to the rights of the parties in regard to the well alone.

(9) Under S. 11, Civil P. C., no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court. There is no reference in that section to questions of law or questions of fact.

If the issue has been finally decided, it is immaterial whether that decision has been arrived at on a consideration of questions of law or questions of fact or mixed questions of fact and law. What matters is that the issue has been heard and finally decided. It is true that observations on general questions of law may not be binding between the parties but the decision on the matter issue is conclusive. Otherwise, the object of the section, viz., to give finally to questions directly raised and decided in suits inter parties would be frustrated.

(10) In -- Sri Sri Sri Ramachandra Deo, Maharaja of Jeypore (dead) and Others Vs. Sutapalli Ramamurthy and Others, (B) a Division Bench of the Madras High Court considered this aspect of the question in some detail. There, the Maharajah of Jeypore instituted a suit on the file of the Agency Additional District Judge, Waltair, for Kattubadi for the year ending with 30-6-1918, 30-6-1919 and 30-6-1920. The defendants to that suit were the Mokhasadars of Pachipenta estate and the usufructuary mortgagees from the Mokhasadars. The mortgage-defendants contended that there was no privity of contract between them and the plaintiff, and, therefore, they were not liable for the rent payable by the mortgagors.

But in O. S. No. 18 of 1913 on the file of the Special Assistant Agent, Korapur, the question of the liability of the mortgagees was not raised and a decree was made therein against them for the recovery of Kattubadi. The question arose whether that previous decision operated as *res judicata*. It was contended that the decision holding that the mortgage was liable to pay rent was an erroneous decision on a question of law and as such could not operate as *res judicata* in a subsequent suit.

After considering the cases cited, the learned Judges made the following observations at p. 928:

"Section 11, Civil P. C. makes no reference to question of law or to cause of action. Under that section if an issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties and if that has been heard and finally decided then the decision on that issue is *res judicata* in the subsequent suit provided the other conditions are fulfilled. Both on principle and on authority it follow that the

arguments that the previous decision was erroneous in law and that it was given with respect to previous faslis have no bearing on the question whether that decision does or does not operate as res judicata.

(11) I respectfully follow the aforesaid observations. But it is argued that a Full Bench of the Madras High Court in -- "Narayana Ayyangar v. Subramania Chettiar", AIR 1937 Mad 254 (FB) (C) expressed a different view. But a perusal of the judgment does not support the said contention. There a ryot resisted the claim of a landlord for a higher rate of rent with respect to a particular area and stated that he was liable to pay only the dry rate on the ground that the cocoanut plantation in the same was an "improvement" within the meaning of S. 3(4)(f), Estates Land Act.

In a prior litigation between the same parties for a previous year with respect to a portion of the area of the same holding, it was held that the planting of a coconut garden was not an improvement and that the landlord was entitled to the enhanced rate.

In regard to that argument. Ramesam J., who delivered the judgment and with whom the other Judges agreed, observed at p. 257 as follows:

"The principle of res judicata should be confined only to matters which actually existed at the time of the former decision. If there are new areas in Patta No. 54, which were not planted with cocoanut at time of the former suit and in respect of which no claim for enhanced rate of rent was or could be made in the former suit, the matter is not res judicata in the present suit in respect of such areas".

(12) The scope of the said observations must be understood with reference to the facts of the case and the principle accepted by the Full Bench. There, the question was whether the earlier decision on a question of law given in respect of a cocoanut plantation in a particular area was res judicata in respect of a cocoanut tree planted in a different area subsequent to the earlier decision. The Full Bench applied the following principle to the facts.

"The principle that a decision of law though erroneous is res judicata in a later suit between the same parties should be confined only to the matters which existed at the time to the prior suit unless some question of general principle was settled in the same".

(13) Applying this principle, they held that the decision of law in regard to one area would not apply to a different area, for, in the latter area, no cocoanuts were planted at the time the earlier decision was given. To state it in terms of S. 11, the matter in issue in the latter suit was not directly and substantially in issue in the earlier suit. Further, an attempt made by the learned counsel to question the correctness of AIR 1933 Mad 925 (B) before the Full Bench has also failed.

(14) The relevant test for the application of the principle of res judicata is stated by d. F. Mulla in his "Civil Procedure Code" at page 47, as follows:

"As the test of res judicata is the matter directly and substantially in issue, it follow that the subject matter of the second suit may be entirely different".

(15) Where in a suit brought by A against B for possession of one of two properties comprised in a sale deed, passed by B to A, B contended that the deed was fictitious and the Court found that the deed was fictitious it was held in 00 Kedar Nath Singh Vs. Sheo Shankar, (2) (D) that the finding that the sale deed was invalid would operate as res judicata in a subsequent suit filed by A against B to recover the other property under the same deed. It was so held because, though the subject-matter was different, the matter in both the suits was the same.

(16) In the instant case, it is true that the subject-matter of O. S. No. 725 of 1943 was a well and the subject-matter in the present suit was a different property. But the defendant acquired title to both the plots under a sale deed in his favour from the Court auction-purchaser. The matter in dispute in O. S. No. 725 of 1943 was whether the Court sale in favour of the defendant's vendor and the sale deed in his favour conveyed only the 1/6th share of Narasimhalu or the interests of all the members of the family.

In regard to that matter, the Court held that it conveyed only the 1/6th share of Narasimhalu. The decision, whether it depended upon a question of law or a question of fact, was a final decision in respect of the matter which is also now in issue and therefore under the express terms of S. 11 and the case law noticed above, the decision in that suit would operate as res judicata in the present suit.

(17) This conclusion would not held the appellants to succeed unless they also get over the second obstacle in their way viz., the objection under O.2, R. 2, Civil P. C. Order 2, R. 2, Civil P. C. reads:

"Every suit shall include the whole of the claim which the plaintiffs is entitled to make in respect of the cause of action but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court".

(18) This rule is obviously aimed against multiplicity of suits in respect of the same cause of action. What a "cause of action" is has been authoritatively stated by the Judicial Committee in -- AIR 1949 78 (Privy Council) (E). Their Lordships summarised their view on the subject at p. 86 as follows:

"The principle laid down in the cases thus far discussed may be thus summarised-

(1) The correct test in cases falling under O. 2, in fact founded upon a cause of action distinct from that which was the foundation for the former suit.

(2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment.

(3) If the evidence to support the two claims is different then the causes of action are also different.

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical.

(5) The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

(19) Applying the said test, what is the position here? O. S. No. 725 of 1943 was filed by the 1st Plaintiff, his brothers and the grandsons of Narasimhalu, who had 5/6th share in the family properties. The present defendant was the sold defendant in that suit. The plaintiffs in that suit alleged that by reason of the decree in O. S. No. 260 of 1918 they had 5/6th share in the joint family properties, that the sale in execution of the decree in O. S. No. 701 of 1924 and the sale by the Court auction-purchaser in favour of the defendant did not convey their interest to him and that the defendant illegally trespassed on their property wherein the well was situated.

The 1st plaintiff and his sons alone have filed the present suit for possession of their shares in the property. In this suit, before the plaintiffs can succeed, they must establish that, under the decree in O. S. No. 260 of 1918, only 1/6th share was given to Narasimhalu, that in the Court sale, in execution of the decree in O. S. No. 701 of 1924 and under the sale deed executed by the auction-purchaser in favour of the defendant, the, 1/6th share of the father alone was legally conveyed and that the defendant trespassed upon the extent of the property not converted by the safe deed.

The trespass on the land by the defendant which constituted an infringement of the plaintiffs right was the same in respect of the subject-matter of both the suits. The facts necessary for the plaintiffs to prove, if traversed, in order to support their right, are the same in both the suits. The evidence also is the same in both the suits. All the tests laid down by the judicial Committee are satisfied in this case. The cause of action to the plaintiffs in the present suit as well as in the earlier suit is the same. If so, as the 1st plaintiff did not include the present claim which arose in respect of the same cause of action in the previous suit, he is barred by reason of O. 2, R. 2, Civil P. C., from filing a separate suit in respect of the same cause of action.

(20) But it is contended that the plaintiffs in O. S. No. 701 of 1924 included not only the 1st plaintiff but others and therefore the 1st plaintiff could not have included the present claim in that suit. As he was not entitled to include the present claim in the previous suit, it is said that O. 2, R. 2 would not in terms apply. The question, therefore, is whether the present 1st plaintiff was entitled to include the present claim in O. S. No. 701 of 1924.

That suit, as I have already stated, was filed by the 1st plaintiff, his brother and nephews in respect of a part of the property purchased by the defendant. The plaintiffs case was that they were entitled to 5/6th share and the defendant was

entitled to 1/6th share in the property including the well. If all the plaintiffs in O. S. No. 725 of 1943 filed the present suit, they could not contend that O. 2, R. 2 would not be a bar to it. If that was concerned, the fact that one of the plaintiffs alone filed the present suit could not in law make any difference. All the plaintiffs in the previous suit were entitled to file the previous suit as they were jointly interested against the defendant within the meaning of O. 2, R. 3. The defendant on the basis of a Court sale and a sale deed trespassed on their property and they were jointly interested in removing the trespass. They could have also asked for relief in the previous suit for possession of their 5/6th share in the property purchased by the defendant. In this view, this contention fails.

(21) In the result, the appeal fails and is dismissed with costs. No leave.

(22) Appeal dismissed.