
(1998) 03 MAD CK 0009
In the Madras High Court
Case No : S.A. No. 467 of 1984

Kista Gounder

APPELLANT

Vs

Abhimanna Gounder (died)and 10 others

RESPONDENT

Date of Decision : 26-03-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 16, Order 22 Rule 10, 11, 141, 151

Citation : (1998) 03 MAD CK 0009

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : Uma Sankar for Mr. T.V. Ramanujam, for the Appellant; S. Mala for Respondent No. 7 and No appearance for Respondents 1 to 6 and 8 to 10, for the Respondent

Judgement

M. Karpagavinayagam, J.—This Second Appeal is directed against the judgment and decree in A.S.No.101 of 1993 dated 25.2.1984

passed by the learned Subordinate Judge, Chengalpattu, confirming the judgment and decree in O.S.No.45 of 1982 dated 23.9.1983 on the file of

the learned District Munsif, Madurantakam. The plaintiff is the appellant herein. He filed the suit for declaration of title and permanent injunction.

2. The case of the plaintiff is as follows: The plaintiff's father Thiruvengada Gounder died in April, 1963. Previously, the said Thiruvengada

Gounder filed a suit in O.S.No.228 of 1957 as against his sons claiming that the suit properties are his absolute properties, which were allotted to

him in a partition between him and his sons. He also filed a suit for recovery of mesne profits in O.S.No.352 of 1957. Both the suits were decreed

in favour of the said Thiruvengada Gounder. After the death of the said Thiruvengada Gounder, the plaintiffs and other sons alone are his heirs and

hence, they are entitled to the suit properties. The claim of right by the first defendant over the suit properties on the strength of the will and settlement deed alleged to have been executed by the said Thiruvengada Gounder in favour of the first defendant is not valid. The finding given by the executing court recognising the first defendant as a legal representative of the said Thiruvengada Gounder in Execution Petition filed by the first defendant to execute the decrees in O.S.No.228 of 1957 and O.S.No.352 of 1957 would not disentitle the plaintiff from claiming title over the suit properties in the exhaustive suits.

3. The case of the first defendant is this:- In both the suits O.S.Nos.228 and 352 of 1997 as against the plaintiff in this suit, the Civil Court granted

decrees in favour of the said Thiruvengada Gounder that he is the absolute owner of the properties and entitled to mesne profits. These decrees

have become final. Before his death, the said Thiruvengada Gounder executed a registered will in favour of the first defendant on 19.11.1961.

After the suit was decreed, he also executed a settlement deed in his favour on 10.4.1963. After his death, the first defendant filed execution

petitions in these two suits and obtained orders in his favour on the strength of the said will and the settlement deed, which were found to be

genuine and binding on the plaintiff in this suit. Therefore, the suit is barred by res judicata in view of the earlier proceedings.

4. After framing the necessary issues, the trial court dismissed the suit with costs. Aggrieved by this, the plaintiff filed an appeal before the lower

appellate court, which in turn, confirmed the judgment of the trial court. Hence, this Second Appeal.

5. At the time of admission, the substantial question of law formulated by this court is as follows:-

Whether the courts below erred in holding that the decision in the earlier execution proceedings that the first defendant is the legal representative of

deceased Thiruvengada under a will and settlement deed alleged to have been executed by him, will operate as res judicata in a comprehensive suit

filed by the plaintiff challenging the execution of the will?

6. In elaboration of the above substantial question of law, the counsel for the appellant would submit that the finding in the earlier execution

proceedings is given during the course of execution proceedings under Order 22,

Rule 10, C.P.C, which are summary in nature, that that would

not finally decide the right of the parties and that any finding therein was only to bring on record the legal representatives to proceed further and as

such, in this suit the plaintiff is entitled to question the validity of the will and settlement deed in this fresh suit.

7. It is further contended that any finding with reference to the will and settlement deed in execution proceedings would not operate as res judicata

in this regularly constituted suit. As such, both the courts below ought to have held that the suit was maintainable and that the plaintiff proved that

the and settlement deed were not valid and genuine documents.

8. On the other hand, the counsel for the respondents would strenuously point out that the principle of res judicata clearly operates in this case and

argued at length in support and justification of the judgments and decrees passed by the courts below.

9. The main point that arises for consideration in this second appeal is this:

Whether the suit instituted in this case is barred by res judicata, in view of the earlier decision taken in the execution proceedings?

10. Before probing into the above question, it would be expedient to give out the factual details which could be culled out from the records of the

courts below. These facts are as follows.

11. The plaintiff and the fourth defendant are the sons of one Thiruvengada Gounder. There was a partition among the father and sons in 1947.

The suit properties were allotted to the share of the father. Since then, the father Thiruvengada Gounder had been in possession and enjoyment of

the properties. There was a disturbance to his possession by the sons in 1957. Therefore, he filed a suit in O.S.No.228 of 1957 as against his sons

for declaration of title and permanent injunction. He also filed another suit in O.S.No. 352 of 1957 for mesne profits. Both the suits were decreed

in his favour.

12. Even when those suits were pending, on 19.11.1961, the father Thiruvengada Gounder executed a registered will in favour of the first

defendant, the first respondent herein, bequeathing the suit properties in his favour. After the decrees were passed on 30.1.1963 in favour of

Thiruvengada Gounder, on 10.4.1963 he also executed a settlement deed settling the suit properties in favour of the first defendant. In April 1963

father Thiruvengada Gounder died.

13. Therefore, the first defendant, who claimed right from Thiruvengada Gounder, filed E.A.No.173 of 1967 in O.S.No.228 of 1957 and

E.A.No,175 of 1967 in O.S.No.352 of 1957 contending that he is entitled to execute the decrees in the above suits and take delivery of the suit

properties on the strength of the will and settlement deed executed by Thiruvengada Gounder.

14. The plaintiff, the appellant herein was the respondent in the said petitions. He contested in those petitions contending that after the death of

Thiruvengada Gounder, the plaintiff and other sons alone are his heirs and that the will and settlement deed alleged to have been executed by

Thiruvengada Gounder in favour of the first defendant are not valid and binding on them.

15. After carefully considering the materials produced by both the parties and submissions made by them, the executing court found that the will

and settlement deed are genuine and valid and that the first defendant is entitled to execute the decrees passed in those suits. This order was

passed on 10.9.1970. As against this order, the plaintiff preferred appeals in C.M.A.Nos.62 of 1970 and 63 of 1970, etc. before the District

Court, Chengalpattu, The appellate court in the above C.M.As. rejected the plea of the plaintiff that the will and settlement deed were not genuine

and confirmed the order of the lower court. Aggrieved against these orders, the plaintiff, the appellant herein filed appeals in A.A.O.Nos.186 and

187 of 1976 before this Court.

16. By the order dated 9.4.1979 this Court rejected the appeals stating that the finding given by the lower appellate court that the registered will

and the settlement deed are genuine and valid is correct.

17. Having failed in all these forums, the appellant herein resorted to the second round of litigation by filing a suit in 1982 claiming for declaration of

title and injunction mainly on the ground that the plaintiff and other sons are the heirs of the deceased Thiruvengadam and the first defendant is not

entitled to the suit properties, as the settlement deed and will are not the genuine documents, thereby successfully prevented the first defendant till

date from executing the decrees as ordered by the lower court in the year 1970 which was confirmed by this Court in 1979.

18. In the light of the above facts, this Court is called upon to decide the issue whether the suit is barred by res judicata, in view of the decision in the earlier proceedings.

19. Section 11, C.P.C, is quite relevant, since the said section deals with the res judicata. Section 11 provides thus:-

Res judicata - 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.

20. The Apex Court in the following decisions would mention the principles and the guidelines to be followed, while applying the doctrine of res

judicata:

Gulam Abbas and Others Vs. State of Uttar Pradesh and Others,

Narayana Prabhu Venkateswara Prabhu Vs. Narayana Prabhu Krishna Prabhu (Dead) by L. Rs.,

Jaswant Singh and Another Vs. Custodian of Evacuee Property, New Delhi,

Syed Mohd. Salie Labbai (Dead) by L.Rs. and Others Vs. Mohd. Hanifa (Dead) by L. Rs. and Others,

Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust and Another,

Pandit Ishwardas Vs. State of Madhya Pradesh and Others,

Smt. Gangabai Gilda Vs. Smt. Chhabubai Gandhi, and

A.I.R. 1985 Mad. 154 (N. V.Panchapagasan v. K.Swaminathan).

21. The said principles and guidelines are as follows:-

The general doctrine of res judicata is founded on considerations of high public policy to achieve two objectives, (1) there must be a finality to

litigation and (2) the individual should not be harassed twice over with the same kind of litigation.

One of the tests in deciding whether the doctrine of res judicata applies to a particular case or not is to determine whether two inconsistent decrees

will come into existence if it is not applied.

In order to establish that the defence of res judicata may succeed, it is necessary to show that not only the cause of action was the same but also

that the plaintiff had an opportunity of getting the relief which he is now seeking in the former proceedings. The test is whether the claim in the

subsequent suit or proceedings is in fact founded upon the same cause of action which was the foundation of the former suit or proceedings.

Before a plea of res judicata can be given effect, the following conditions must be proved: (1) the litigating parties must be same; (2) the subject

matter of the suit also must be identical; (3) the matter must be finally decided between the parties; and (4) the suit must be decided by a

competent court.

If by any judgment or order any matter in issue has been directly and explicitly decided, the decision operates as res judicata and bars the trial of

an identical issue in a subsequent proceedings between the same parties.

Once the questions at issue in the two suits are found to be the same, the fact that the material which led to the decision in the earlier suit was not

again placed before the court in the second suit cannot make the slightest difference.

In order to operate as res judicata the finding must be one disposing of a matter directly and substantially in issue in the former suit and the issue

should have been heard and finally decided by the court trying such suit. A matter which is collaterally or incidentally in issue for the purpose of

deciding the matter which is directly in issue in the case cannot operate as res judicata.

In considering the question of res judicata, the court is not concerned with the correctness or otherwise of the judgment rendered. A finding

rendered on a fact in issue by a competent court in earlier proceedings should be regarded as having been finally decided in a subsequent litigation

raising the same issue between the same parties.

22. In this case, the finding arrived at with reference to the genuineness of the will and settlement deed has been decided by the Civil Court in

execution, proceedings and not in a suit. However, the situation has been saved u/s 11, Explanation VII. The Explanation VII is as follows:-

The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit

shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

23. Therefore, Section 11 by introduction of Explanation VII by Amendment Act, 1976, is now made applicable to the execution proceedings also

by giving more extensive meaning to the word ""suit"". Hence, there is no difficulty in coming to the conclusion that the issue decided in the execution

proceedings which is directly and substantially same in the suit, would certainly be res judicata. In other words, issue decided in the proceedings

should not be a collateral or incidental one.

24. It is seen from the records that the first defendant filed execution petitions in O.S.Nos. 228 and 352 of 1957 under Order 21, Rule 16 read

with Sections 151 and 141 C.P.C, and under Order 22, Rule 10, C.P.C. The prayers in these petitions are to record his name as a transferee or

as one on whom the interest was devolved or as one claiming under Order 21, Rule 16, C.P.C. So, these prayers were made only on the basis of

the registered will dated 19.11.1961 voluntarily executed by the said Thiruvengadam in a sound disposing state of mind in his favour and also a

registered settlement deed dated 10.4.1963 settling the suit properties in his favour. These applications were contested by the plaintiff, the

appellant herein contending that the will and the settlement deed were not proved as they were not proved to be executed when the executor was

in a sound mind.

25. In the light of the said objection, the executing court framed the following issues:-

Whether the will is true?

Whether the settlement deed is true?

To what relief, is the plaintiff entitled?

After examination of the witnesses, the executing court allowed those petitions holding that both these documents were true and genuine and the

first respondent herein was entitled to execute the decrees passed in favour of the executors. This finding, on appeal, was confirmed by the District

court as well as this court. By the order dated 9.4.1979 this Court while dismissing the appeals filed by the plaintiff held that the finding given by

the lower court on consideration of the documents, Ex.A1 will and Ex.A2 settlement deed, was correct and proper.

26. In this context, it would be appropriate to refer some of the observations made by Honourable Justice Sathiadev (as he then was) in the said order, which are as follows:

The courts below have considered the genuineness of that Ex.A1 and A2. The registered will, Ex.A-2, dated 19.11.1961 had. been challenged

on the ground that it has been brought about by undue influence and that the attestors and the scribe have not been examined and the respondent

herein having been present at the time of the execution had disabled himself from deriving the benefits under the will. On these aspects, it has been

found that there has been no plea of undue influence and no evidence had been let in to show that such an undue. influence had been practised on

Thiruvengada Gounder. The mere fact that the respondent was present at the time of registration would not disentitle him to get a relief unless it be

shown that he influenced the mind of the testator. P.Ws.2 and 4 have been examined. They have been believed and thus the genuineness of the will

had been established on a proper appreciation of the materials placed before the courts. Even assuming that Ex.A-2 will not be sufficient, the

settlement deed, Ex.-1 dated 10.4.1963, could not be challenged successfully by the appellant in these matters. Nothing has been shown as to

how Ex.-1 can be considered as an invalid document or that it is not a genuine one. When the courts below have come to the concurrent finding on

an appreciation of facts that - 1 and Ex.A-2 are genuine documents, the only other question that deserves to be considered is whether in execution

proceedings these two documents can be taken into account which would form the basis for declaring a party as a legal representative of a plaintiff,

who passed away during the pendency of the proceedings. On this aspect, the counsel for the respondent rightly places reliance on a decision of

this court in Rangaswami Naicker v. Rangammal (1968 II MLJ 610) which arose under proceedings in execution and it has been held that the

executing court is the proper court to determine the question whether the will is genuine and the property in question was bequeathed to the

claimant. When the necessity arises for finding out as to who could be the legal representative in a pending proceedings it cannot be said that such

an issue should always be relegated to a separate suit and it is only after the determination in such a suit, the party interested in the proceedings and

entitled to can further pursue with the execution. These aspects have been considered in detail in the said decision. Based on this considered

decision, the courts below have come to the conclusion that the objection taken by the appellant-petitioner herein has to be rejected."

27. As indicated above, Exs.A1 and A2 have been elaborately considered by the executing court and the issues have been answered in favour of

the first respondent herein. Now, in the present suit the prayer of the plaintiff, the appellant herein is for declaration that the suit properties belong

to the sons of the deceased Thiruvengada Gounder, in view of the fact that the documents Exs.A1 and A2 were not genuine and would not bind

them. Therefore, as indicated by both the courts below, the main issue in both the suits and execution proceedings substantially the same.

28. The question is whether Exs.A1 and A2 are genuine documents or not. In fact, the present plaintiff who is the respondent in the execution

petitions contended even in this court that the first respondent has to file a suit to establish his right under the will and settlement and he cannot

claim the suit properties by virtue of the will and settlement in the execution proceedings. This contention has been rejected by the courts below as

well as this Court by holding that the first defendant is entitled to establish his right under those documents in the execution proceedings itself, as the

executing court is well within the powers to decide about the same considering the genuineness or otherwise and that the first defendant need not

go to the civil court to file a suit. This observation by this Court in the order dated 9.4.1979, in my view, has been given scant respect by the

plaintiff by filing the present suit, in Older to see that the first defendant does not enjoy the fruits of the order of this court for ever.

29. Both the courts below found that the first defendant filed execution petition under Order 21, Rule 16 and Section 151 C.P.C. Both the courts

have elaborately considered the evidence let in by the first defendant and the plaintiff and factually also they have come to the conclusion that the

plaintiff has failed to prove that the documents were not genuine.

30. As rightly held, the application filed by the first defendant was to declare him as a legal representative to continue the proceedings and he has

also established that the interest devolved upon him on the basis of the documents which were found to be valid and genuine. Therefore, in my view, Section 11 Explanation VII C.P.C, would squarely be applicable to this case and as such, I am unable to agree with the contentions urged by the learned counsel for the appellant that the earlier proceedings will not operate as res judicata in the present suit. Consequently, I am of the view that the present plaintiff is not entitled to agitate again by filing a suit raising the issue afresh which was decided "" in the execution proceedings earlier. In view of the finding on the above point, the Second Appeal fails and is dismissed with costs.