

(1958) 11 MAD CK 0040
In the Madras High Court
Case No : Appeal No. 11 of 1955

Kothandarama Gramani

APPELLANT

Vs

Sellammal and Others

RESPONDENT

Date of Decision : 26-11-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Evidence Act, 1872 — Section 44

Citation : AIR 1959 Mad 524

Hon'ble Judges : Ramachandra Iyer, J

Bench : Single Bench

Advocate : S.V. Venkatasubramaniam, for the Appellant; N.R. Raghavachariar and V.C. Srikumar, for the Respondent

Final Decision : Dismissed

Judgement

Ramachandra Iyer, J.—This is an appeal against the decree and judgment of the District Judge 01 South Arcot at Cuddalore in O. S. No. 43 of 1933, dismissing the appellant's suit for a declaration that a settlement deed executed by his grandfather Varadappa in favour of his second wife, Sellammal, the first respondent in the appeal, was void and not binding on the appellant. Varadappa who owned considerable properties was survived by his second wife Sellammal and four sons, respondents 2 to 5 to this appeal. Varadappa died in the year 1950. Prior to his death he executed a deed of settlement Ex. 15. 1 in favour of the first respondent given her an interest for life 36 acres of land. The sons of Varadappa were evidently not pleased with the settlement.

They tried to trespass on the properties settled upon their step mother. Thereupon the first respondent filed O. S. No. 113 of 1946, on the file of the District Munsif's Court, Tindivanam, for a declaration, of her right to the properties under the settlement and an injunction restraining the defendants to the suit from interfering with her possession. Three out of the four sons of Varadappa were made parties to the suit. The father of the appellant

Chinnathambi was the fourth defendant to that suit. The defendants contested the suit on the ground that the properties were joint family properties or at least jointly acquired properties and that Varadappa could not therefore validly make a settlement in favour of the first respondent.

Varadappa who was alive at the time of the suit was examined as the first witness on the side of the plaintiff in that suit. He supported the claim of the first respondent. The suit was in substance a claim by the first respondent against rest of the members of the family putting forward the right of Varadappa to execute the settlement deed on the basis that the property was Varadappa's self-acquired property or that even otherwise was valid on the footing that as the father of a joint Hindu family he was entitled to make a reasonable provision for the maintenance of his second wife. The defence was a common to all the defendants. They set up the title in the family and contested the claim. The District Munsif held that the properties settled were self-acquired properties of Varadappa and that even if it were held to be joint family properties the settlement was a reasonable provision for the maintenance of the second wife having regard to the extent of the properties owned by the family. In that view he decreed the first respondent's claim.

2. An appeal was taken to the Subordinate Judge of Cuddalore against the decree of the District Munsif. The learned Subordinate Judge affirmed the finding of the trial court that the properties were self-acquired. But he held that the properties should be deemed to have been blended with joint family properties and therefore part of coparcenary property. In that view the learned Subordinate Judge allowed the appeal and dismissed the suit.

3. A second appeal was taken to this court against the decree of the appellate court. This court set aside the decree of the Subordinate Judge on the ground that the plea of blending of self acquired property with the other joint family property was not open to the defendants as they had not raised it in the trial court. This court therefore remanded the appeal for a further consideration by the Subordinate Judge on the other questions involved in this case namely whether the joint family properties were jointly acquired by the father and his sons" and whether even if the properties were held to be joint family properties provision made under Ex. B. 1 in favour of the settler could be deemed to be reasonable and proper one in the circumstances of the case. The learned Subordinate Judge held in favour of the first respondent on both the points. He held that the properties were not joint family properties. He also held that Ex. B. 1 was valid and binding upon the members of the family. The result was that the decree of the trial court was confirmed. A second appeal is stated to have been filed on behalf of the contesting defendant but that was rejected under Order 41 Rule 11 C. p. C.

4. The appellant who is the son of the fourth defendant to the previous suit has thereupon filed the present suit for a declaration that the settlement deed dated 5-11-1939 executed by Varadappa in favour of the first respondent was not valid

and binding on him and praying for cancellation of the same. He impleaded to the suit not merely the first respondent but his father and uncles who are respondents 2 to 5 to the present appeal. The fifth respondent who is the youngest son of Varadappa contested the suit along with the first defendant. He was not made a party to the previous suit as evidently he did not contest the settlement deed. The contesting defendants raised several pleas as to the maintainability of the suit. Other defendants were ex parte.

5. The following issues were framed in the case.

1. Whether the suit is barred by res judicata by the decree in O. S. No. 113 of 1946 (and appeal thereof).

2. Whether the properties in the settlement are the joint family properties of plaintiff and defendants 2 to 5.

3. Whether the settlement deed has not been acted upon.

4. Whether the suit is in time.

5. Whether the suit for declaration is maintainable.

6. To what relief, if any, is plaintiff entitled

7. Whether the father and uncles of the plaintiff have been grossly negligent in conducting O. S. No. 113 of 1946 on the file of Tindivanam District Munsif's court.

6. The District Judge took up for trial issues 1 and 7. He came to the conclusion that the present suit was barred by res judicata by reason of the decree in O. S. No. 113 of 1946 and the appeal there from. On that finding he dismissed the suit. The plaintiff has thereupon filed the present appeal.

7. The case for the plaintiff in regard to the question involved in the present appeal is that the decision in the previous suit could not operate as res judicata as the defendants" therein failed to take an obvious plea that was open to them. That plea, according to him, was that the properties though they were acquired by Varadappa they should be held to be treated as joint family properties by him and therefore they lost their character as self acquired properties in which event the acquirer Varadappa could not make a settlement like the one under Ex. B. 1. He therefore contended that the present suit by the son of the fourth defendant therein is maintainable as the conduct of the, previous suit is vitiated by the negligence of the contesting defendants thereto.

8. Mr. S. V. Venkatasubramaniam the learned advocate for the appellant has referred me to the decision in *Amissah v. Krahah*, AIR 1936 P. C. 147. In that case it was held that an action by or on behalf of a family may result in res judicata but such an action, if it were to bind absent or future members of the family, must be so constituted according to the local rules of procedure or by a representation order or in some other way that all such members can be

regarded as represented before the court. That was a case that went up to the Privy Council from Gold Coast colony. We do not know the rules of procedure obtaining in the Gold Coast. It is not therefore possible to apply the principle of the decision of that case to our country where we are governed by the Code of Civil Procedure. Explanation VI to Section 11 C. P. Code says,

"Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating." It is not stated by Mr. Venkatasubramaniam that there has been any fraud in the conduct of the previous litigation nor can it be said that there was any lack of bona fides. The only complaint now made is that there has been negligence in the conduct of the previous litigation. That the previous litigation was on behalf of the members of the family would be clear from the nature of the defence that was put up in that case.

The defendants to that action asserted not their individual right but their right as members of a joint family. I have already mentioned the fact that the 5th defendant to the present action was not made a party. It can be presumed that the 5th respondent was really one with his father in regard to the validity of Ex. B. I. Therefore in the previous suit there was on the one side a claim by the father's alienee supported by the 5th respondent setting up his exclusive title which was contested by the other members of the family pleading title, in the family. That would certainly amount to litigating on behalf of the family. The learned District Judge was therefore right in holding that Explanation VI to Section 11, C. P. C. would apply to the present case.

9. Mr. Venkatasubramaniam then referred to the decision in *Sundarlal v. Chittamal*, ILR 29 All 215. In that case it was held that the dismissal for redemption of the mortgage of the joint family brought by the father of the joint Hindu family would not be a bar to the subsequent suit for redemption. The principle of this decision cannot however apply having regard to the Full Bench decision of our Court in *Vadlamanati Venkatanarayana Rao Vs. Gottumukkule Venkata Somaraju*, where it was held that a Hindu father by virtue of his position as manager of the undivided Hindu family, would have the power to represent the entire family in all transactions relating to the family and that this right of representation applied not merely to suits in connection with Immovable properties but also to other transactions as well.

In the present case the matter can be viewed in two ways. First is that respondents 2 to 4 were agitating the previous suit on behalf of the family in regard to their joint family rights as against the alienee from the father. If that were so the explanation VI to Section 11 C. P. C. would apply and the decision in that suit would be *res judicata*. Even otherwise it can be held that so far as at least the appellant is concerned he will be barred by *res judicata* because his father was a party to the suit and he should be deemed to have been completely represented in that suit.

10. Mr. S. V. Venkatasubramanian then contended that as there was negligence in the conduct of the previous suit it should be held that he was entitled as a member of the joint family to agitate his own personal right in a subsequent litigation. The learned advocate argued that where the previous suit was conducted without due care and caution the result of that suit could not affect persons who were not eo nomine parties to the action. This statement of the law cannot be accepted.

In AIR 1937 1 (Privy Council) , the Privy Council has held that the provisions of Section 11 C. P. C. are mandatory, and the ordinary litigant who claims under one of the parties to the former suit can only avoid its provisions by taking advantage of Section 44 of the Indian Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion, or by showing a want of bona fides in the prosecution of the former suit and that it is not for the court to treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from the facts. It is not the case of the appellant that there was any fraud or even want of bona fides but there was only negligence which amounted to gross negligence in the circumstances of the present case and that gross negligence would entitle him to ignore the previous decision.

The Privy Council decision expressly states that even, negligence or gross negligence cannot be a ground for setting aside the previous decision binding between the parties to the suit. The matter has been further considered in a decision of a Bench of this court in Nagamma Shedthi Vs. Korathu Hengsu and Others, . That was a case where it was held that in the absence of fraud or collusion a decree obtained by a karnavan would be binding on the junior members of the family. The same would apply to the present case viewed either on the footing that it was a litigation fought on behalf of the family or on the footing that the appellant herein was represented by his father. Secondly, mere negligence or even gross negligence may not amount to any mala fide conduct.

Negligence may be negligence by reason of an error of judgment on the facts at the disposal of the litigants. He might in all honesty have decided not to present a particular aspect of a case having regard to the evidence available to him. The mere fact that the case of blending was not put forward by the respondents 2 to 4 in the previous litigation cannot really amount to any negligence or mala fides. Further it must be pointed out that the lower court tried the case on issues 1 and 7. Issue 7 related to the question of negligence. Admittedly evidence was not let in regard to that point. No attempt has been made to produce evidence, to show what exactly was the negligence that was attributable to the conduct of the respondents 2 to 4 in the previous litigation.

11. The appellant in order to succeed should have shown that there were materials available which were not taken note of by respondents 2 to 4 for proving the plea of blending in the former litigation. This he failed to do. The only evidence let in on issues 1 and 7 are Ex. B. 1 to B. 4 Beyond showing that the

plea as to blending was not taken in the previous proceedings the evidence does not show that such a plea was available and that plea was not taken on account of negligence. I am therefore satisfied that even factually the appellant has not been able to make out any case of negligence on the part of the respondents 2 to 4 when they conducted a litigation as stated above. The conclusion of the learned District Judge is therefore correct. This appeal fails and is dismissed with costs.