

(1988) 12 MAD CK 0031
In the Madras High Court

M. Subramaniam and Others

APPELLANT

Vs

C. Chhottabhai and Company and Others

RESPONDENT

Date of Decision : 20-12-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11

Citation : (1990) 1 LW 183 : (1990) 2 MLJ 66

Hon'ble Judges : M. Srinivasan, J

Bench : Division Bench

Judgement

M. Srinivasan, J.—The former appeal arises out of O.S. No. 248 of 1969 on the file of the Sub Court, Salem. That suit was filed by the first respondent herein for recovery of a sum of Rs. 19,804-34 with interest on Rs. 12,424-34 at 18 per cent per annum from the date of plaint till decree and thereafter at 6 percent per annum till payment. That suit was based on a hire purchase agreement between the plaintiff and the first defendant by name Murugiah Chetti. Defendants 2 and 3 were said to be the guarantors. According to the plaint, certain amounts were paid on various dates towards the liability; but a huge amount remained to be discharged. Consequently, for the recovery of the sum due to the plaintiff, the suit was filed. It is not necessary to go into the other details of the plaint.

2. The suit was contested by the appellants herein on the ground that the transaction was not binding on them. The appellants are the sons and daughter of Murugaiah Chetty, the first defendant. According to them, the debts were incurred by the first defendant for immoral and illegal purpose and that they were not binding on them.

3. The other appeal viz., Tr. A.S. No. 1143 of 1986 arises out of O.S. No. 296 of 1967 filed by one Nallammal for recovery of a sum of Rs. 6662-50 alleged to be due on a mortgage executed by defendants 1 and 2 in the suit viz., Murugiah Chettiar and his wife. It was also alleged that the first defendant represented his minor sons also in the transaction. That suit was also contested on the ground that the debt was incurred for illegal and immoral purposes and was not binding

on the children of Murugaiah Chettiar.

4. There was a third suit filed by the appellants in the two appeals for declaration that the conveyance deed dated 5-10-1961 in favour of their father Murugaiah Chettiar executed by their mother Bagiyam alias Thangammal was not binding on them and the subsequent alienations were void. An alternative relief was prayed to the effect that fee alienations of defendants 1 and 2 in the suit being the father and mother of the plaintiffs in favour of defendants 3 to 13 and the court proceedings by defendants 13 to 16 were not binding on the share of plaintiffs 1 to 3 and for making a provision for maintenance and marriage expenses for the 4th plaintiff (a daughter) and for division of the properties into four equal shares and to allot three shares to plaintiffs 1 to 3. 14th defendant in the partition suit is the plaintiff in O.S. No. 248 of 1969. 6th defendant in the partition suit is the plaintiff in O.S. No. 296 of 1967. All the three suits were disposed of by a common judgment by the learned Subordinate Judge, Salem, on 26-10-1978. The learned Subordinate Judge considered the issues which arose in O.S. No. 346 of 1968, the partition suit, and gave his findings thereon. The relevant findings are that the debts incurred by Murugaiah Chettiar and Bagiyam alias Thangammal were binding on the appellants herein and it was held that both the 6th defendant and 14th defendant in the partition suit were entitled to proceed against the properties of the family as the transactions challenged by the appellants herein were binding on the appellants. Based on those findings, the learned Subordinate Judge passed a preliminary decree for partition of the suit properties into four equal shares and allotment of three shares to plaintiffs 1 to 3. It was also declared that the alienations effected by defendants 1 and 2 in the suit in favour of defendants 3 to 7 and 14 to 16 were binding on the shares of plaintiffs 1 to 3 in the suit. The prayer for declaration in respect of the document dated 5-10-1961 was also negatived.

5. Based on the findings given in the judgment, a preliminary decree was passed in O.S. No.296 of 1976 on foot of the mortgage against defendants 1 to 6, 8 and 10 to 12 therein. Similarly, a decree was passed in O.S. No.248 of 1969 for a sum of Rs.15,404-34 with interest on Rs. 8,024.34 at 18% annum from the date of suit till the date of decree and thereafter at the rate of 6% per annum till the date of realisation against defendants 1 to 5 and 7 to 12 in the suit. A direction was also given to proceed against the assets of defendants 1,4 and 5 at the first instance and if the amount are not realised, then to proceed against defendants 2 and 3 in the suit.

6. These two appeals have been filed only against the decrees in O.S. No.248 of 1969 and O.S. No. 296 of 1967 respectively. Admittedly, there is no appeal against the decree passed in O.S. No.346 of 1968 in the partition suit. The result is that the decree in the partition suit has become final and conclusive. That decree is based on the finding that the transactions with the plaintiffs in O.S. No.248 of 1969 and O.S. No.296 of 1969 are binding on the appellants herein. Since the decree in O.S. NO. 346 of 1968 has become final and conclusive, both

the appeals are barred by the principle of res judicata.

7. Learned Counsel for the appellants contended that the principle of "res judicata would not apply to the present case as there was no confirmation of the decrees in O.S. Nos. 248 of 1969 and 296 of 1967 by an appellate court. According to learned Counsel, the judgment being common, there is no necessity for filing a separate appeal against the decree in O.S. No.346 of 1968. It is also argued that the doctrine of res judicata is based on the principle that no, litigant should be vexed twice. Learned Counsel contends that when an appeal has been filed against a common judgment/there is no question of vexing the litigant more than once. He relied upon a Full Bench decision of this Court in Pappammal alias Muthu Karuppayee Ammal Vs. Meenammal and Others, . He also placed reliance on the decisions in Parasram Vs. Amarchand and Another, and Ramagya Prasad Gupta and Others Vs. Murli Prasad and Others, . He distinguished the decision of the Supreme Court in Sheodan Singh Vs. Smt. Daryao Kunwar, .

8. It is not necessary to consider the aforesaid decisions in detail in view of a later Supreme Court decision which concludes the question beyond doubt. In Lonankutty Vs. Thomman and Another, , there were two cross suits by two parties. The trial court disposed of the same by two different judgments on two different dates. As the parties had succeeded partly in the two suits, there were four appeals before the appellate court. All the four appeals were heard together and a common judgment was rendered by the appellate Judge. He dismissed all the appeals and confirmed the decrees passed by the trial Court. While one of the parties filed appeals to the High Court, the other party did not challenge the correctness of the judgment of the appellate Court. When the High Court took up the second appeals for hearing, it was contended that the question raised by the respondents in the second appeal was barred by res judicata as the decree passed by the Subordinate Judge in the appeals arising out of the suit filed by the respondent had become final not having been appealed against. The High Court over-ruled that contention and remanded the matter for fresh disposal to the lower appellate court on merits. After the lower appellate court disposed of the matter, it came again to the High Court by way of appeal and after the judgment of the High Court rendered for the second time, the matter was taken up to the Supreme Court. One of the contentions raised before the Supreme Court was that the High Court was in error in dealing with the merits on the first occasion and ought to have disposed of the appeals on the basis of res judicata. The Supreme Court accepted that contention and held that the decision of the appellate Court rendered in a common judgment would constitute res judicata when no appeals were filed against the said judgment with reference to one of the suits out of which the same arose. The following passage in the judgment of the Supreme Court is instructive:

19. Respondents did not file any further appeal against the decree passed by the District Court in the appeals arising out of their suit. They filed a Second Appeal in the High Court only as against the decree passed by the District Court in A.S.

66 of 1958 which arose out of the decree passed by the Trial Court in the appellant's suit. Thus, the decision of the District Court rendered in the appeal arising out of the respondent's suit became final and conclusive. That decision, not having been appealed against, could not be re-opened in the Second Appeal arising out of the appellant's suit. The issue whether respondents had the easementary right to the flow of water through the appellant's land for fishing purposes was directly and substantially in issue in the respondent's suit. That issue was heard and finally decided by the District Court in a proceeding between the same parties and the decision was rendered before the High Court decided the Second Appeal. The decision of the District Court was given in an appeal arising out of a suit, which though instituted subsequently stood finally decided before the High Court disposed of the Second Appeal. The decision was therefore one in a "former suit" within the meaning of S.II, Explanation I, Civil Procedure Code. Accordingly, the High Court was in error in deciding an issue which was heard-and finally decided in a "former suit" and was therefore barred by res judicata.

21. In its remanding judgment dated July 8, 1964 by which the plea of res judicata was repelled, the High Court relied principally on the decision of this Court in *Narhari and Others Vs. Shankar and Others*, . That decision is in our opinion distinguishable because in that case only one suit was filed giving rise to 2 appeals. A filed a suit against B and C which was decreed. B and C preferred separate appeals which were allowed by a common judgment, but the appellate court drew 2 separate decrees. A preferred an appeal against one of the decrees only and after the period of limitation was over, he preferred an appeal against the other decree on insufficient court fee. The High Court held that A, should have filed 2 separate appeals and since one of the appeals was time barred the appeal filed within time was barred by res judicata. This Court held that "there is no question of the application of the principle of res judicata", because "when there is only one suit, the question of res judicata does not arise at all". This was put on the ground that where there has been one trial, one finding, and one decision, there need not be two appeals even though two decrees may have been drawn up." In our case, there were 2 suits and since the appellate decree in one of the suits had become final, the issues decided therein could not be reopened in the Second Appeal filed against the decree passed in an appeal arising out of another suit. This precisely is the ground on which *Narhari's* case was distinguished by this Court in *Sheodan Singh Vs. Smt. Daryao Kunwar*, , it was held that where the trial court has decided 2 suits having common issues on the merits and there are two appeals therefrom the decision in one appeal will operate as res judicata in the other appeal.

22. The circumstance that the District Court disposed of the 4 appeals by a common judgment cannot affect the application of S.II because as observed in *Badri Narayan Singh v. Kamedo Prasad Singh and Anr.* 1962 3 SCR 759, even where 2 appeals arise out of one proceeding and even if the appeals are disposed of by a common judgment, the decision in that judgment may amount to 2

decisions and not to one if the subject-matter of each appeal is different. The case before us is stronger still for the application of Section 11 because the appeals filed in the District Court arose not out of one proceeding but out of 2 different suits, one by the appellant and the other by the respondents. The failure of the respondents to challenge the decision of the District Court in so far as it pertained to their suit attracts the application of Section 11 because to the extent to which the District Court decided issues arising in the respondents' suit against them, that decision would operate as *res judicata* since it was not appealed against.

The principle laid down in the above decision was reiterated in *Narayana Prabhu Venkateswara Prabhu Vs. Narayana Prabhu Krishna Prabhu (Dead)* by L. Rs., . In that case, there was a partition suit in the Sub-Court and a preliminary decree was passed. The defendant in the partition suit had filed a money suit in the court of the Munsif against one of the four brothers who were impleaded in the partition suit. The money suit was transferred to the file of the Sub-Court and tried together with the partition suit. That suit was also decreed. The plaintiff in the partition suit appealed against both the decrees in the High Court and the two appeals were heard and decided together by the High Court. The High Court after pronouncing the judgment in the partition suit proceeded to give judgment in the money suit under a new hearing and number of the appeal. The defendant, got a certificate to file an appeal in the Supreme Court as a matter of right as the decree of the trial Court was modified by the High Court. He did not seek any leave to file an appeal against the decree in the money suit. The Supreme Court held that the appeal filed by him arising-out of the partition suit was barred by *res judicata*. It was laid down by the Supreme Court that the question whether there is a bar of *res judicata* does not depend on the existence of a right of appeal of the same nature against each of the two decisions but on the question whether the same issue under the circumstances given in Section 11, has been heard and finally decided. It was observed that the expression "former suit", according to Explanation I of Section 11, Civil Procedure Code, makes it clear that, if a decision is given before institution of the proceeding which is sought to be barred by *res judicata*, and that decision is allowed to become final or becomes final by operation of law, a bar of *res judicata* would emerge.

9. In view of the pronouncements of the Supreme Court in the above two cases, there can be no doubt that the present appeals are barred by *res judicata*. It is not open to the appellants herein to contest the same issues in the appeals when there is a decree against them in O.S. No.346 of 1968 which has become final and conclusive. The argument of learned Counsel for the appellants that there should be a confirmation of the decree of the trial court by an appellate court in order to constitute *res judicata* is without any substance.

10. Learned Counsel for the appellants wanted to argue on the merits of the case also. He invited me to give my findings on all the issues in addition to my finding

on the question of res judicata. I have prevented him from arguing the matter as in my view there can be no doubt that the present appeals are barred by res judicata. Hence learned Counsel could not argue the other issues.

11. In so far as Tr. Appeal No. 1143 of 1986 is concerned, it was originally filed in the court of the District Judge, Salem, in view of the valuation of the suit and the appeal. By an order of this Court in Tr. C.MP. No. 19431 of 1981 the appeal was transferred to the file of this court and numbered as Tr.App. No. 1143 of 1986. Though the appellants in the appeal are represented by counsel, no notice has been so far issued to the respondents in the appeal. But as I have taken the view that the appeal is barred by res judicata, it is not necessary to issue any notice to the respondents in the appeal. Exercising my powers under Order 41, Rule 11, C.P.C., I am dismissing the said appeal.

12. In the result both the appeals are dismissed. The appellants will pay the costs of the first respondent in A.S. 381 of 1980. Tr. A.S. 1143 of 1986 is dismissed without costs.