
(1954) 09 AP CK 0001

In the Andhra Pradesh High Court

Case No : Second Appeal No. 1360 of 1950

Mallayya and Another

APPELLANT

Vs

Talari Trippanna and Others

RESPONDENT

Date of Decision : 15-09-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : AIR 1955 AP 81

Hon'ble Judges : Subba Rao, C.J

Bench : Single Bench

Advocate : K. Srinivasan, S. Krishnaswamy, N. Suryanarayana and G. Suryanarayana, for the Appellant; A. Bhujanga Rao, for the Respondent

Judgement

(1) The only question in the second appeal is whether O. S. No. 172 of 1947 filed by the appellants in the Court of the District Musif of Bellary is maintainable in view of a prior decision in O. S. No. 108 of 1935, a suit between the same parties.

(2) The facts relevant to the question raised may be briefly narrated. The plaintiffs and defendants 1 to 8 were the joint owners of the plaint schedule property. Two of the co-owners Lingappa and Mangamma, filed O. S. No. 108 of 1935 on the file of the District Munsif's Court of Bellary, for recovery of possession of their one-sixth share in the plaint schedule property. To that suit, Mandavaliah, the predecessor-in-interest of the second plaintiff in this suit, was added as the second defendant and Mallayya, the first plaintiff herein, was added as the fifth defendant in the other suit. The other sharers were also added as defendants. 9th defendant in this suit is the son the 11th defendant in O. S. No. 108 of 1935. 10th defendant in this suit is the brother of the 12th defendant in that suit, and the 11th defendant in this suit figured as the 13th defendant in the earlier suit. They were added as parties claiming title to a share in the joint property. On 15.6.1937 the learned District Munsif held that the plaintiff (in O. S. No. 108 of 1935 was entitled to a decree for recovery of possession of one-sixth

share in the suit land with mesne profits.

Pursuant to that judgment, preliminary decree was made ; in due course, a final decree was passed. The final decree reads :

"This court doth order and decree that the plaintiff's be and (are hereby) entitled to recover possession of share "A" marked in the plan hereto attached, i.e., in Survey No. 116 mentioned in the schedule hereunder ; that as regards mesne profits, past and future, and suit costs up-to-date of the preliminary decree passed in this suit on 15.6.1937 shall stand and that the defendants do pay plaintiffs the sum of Rs. 12-9-0 for their costs of this final decree."

It is apparent from the decree that no relief was given in favour of any of the other defendants. To enable the Court to pass the decree, the Commissioner divided the properties in the manner shown in the plan attached to the decree. The present suit is filed by the successor-in-interest of the second defendant in the other suit (2nd plaintiff) and by the fifth defendant in that suit (1st plaintiff) for partition and possession of their share in the plaint schedule property. The learned District Judge dismissed the suit on the ground that the present relief should have been asked by the plaintiffs in the other suit, & that the cause of action was one and the same in both the suits. Hence the above second appeal. The question is whether the present plaintiffs who are defendants in the earlier suit. ought to have asked for a decree for possession by dividing their share of properties by metes and bounds.

In a partition suit, though the defendant have got the option to ask for such a relief and obtain the same, they are not bound to do so. When they did not exercise their option to ask for partition of their share, I do not see how the decree in the earlier suit would be a bar to the maintainability of the present action. Mr. Bhujanga Ral, the learned counsel for defendants, strongly relied on the decision in -- "Sethurama Saheb v. Chotta Raja Sahib", AIR 1918 Mad 751 (A). There the plaintiff filed an earlier suit for partition of the family properties and obtained a decree therein. Subsequently, he filed another suit for partition of properties omitted in the earlier suit. The learned Judges held that the second suit was not maintainable. In so holding, they observed that the cause of action for partition was one and the same and once it had merged into a preliminary decree and final decree, a second suit for partition would not lie. I do not see how that case has any bearing on the question to be decided in the present case. There a party who filed a suit for partition and obtained a decree, attempted to file another suit on the same cause of action. The Court rightly held that the cause of action was one and the same, and therefore the second suit was not maintainable.

Reliance is also placed on the decision in -- Uppuluri Ramamani Vs. Yelamanchili Basavayya and Others, . That decision only re-stated the well-settled principle that in a partition, the sharers are both the plaintiffs and the defendants and each defendant is also in the position of plaintiff. Somayya J. held that when one

of the defendants, in fact, applies for a decree in respect of his share, and the alienees are arrayed as co-defendants, the decision operates as *res judicata*, and cannot again be re-opened in a subsequent suit between the particular defendant whose share was the subject of decision and the alienee defendant. The proposition laid down is self-evident. When the defendant, who is in the position of a plaintiff, specifically raises the question and gets a decision against him, he is certainly precluded from filing another suit on the same cause of action.

Another decision of Somayya J. in -- Kizhakkiniyakath Kunhi Koyamutty Naha Haji Vs. Veeran and Others, (C) is more in point. There, a decree in a partition suit contained a clause which ran thus :

"That the remaining sharers other than plaintiff shall be put in possession of their respective shares on paying the necessary court-fee."

But advantage was not taken of that conditional relief. When another suit was filed, it was contended that the proper remedy was by way of execution of the partition decree and that S. 47, Civil P. C., was a bar to that suit.

In dealing with this contention, the learned Judge observed at page 365 of the report as follows :

"Therefore, it is an opinion given to the defendant in a partition action, to pay the court-fee on the entire properties allotted to him if they wish to execute the decree. But if he does not, the allotment of certain properties to him under the partition decree stands. His rights are declared by that document and there is no reason why in such a case a separate suit ought not to be entertained. It is possible that a decree may be passed in favour of the defendant without any condition, particularly as regards the payment of court-fees. If the decree allots certain properties to the parties, and directs each party to be in possession of the properties allotted to him under the decree, then it might be a decree which is executable by each and S. 47 may bar a separate suit by a defendant, who could execute the decree unconditionally, but to bring about that result, it seems to me, you must have an unconditional decree giving the defendant a right to execute the decree to get the properties allotted to him."

The aforesaid two paragraphs bring out the distinction between the two classes of cases. Where the relief was given only to the plaintiff and where the rights of the defendants were only declared but no executable decree was passed in their favour, this decision is an authority for the position that a separate suit would lie at their instance for separate possession of their share. I respectfully follow the reasoning and the conclusion of the learned Judge.

(3) In the result, the appeal is allowed and the decree of the lower appellate Court is set aside. The matter is remanded to the District Judge, Kurnool, for fresh disposal in accordance with law. Costs will abide the result. The appellant will have a refund of the court-fee paid by him.

(4) Appeal allowed.