
(2011) 09 MAD CK 0064
In the Madras High Court
Case No : O.S.A. No. 118 of 2011

M.R. Murali

APPELLANT

Vs

Hemalatha Mohan

RESPONDENT

Date of Decision : 07-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Original Side Rules — Rule 1

Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 — Section 10(2)

Citation : (2011) 09 MAD CK 0064

Hon'ble Judges : R. Banumathi, J;B. Rajendran, J

Bench : Division Bench

Advocate : R. Thiagarajan, for the Respondent

Final Decision : Dismissed

Judgement

R. Banumathi, J.—Being aggrieved by the order dated 02.02.2011 dismissing the application filed under Order 7, Rule 11 Code of Civil

Procedure, 3rd Defendant/Party -in-person has preferred this appeal.

2. The dispute is in respect of the division of the properties between the legal heirs of the deceased Ramachandra Naidu. Suit properties and other

properties were originally belonged to one Bashyam Naidu and parties are related as under:

3. Bashyam Naidu had executed a Will [30.01.1935] bequeathing the properties to his two sons Kamalanabha Naidu and Ramachandra Naidu to

be enjoyed by them for their life and thereafter to his grandsons absolutely and the said Will has been probated. He also gave life interest to his

wife Dhanalakshmi. Kamalanabha Naidu and Ramachandra Naidu did not have power to alienate the properties After the death of Bashyam

Naidu, Kamalanabha Naidu and Ramchandra Naidu partitioned the properties by dividing the properties into two equal shares by partition deed

dated 12.10.1950. Deed of partition was also acted upon. In 1962, Ramachandra Naidu performed the marriage of Plaintiff-Hemalatha Mohan.

4. Plaintiff filed the suit C.S. No. 952 of 1990 for partition against her father, mother and brother and sister [Defendants 1 to 4]. Tenants were also

impleaded as Defendants 5 to 7 in the suit. Plaintiff has alleged that her father-1st Defendant along with Defendants 2 to 4 have been dealing with

the suit properties to the detriment of the Plaintiff and without her consent and knowledge, Ramachandra Naidu, who has No. right of alienation,

has alienated ""B"" schedule property to the 6th Defendant-Subramanian. Plaintiff has further alleged that the grandchildren of testator are absolutely

entitled to the immovable properties and the Will [30.01.1935] specifically mentions that the grandsons together are to take half share in the

immovable properties and thereby the testator had intended that the remaining half share should be taken absolutely by the granddaughters viz., the

Plaintiff and 4th Defendant-Krishna kumari. Stating that she is entitled to 1/4th share, Plaintiff has filed the suit for partition of ""A"" ""B"" ""C"" and ""D

schedule properties into four equal shares and to allot one such share to her.

5. During his life time, 1st Defendant-Ramachandra Naidu has filed the written statement contending that testator Bashyam Naidu has expressed in

clear terms that his two sons were entitled to appropriate the properties in two equal shares with No. power of alienation and Plaintiff being the

second daughter of 1st Defendant has No. right to claim any share in the suit properties. 3rd Defendant-Murali is the son of 1st Defendant and

since 1st Defendant has one son [3rd Defendant], as per the wishes of the testator, property will go to the male heir. Plaintiff has No. locus to lay

the claim to any share in the suit properties of late Bashyam Naidu. Defendants 2 to 4 adopted the written statement filed by the 1st Defendant.

6. During the pendency of suit, 1st Defendant-Ramachandra Naidu died in 1991. Alleging that the partition suit filed by the Plaintiff is abuse of

process of law and devoid of merits, 3rd Defendant has filed A. No. 3929 of 2010 under Order 7, Rule 11 CPC praying for rejection of the plaint

on the ground that the number of applications filed by the Plaintiff were dismissed and those findings would operate as res judicata and that plaint

does not disclose any cause of action for the suit. It was further averred that the probated Will of the grandfather Bashyam Naidu dated

30.01.1935 does not disclose the name of the Plaintiff as beneficiary and that the said aspect has already been dealt with in O.A. No. 269 of 1993

and Plaintiff has not challenged the said findings thereon and it has become final. According to 3rd Defendant, the findings in O.A. No. 269 of

1993 operate as res judicata and the plaint is liable to be rejected as barred by the principles of res judicata.

7. Resisting the application, Plaintiff has filed the counter contending that any application under Order 7, Rule 11 CPC can be considered only on

the strength of the averments contained in the plaint and not otherwise and that the suit properties are available for partition. Plaintiff has further

averred that the findings in an interlocutory application would not operate as res judicata. Application under Order 7, Rule 11 CPC has been filed

nearly 20 years after the filing of the suit and that the Appellant is only bent upon denying the Plaintiff's legitimate right in the suit properties.

8. Upon consideration of the rival contentions, learned Judge has dismissed the application A. No. 3929 of 2010 holding that the averments in the

plaint are to be considered meaningfully without referring to the written statement and finding that the plaint averments disclose cause of action.

Observing that the findings in an interlocutory application would not operate as res judicata and that the plaint cannot be rejected on the ground of

principles of res judicata, the learned Judge dismissed the application.

9. Earlier, Plaintiff has taken out various applications viz., O.A. No. 269 of 1993 for appointment of Receiver; A. Nos. 466 and 467 of 2003,

5587 of 2003 and 292 of 2005 seeking for injunction and other reliefs. Receiver Application O.A. No. 269 of 1993 came to be dismissed by the

order dated 17.08.1993. While dismissing the Receiver Application [O.A. No. 269 of 1993], Justice Govardhan observed that ""the Will does not

disclose that the testator had given any property in favour of the Applicant/Plaintiff and the Plaintiff's claim for appointment of Receiver cannot be

appreciated, since Plaintiff has No. prima facie case"". Subsequently, Plaintiff had taken out another application in A. No. 467 of 1997 seeking to

appoint her as party Receiver to manage the affairs of the suit properties and to collect the income from the property which came to be dismissed

as not pressed.

10. Appellant-3rd Defendant who is also a practising Advocate appearing in-person contended that the Receiver Application [O.A. No. 269 of

1993] filed by the Plaintiff was dismissed on the ground that Plaintiff is having No. right in the property and that the said order finally determines the

rights of the parties and the findings would operate as res judicata. Appellant would further contend that the findings in the Receiver Application

that Plaintiff has No. prima facie case has become final and while so, continuation of the partition suit is only an abuse of process of Court.

11. Contending that the findings in the Receiver Application would operate as res judicata, Appellant has placed reliance upon 2005 (2) SBR 217

Bhanu Kumar Jain v. Archana Kumar and Anr. wherein the Hon"ble Supreme Court has held that principles of res judicata applies in different

stages of the same proceedings. Referring to various other decisions, in Paragraph (18), the Hon"ble Supreme Court held as under:

18. It is now well-settled that principles of res judicata applies in different stages of the same proceedings.

[See Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, and Prahlad Singh Vs. Col. Sukhdev Singh, .

In Y.B. Patil (supra) it was held:

4..... It is well settled that principles of res judicata can be invoked not only in separate subsequent proceedings, they also get attracted in

subsequent stage of the same proceedings. Once an order made in the course of a proceeding becomes final, it would be binding at the subsequent

stage of that proceeding.....

The same principle was reiterated in 2002 (10) SBR 281 [C.V.Rajendran and Anr. v. N.M.Muhammed Kunhi] where the Hon"ble Supreme

Court has held that principles of res judicata applies as between two stages in the same litigation so that if an issue has been decided at an earlier

stage against a party it cannot be allowed to be re-agitated by him at a subsequent stage in the same suit or proceedings. Reference was made in

Hope Plantations Ltd. Vs. Taluk Land Board, Peermade and Another, .

12. The ratio of the above decisions is that res judicata applies as between the two stages in the same litigation. But it cannot be contended that the

observations and orders in an interlocutory application would operate as res

judicata in the main suit itself.

13. u/s 11 CPC the conditions of res judicata are:

(i) identity of the matter in issue, i.e. the matter ""directly and substantially"" in issue in the subsequent suit must be the same matter which was

directly and substantially"" in issue in the former suit;

(ii) identity of parties;

(iii) same title - the parties in the subsequent suit must have litigated under the same title in the former suit;

(iv) Court which decided the former suit must have been competent to try the subsequent suit; and

(v) the matter ""directly and substantially"" in issue in the subsequent suit must have been heard and finally decided in the former suit.

14. Doctrine of res judicata applies not only to the actual decision in the case; but also to the facts and grounds for that judgment pleaded by the

parties. Thus for applying the principles of res judicata the words used in Section 11 CPC are ""directly and substantially"" in issue. The test to

determine whether an issue was ""directly and substantially"" in issue in earlier proceedings or collaterally or incidentally, is that if the issue was

"necessary" to be decided for adjudicating on the principal issue and was decided, it would have to be treated as ""directly and substantially"" in

issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a later case. In Sajjadanashin Sayed

Md. B.E.Edr. (D) By Lrs. Vs. Musa Dadabhai Ummer and Others, , it was held that one has to examine the plaint, the written statement, the

issues and the judgment to find out if the matter was ""directly and substantially"" in issue. It is not to be assumed that matters in respect of which

issues have been framed are all of them ""directly and substantially"" in issue. Nor is there any special significance to be attached to the fact that a

particular issue is that first in the list of issues.

15. Principles of res judicata is intended to prevent re-litigating of the same issue so that the same person cannot be harassed again and again in

various proceedings upon the same question of law. Section 11 CPC thus operates against the same parties and the issue was already decided

between the same parties in the former suit or other proceedings. The essential pre-requisite is that the issue was ""directly and substantially"" in issue

in the earlier proceedings or collaterally. Receiver application earlier filed by the Plaintiff cannot be taken as the proceedings where the issue was directly and substantially"" in issue. The observations made in the Receiver application were only for the limited purpose of considering whether Respondent-Plaintiff should be appointed as Receiver or not and the question of considering the Plaintiff's share was not at all ""directly and substantially"" in issue. Therefore, Appellant is not right in contending that the observation in the Receiver application has finally determined the rights of the parties and that it would operate as res judicata in continuation of the partition suit.

16. Case of Appellant is that as per the partition effected between Kamalanabha Naidu and Ramachandra Naidu, ""C"" schedule fell to the share of

Ramachandra Naidu and since then the suit property was enjoyed by Ramachandra Naidu for his life time and as per the terms of the probated

Will, succeeded by the Appellant who is the only son of Ramachandra Naidu. Contention of Appellant is that the terms of probated Will stipulate

that only the sons of Ramachandra Naidu are the beneficiaries and the Plaintiff who is the daughter of Ramachandra Naidu has No. right in the suit

A"", ""B"" and ""C"" schedule properties or any other properties mentioned in the probated Will of Bashyam Naidu and while so, Plaintiff has not

given any material particulars as to how she claims right in the suit properties. It was further submitted that No. parole evidence could be adduced

to interpret the Will and that the intention of the testator debars the daughter of Ramachandra Naidu, Plaintiff cannot seek for any partition

interpreting the Will by adducing oral evidence. Appellant contended that plaint does not disclose any cause of action and is devoid of material

particulars and therefore under Order 7, Rule 11 (a) Code of Civil Procedure, the suit is liable to be rejected.

17. Mr. R.Thiagarajan, Learned Counsel for Respondent-Plaintiff has submitted that any application under Order 7, Rule 11 CPC can be

considered only on the strength of the averments contained in the plaint and not otherwise. It was further submitted that the suit is one for partition

and separate possession of plaint ""A"", ""B"", ""C"" schedule properties and that application to reject the plaint has been filed only to side track the

entire issue. Learned Counsel for Respondent would further contend that application for rejection of plaint came to be filed nearly 20 years after

the filing of the suit which would clearly show that Appellant is bent upon denying the Plaintiff's legitimate right in the suit properties. In support of

his contentions, Learned Counsel for Respondent placed reliance upon D. Ramachandran Vs. R.V. Janakiraman and Others, and Mayar (H.K.)

Ltd. and Others Vs. Owners and Parties, Vessel M.V. Fortune Express and Others, .

18. In plaint paragraphs (11) and (12), Plaintiff has explained as to how she is claiming 1/4th share in the suit properties. Whether the plaint

discloses any cause of action or not, the Court has to find out from the allegations made in the plaint itself and not beyond, it to see as to whether

the bogus or vexatious litigation has been initiated by the Plaintiff. What is required to be disclosed by the Plaintiff is a right to sue. Phrase in Order

7, Rule 11(a) CPC ""does not disclose the cause of action"" has to be narrowly construed. Rejection of plaint has very serious consequences and

this power therefore has to be used in exceptional circumstances. Rejection of plaint is not justified merely because plea of the Defendant that claim

made by the Plaintiff is not a legally recognisable claim. Merits of the plaint averments could be gone into only at the time of trial when the parties

adduce oral and documentary evidence.

19. As rightly contended by the Learned Counsel for Respondent/Plaintiff, the partition suit is pending for nearly 20 years. After the dismissal of

the application in A. No. 3929 of 2010, trial commenced on 19.01.2011 and proof affidavit of Respondent/Plaintiff was filed on 9.2.2011 and

documents -Exs.P.1 to P.7 were marked. Chief examination of Plaintiff was over on 9.2.2011 and thereafter the matter was posted for cross

examination of the Plaintiff. It was stated that since the Appellant and other Defendants did not turn up for cross examining Respondent/Plaintiff,

the suit was posted before the Court for hearing arguments on 19.04.2011. When the Suit has been pending for nearly 20 years, at this distant

point of time, the Suit cannot be rejected on the ground that the plaint does not disclose a cause of action.

20. Appellant contended that continuation of partition suit is clear abuse of process of Court. Earlier, Appellant had filed eviction petition against

the tenants - J.J. Lal Private Limited and Ors. on the ground of (i) denial of title of the landlord - u/s 10(2)(vii) of Tamil Nadu Buildings (Lease and

Rent Control) Act and (ii) u/s 10(2)(iii) of Tamil Nadu Buildings (Lease and Rent Control) Act wilful default in payment of rent. Eviction was

ordered on both the grounds of denial of title and wilful default in payment of rent. In the appeal preferred by the tenant, the Hon"ble Supreme

Court [vide J.J. Lal Pvt. Ltd. and Others Vs. M.R. Murali and Another, set aside the order of eviction and allowed the appeal on the ground that

No. case for eviction is made out either on the ground of denial of title ""not bonafide"" or on the ground of wilful default in payment of rent. In the

said proceedings, Plaintiff herein has filed I.A. Nos. 33 to 36 of 2001 seeking to implead herself on the basis of the Will dated 30.01.1935

executed by her grandfather she is one of the landlords entitled to apportionment of rent. Referring to the civil suit filed, the Hon"ble Supreme

Court has dismissed the applications directing the parties to establish their claims and title in any independent proceedings before the competent

forum.

21. Drawing our attention to the decision of the Hon"ble Supreme Court in J.J. Lal Pvt. Ltd. and Others Vs. M.R. Murali and Another, , Appellant

contended that conduct of Respondent-Plaintiff would show that she has been taking sides with the tenants and that she was trying to protract the

eviction proceedings and while so, acting against the interest of the Appellant and other family members and continuation of the suit for partition is

clear abuse of process of law. This contention does not merit acceptance in view of the observations of the Hon"ble Supreme Court and granting

liberty to the Plaintiff to establish her claim and title in any independent proceedings. However, we leave the issue open to be agitated in the suit;

but certainly it cannot be a ground for rejection of plaint.

22. Pointing out that the findings in an interlocutory application would not operate as res judicata, learned single Judge has rightly dismissed the

application for rejection of plaint. We do not find any reason warranting interference in the impugned order and this appeal is liable to be

dismissed.

23. In the result, the appeal is dismissed. Consequently, connected M.Ps. are closed. No costs.