

(1989) 01 MAD CK 0061
In the Madras High Court

Murugaiyan

APPELLANT

Vs

Meenakshi Ammal

RESPONDENT

Date of Decision : 03-01-1989

Acts Referred:

Citation : (1989) 1 LW 168 : (1989) 1 MLJ 376

Hon'ble Judges : K.M. Natarajan, J

Bench : Division Bench

Judgement

K.M. Natarajan, J.—This application is filed u/s 151, Civil Procedure Code, for stay of ; final decree proceedings in O.S. No. 1069 of

1980 on the file of the Principal District Munsif, Villupuram, pending disposal of the second appeal. It is alleged in the affidavit filed in support of

the application that the respondent filed the suit O.S. No. 1069 of 1980 for recovery of possession on the ground that she is the only heir of late

Kanna Kounder and that the petitioner herein is the son of the respondent's father's concubine. The case of the petitioner defendant is that his

mother was the lawfully married wife of Kannia Kounder and that the respondent's mother was not the wife of his father and that she is the wife of

one Narasinga Pillai. It is his further case that items 1 to 3 belonged to his father and that items 4 and 5 belonged to the deceased Thayarammal

who is the first wife of his father. The trial Court dismissed the suit while the appellate Court revised the finding and held that both the plaintiff and

the defendant are the daughter and son respectively of the deceased Kannia Kounder and that the plaintiff, respondent herein, is entitled to half

share in items 1 to 3 while rejecting the claim of the respondent with regard to items 4 and 5 holding that they devolved on the petitioner through

his mother. It is also submitted that the appellate Court has not made any provision for discharging the debts. It is against the said judgment, he has

filed the second appeal. His previous stay application appears to have been dismissed. Since the respondent has filed an application in the trial

Court for appointment of a Commissioner to divide the properties, he has filed this application for stay as he will be put to irreparable loss and

injury if final decree is passed pending disposal of the second appeal.

2. The said application is resisted by the respondent-plaintiff and in the counter affidavit, it is contended that she alone is entitled to the suit

properties, that she has filed a cross appeal and that the petitioner has no case in the second appeal. It is further contended that in the earlier

petition in C.M.P. No. 9426 of 1985 praying for stay of further proceedings in pursuance of the decree passed by the appellate Court, she filed a

counter affidavit. This Court after hearing the counsel appearing on both sides held that there need not be any stay in so far as items 1 to 3 of the

suit properties are concerned and consequently dismissed the application. In view of the above order, the present application for stay is not

maintainable and is liable to be dismissed. It is further stated that the petition to send back the records in C.M.P. No. 8246 of 1988 was ordered

on 26.3.1988 and thereafter, he filed the petition for appointment of a Commissioner, Hence, she prayed for dismissal of the application.

3. The main question for consideration in this application is whether in view of the earlier order passed dismissing the application for stay of further

proceedings, the present application is maintainable Learned Counsel for the petitioner Mr. Velusami relied on the decisions reported in Syam

Prasad v. Mastariamamma (1954)1 M.L.J. (A.P.)3 : AIR 1954 A.P.40 and Chandrasekara Pandia Nadar v. Ratnasami Nadar 1972 T.L.N.J. 455

for the proposition that an order passed under Order 41, Rule, 5 C.P.C. staying the execution of the decree is not a final one, but a tentative one.

Further, it does not decide the rights of any parties, but is merely one giving some interim relief to parties. The High Court has ample power u/s

151, C.P.C. to vary the order in proper circumstances in order to grant relief and to do substantial justice between the parties. On the other hand,

the learned Counsel for the respondent submitted that only in certain circumstances a second application can be filed. In the instant case, no fresh

facts were alleged and no fraud and misrepresentation or other similar grounds have been raised and as such, the present application is not

maintainable. My attention was drawn to the decision of the Supreme Court in Arjun Singh Vs. Mohindra Kumar and Others, : In that case, in

para 13 at page 1000, it was held:

It is needless to point out that interlocutory orders are of various kinds; some like orders of stay, in injunction or receiver are designed to preserve

the Status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal duty which the proceedings before the

court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit, and do not, of course, put an

end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally

only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the

principle of res judicata does not apply to the findings on which these orders are based, though if applications were made for relief on the same

basis after the same has been disposed of the court would be justified in rejecting the same as an abuse of the process of Court.

In P. Satyanarayana Vs. The Land Reforms Tribunal and Others, , it was held in para 13, that a court of Tribunal can review its own order of

judgment only where the party by way of misrepresentation has played a fraud upon the court and not in other cases. That decision is not

applicable to the facts of this case. That was a case where the petitioner has filed a declaration of his holding as required by Section 8 of the

Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act, 1975. The Tahsildar on verification passed an order as per Rule 4(4) of the

Act that the petitioner's family consists of seven members. On the basis of the report of the Tahsildar the statements made by the petitioner, the

Tribunal held that the petitioner's family unit consists of seven members and since he is entitled to an additional 2/5ths holding on that account, his

holding was within the permissible limit. The said order has become final, not having been appealed against. About six months later, the case has

been reopened at the instance of the authorised officer since he has raised an objection that the petitioner was not having two of the five children

mentioned by him in the declaration. In the circumstances, it was held that a Court or Tribunal cannot review its own order or judgment unless

there is a statutory provision providing for the same, but Court or Tribunal has inherent powers to recall orders obtained by practising fraud or

misrepresentation on it. That is not the case here. As pointed out in *Syam Prasad v. Mastanamma* AIR 1954 Andh 40, the order passed staying

the execution of the decree is not a final one and it does not decide the rights of the parties. The High Court has ample powers to vary the order in

proper circumstances.

4. Learned Counsel for the respondents relied on the decision in *Abdul Ghani v. Mahantram Saran* AIR 1976 J K 72, wherein reliance was placed

on the decision of the Supreme Court in *Arjun Singh Vs. Mohindra Kumar and Others*, referred to above. In that case it was held that though the

principle of *res judicata* may not be applicable to the findings contained in interim or interlocutory orders, yet, a second application on identical

facts had been refused. In that case it was held that though the principle of *res judicata* may not be applicable to the findings contained in interim or

interlocutory orders, yet, a second application for obtaining substantially the same order of relief cannot lie when a previous application on identical

facts had been refused. In *A. Thakurdas and Anr Vs. A. Venilal and Others*, , it was held

The concept of *res judicata* has its genesis in the finality of litigation. It is fairly settled that the principle of *res judicata* can be invoked even in the

interlocutory proceedings arising out of the same suit.

It was held in the said decision that the mere fact that some of the defendants were not permitted to be arrayed as plaintiffs will not stand in their

way claiming a final decree for partition. That principle is not disputed even in cases of interlocutory applications as was held in *Arjun Singh Vs.*

Mohindra Kumar and Others, , In *Samar Bhushan v. Sakti Pada* AIR 1980 Cal. 253, it was held by a single Judge of the said High Court.

It is true that u/s 151, C.P.C. a Court cannot reverse its earlier order on the ground that it is subsequently found to be erroneous on merit. But, this

principle shall not be applicable in a case in which the order is passed under a misunderstanding of the case. In such a case, the court has inherent

jurisdiction to set aside its own order. In the case of miscarriage of justice, the

injustice so done must be remedied on the principle actus curis

nemiriem grave bit-the act of the Court shall prejudice no person.

On a careful analysis of the ratio laid down in the above cases. It is clear that the Court has got inherent power to pass an order altering or varying

the earlier order by subsequent applications for the same relief though normally only on proof of new facts or new situations which subsequently

emerge. In the instant case, the earlier order passed in C.M.P. No. 9246 of 1986 is as follows

After perusing the affidavit and the counter affidavit, I am of the view that there need not be any stay in so far as items 1 to 3 of the suit properties

are concerned. Hence, this application is dismissed.

In the present application, new facts were also alleged in para 4 of the affidavit. It is stated that the lower appellate Court has not made any

provision for discharging the debts and further, its findings are not based on any acceptable or legal evidence. It is also alleged that the respondent

plaintiff has filed an application for appointment of a Commissioner to divide the properties and allot half share to her and that during the pendency

of the second appeal, if a final decree is passed, he will be put to irreparable loss and injury. This Court has not discussed the merits and demerits

of the case of the respective parties at the time of passing the earlier order. Even otherwise, it is not in dispute that the suit filed by the respondent

claiming exclusive right to the properties as the heir of Kannia Kounder was dismissed by the trial Court. On appeal, the appellate Court came to

the conclusion that both the appellant and the respondent are the heirs of the deceased Kannia Kounder and that they are entitled to claim shares.

It is against the said judgment, the present appeal is filed. The two substantial questions of law raised in the second appeal are (1) Whether there

was a valid legal marriage between Kannayyan, father of the appellant and Pokkilai, mother of the respondent, and (2) Whether the lower

appellate court was right in granting a decree for partition. It is not in dispute that the appellant is in possession of the properties. In the

circumstances, to preserve status quo, it is just and proper that stay of the passing of final decree can be granted, and certainly the proceedings

regarding division of properties for allotment of half share to the respondent plaintiff as per the preliminary decree, and other proceedings can be

proceeded. Since the appeal is of the year 1985 the hearing of the appeal also can be expedited.

5. For all these reasons, the application is allowed and there shall be stay of passing of final decree alone pending disposal of the second appeal. It

is made clear that the other proceedings with regard to the division of the properties by appointment of a Commissioner in pursuance of the

preliminary decree can go on. The hearing of the second appeal is fixed on 17.7.1989, for final disposal. No order as to costs.