
(2017) 05 MAD CK 0004

In the Madras High Court

Case No : 1241 of 1994 and M P (MD)No 1 of 2010

Syed Mohamed Bahrudeen(Died) & Ors.

APPELLANT

Vs

A.S.S.Ahmed Sultan Beevi(died) & Ors.

RESPONDENT

Date of Decision : 17-05-2017

Acts Referred:

[Order 41 Rule 27](#), Section 11

Citation : (2017) 05 MAD CK 0004

Hon'ble Judges : C.V.Karthikeyan

Bench : SINGLE BENCH

Advocate : C.V.Karthikeyan

Judgement

1. A.S.No.1241 of 1994 has been filed by the second defendant in O.S.No.79 of 1992 aggrieved by the Judgment and Decree of the learned

Subordinate Judge, Ramanathapuram in O.S.No.79 of 1992, dated 30.09.1994. M.P.(MD)No.1 of 2010 has been filed by the appellant under

Order 41 Rule 27 of C.P.C., to receive the additional documents as additional evidence on behalf of the appellants.

2. O.S.No.72 of 1992 has been filed seeking partition and separate possession of 1/4th share in the suit property. The plaintiff in the said

suit,namely, A.S.S.Ahamed Sulthan Beevi and the first defendant in the said suit, namely, Jannath Bridhosh Beevi were sisters. The third defendant

in the suit, namely, A.S.S.Ahamed Sahib, was their brother. The suit was filed seeking 1/4th undivided share and it was also mentioned that the

first defendant as a sister was entitled to 1/4th undivided share and the third defendant as a brother was entitled to 1/2 share. It was stated that the

second defendant who was the son-in-law of the plaintiff was colluding with the first defendant to grab the entire property.

3. The suit property is a vacant site with dilapidated structures in Keezhakarai Town, Ramanathapuram District, measuring 52 feet north to south and 40 feet east to west. It is the case of the plaintiff that the suit property belonged to Umar Sahib and he died in the year 1945. He gave the property by an oral gift to his wife, namely, Maula Ummal. She built sheds in the said property and she enjoyed the property and died in the year 1959. Both Umar Sahib and Maula Ummal did not have any children. Consequently, the brother of Maula Ummal, by name, Sekhu Madhar Sahib Ambalam became the owner of the property and he also died. His daughters are the plaintiff and the first defendant and his son is the third defendant. Consequently, they claimed division of the property in the ratio of $1/4 : 1/4 : 1/2$. However, the property was in the possession of the first defendant. The relationship between the two sisters, namely, the plaintiff and the first defendant was very strained. The relationship between the plaintiff and the son-in-law, namely, the second defendant was also strained. Taking advantage of this, the first defendant and the second defendant have tried to take over the entire property and the second defendant, namely, Syed Mohamed Fakrudeen, mutated the revenue records of the property in his name. The first defendant also attempted to put up further construction in the suit property. Consequently, the plaintiff was forced to file the suit in O.S.No.79 of 1992.

4. The first defendant Jannath Birdhosh Beevi filed a written statement admitting the relationship of the properties of the parties and also admitting that originally, Umar Sahib was the owner of the property and after his death, his wife Maula Ummal enjoyed the suit property and she also died. It was also stated that Umar Sahib had brothers and sisters and their children also made rival claim over the suit property and several other properties. Similarly, Maula Ummal also had brothers and sisters and their children also claimed the right over the property. It was the further claim that the suit should be dismissed.

5. The second defendant filed a written statement and he stated that the property did not belonged to Umar Sahib. According to him, the property belonged to Mohamed Mohideen Maraikayar. He sold the property in the year 1916 to Syed Mohamed Alim Pulavar. The second defendant's mother was the daughter of the said Syed Mohamed Alim Pulavar. The second

defendant claimed the suit property as a distant relative, since the said Syed Mohamed Alim Pulavar died leaving behind his only daughter, namely, the mother of the second defendant. According to the second defendant, the plaintiff, the first defendant and the third defendant did not have any right title or interest over the property. His mother Sulaika Beevi became the owner after the death of her father, namely, Syed Mohamed Alim Pulavar and after her death, the entire property became vested with the second defendant. The third defendant did not file any written statement and he was set ex-parte during the trial.

6. On consideration of the rival pleadings, the learned Subordinate Judge, Ramanathapuram, framed the following issues:- "1. Whether the plaintiff was entitled to 1/4th share in the suit property? 2. To what relief the plaintiff is entitled?" During the trial, the plaintiff examined three witnesses.

P.W.1 was S.M.Noorul Hamid, P.W.2 was Thambi Sahib. P.W.3 was Ganesan. P.W.4 Ahamed Sulthan Beevi who was the plaintiff in the suit.

The second defendant Syed Mohamed Bakrudeen examined himself as D.W.1. On behalf of the plaintiff, Ex.A-1 to Ex.A.6 were marked and

these included as Ex.A.2 and Ex.A.3 Revenue Records in the name of Maula Ummal and Ex.A.6, Settlement Deed, dated 30.06.1938 executed

by Syed Mohamed Alim Pulavar. On the side of the defendants, Ex.B.1 to Ex.B.30 were marked. These included as Ex.B.1, a xerox copy of the

Judgment in O.S.No.56 of 1951, dated 28.03.1953, Sale Deed in favour of Syed Mohamed Alim Pulavar executed by Mohamed Mohideen,

dated 19.03.1916 as Ex.B.2, the revenue records in the name of the second defendant as Ex.B.31 and Ex.B.32 and Ex.B.25 to Ex.B.28 and

Ex.B.30.

7. On consideration of the oral and documentary evidence, the learned Subordinate Judge, Ramanathapuram, held that the property originally

belonged to Umar Sahib and he had gifted the same to his wife Maula Ummal and that she was in possession and they did not leave any legal heirs

as children and consequently her brother Sekhu Madhar Sahib inherited the property and on his death, the plaintiff, first defendant and third

defendant inherited the property again. Consequently, in accordance with the law of inheritance, the learned Subordinate Judge granted a

preliminary decree granting 1/4th undivided share to the plaintiff and 1/4th

undivided share to the first defendant and 1/2 undivided share to the third defendant. In view of the relationship among the parties, cost was not awarded. The second defendant preferred the present appeal against the said Judgement and Decree in O.S.No.79 of 1992.

8. In the present appeal, the appellant also filed M.P(MD)No. 1 of 2010 under Order 41 Rule 27 of C.P.C., seeking permission to adduce

additional evidence. The documents which were sought to be produced. i) Certified copy of the plaint in O.S.No.56 of 1951 and ii) Certified copy

of the Judgement in O.S.No. 56 of 1951 on the file of Subordinate Court, Ramanathapuram. It is to be mentioned that the Xerox copy of the

Judgement was produced during the trial and consequently to enhance evidentiary value, the certified copy of the said Judgement had now been

produced and it has been requested that the same has to be taken on record as additional evidence. In the said Judgement, now under appeal

among other reasons given by the learned Judge to decree the suit was that in the earlier suit in O.S.No. 56 of 1951, Maula Ummal was the sixth

defendant and Syed Mohamed Alim Pulavar was the seventh defendant. The learned Judge found that the Xerox copy of the said Judgement

which was marked as Ex.B.1 could not be looked in as an admissible evidence and consequently did not rely on the findings in O.S.No.56 of

1951. Consequently, M.P(MD)No.1 of 2010 has been filed by the appellants to produce the certified copy of the plaint and the certified copy of

the Judgement in the said suit. Even though the learned counsel for the respondents 4 and 7 had filed counter affidavit, I hold that in the interest of

the Justice, these documents should be taken on record and consequently, the said documents are taken on record and since they are certified

copies of Court documents, the genuineness of which cannot be disputed, they are taken on record as Ex.B.31 - Certified copy of the plaint in

O.S.No.56 of 1951 (Subordinate Court, Ramanathapuram) and Ex.B.32-Certified copy of the Judgement in O.S.No. 56 of 1951, dated

28.03.1953 (Subordinate Court, Ramanathapuram). Consequently, M.P.(MD)No.1 of 2010 is allowed and the documents mentioned therein are

taken as evidence on record.

9. Mr.A.Arumugam, learned counsel for the appellants pointed out that there was no document to show that Umar Sahib was the owner of the

property. Again there was no evidence to show that he had gifted the property to his wife Maula Ummal. In the absence of any such evidence, the

learned counsel pointed out that it was injudicious on the part of the learned trial judge to hold that merely because, Maula Ummal resided in the

property she was the owner of the property. The learned counsel for the appellants also stated that revenue records could not give title to any

person. Since the title of the Maula Ummal itself was under a cloudy, her brother Sekhu Madhar Sahib could not have inherited the property.

Once such inheritance is doubted, the claim of the plaintiff and the defendants 1 and 3 that as daughters and son of Sekhu Madhar, they inherited

the property also cannot be held to be legally accepted. Consequently, the learned counsel stated that the claim of the plaintiff to ownership must

be rejected.

10. On the other hand, the learned counsel for the appellants further stated that there was a Sale Deed in favour of Syed Mohamed Alim Pulavar.

This Sale Deed had been marked as Ex.B.2, dated 19.03.1916. The learned counsel further stated in the earlier suit with relation to the suit

property and other suit properties among the various branches of the same family, the sixth defendant in the said suit was Maula Ummal, through

whom, the plaintiff and the defendants 1 and 3 traced title. The seventh defendant was Syed Mohamed Alim Pulavar, through whom, the second

defendant traced title. In the said suit in O.S.No.56 of 1951, the Xerox copy of the Judgement was marked as Ex.B.1 and the certified copy of the

plaint and the Judgement had now been marked as Ex.B.31 and Ex.B.32, the title of Syed Mohamed Alim Pulavar to the suit property had been

upheld and consequently, the said Judgement acted as res judicata in so far as the claim of the plaintiff is concerned. The learned counsel therefore

stated that the Judgement under appeal should be interfered with.

11. On the other hand, Mr.M.V.Venkateshan, learned counsel for the respondents 4 and 7 stated that Syed Mohamed Alim Pulavar became a

Sufi Saint and left the world. Consequently, the property was entrusted by him to Umar Sahib. The plaintiff traced title through Umar Sahib and his

wife Maula Ummal which had also been accepted by the learned trial Judge and the learned counsel stated that the Judgement need not be

interfered with.

12. I have carefully considered the rival submissions.

13. The plaint in the earlier suit in O.S.No.56 of 1951 which had been taken on record in the present proceedings as Ex.B.31, was a suit for

partition and separate possession of the suit properties mentioned therein. In the said plaint, the fifth item in the "A" schedule is the present suit

property. In the said suit, namely, O.S.No.56 of 1951, Maula Ummal, through whom the plaintiff traced title was shown as the sixth defendant and

Syed Mohamed Alim Sahib was shown as the seventh defendant. The second defendant traced title through Syed Mohamed Sahib. The said

individual became a Sufi Saint and consequently he was called Syed Mohamed Alim Pulavar. In the said suit, the Xerox copy of the Judgement

was marked as Ex.B.1. The certified copy has now been taken on record as Ex.B.32. Issue No.14, 14(a) and 14(b) deals with the title of the

property which is the subject matter of the present appeal. Issue No.14 ""Whether the Sale Deed in respect of items 3 to 5 of "A" Schedule, dated

19.03.1916 by the father of the plaintiff in favour of the seventh defendant is true valid and supported by consideration or whether the said deed is

a sham and benami document and was never acted upon"". Issue 14(a) ""Whether the enjoyment of portions of items 3,4 and 5 of "A" schedule by

Mohamed Umar Shahib and by the sixth defendant is permissive"" and issue No.14(b) ""whether the seventh defendant has acquired title by adverse

possession and enjoyment"". Since an earlier competent Court had decided the right title and interest vis-a-vis both Mohamed Umar Shahib and

Syed Mohamed Alim Pulavar, this Court has to accept the findings in the said Judgement as final and in the said Judgment would act as res

judicata in so far as the issue in the present appeal is concerned. The father of the plaintiff mentioned in the issue No.14 was Mohamed Mohidden

Maraikkayar. The seventh defendant in the said suit as stated above was the Syed Mohamed Alim Shahib and the sixth defendant was Maula

Ummal.

14. On consideration of the oral and documentary evidence, it was determined in O.S.No.56 of 1951 that the Sale Deed, dated 19.03.1916,

which had been marked in the present proceedings as Ex.B.2 and which was executed by Mohamed Mohideen Maraikkayar in favour of Syed

Mohamed Alim Pulavar was true, valid and supported by consideration and that it

was neither sham nor benami. It was further found that the seventh defendant, namely, Syed Mohamed Alim Pulavar was in possession of the suit property from the year 1916. It was further found that the sixth defendant, namely, Maula Ummal did not have any right or title over the suit property. The findings in the said suit directly affects the findings in the present case. Section 11 of the Code of Civil Procedure is extracted as follows:-

Res Judicata:- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. Explanation I: The expression ""former suit"" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II: For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court. Explanation III: The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV: Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V: Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused.

Explanation VI: 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.

(Inserted by Act 104 of 1976) Explanation VII: The provisions of this section shall apply to a proceeding for the execution of a decree and

reference in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the

decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII: An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata

in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.

In this case, I hold the Judgement in O.S.No.56 of 1951 acts as direct res judicata. The findings in the said Judgment in the said suit with respect

to the same suit property and in which the rival claims had been adjudicated finally is binding on present subsequent suit. It must also be mentioned

that pending the appeal, the appellant died and his legal representatives had been brought on record. Similarly, the first respondent died and her

legal representatives had also been brought on record. It is also seen that the appellant in his position as the second defendant in the suit has also

produced document to establish his possession over the suit property. The Judgment under appeal had proceeded on the basis that the xerox copy

of the Judgment in O.S.No.56 of 1951 cannot be relied upon. However, as stated above, the certified copy of the same is now produced as an

additional document and taken on record as an additional evidence as Ex.B.32. It was also found by the learned trial Judge that was no evidence

to connect the suit property with the property in O.S.No.56 of 1951. However, a comparison of the schedule, reveals that the present suit

property is the 5th item in "A" schedule mentioned in the plaint in O.S.No.56 of 1951.

15. On all these grounds, I hold that the appeal has to be interfered with. The finding of the learned Judge that the first respondent was entitled to

partition and separate possession has to be reversed, since the first respondent did not have any title over the suit property. This has been

established in the earlier suit in O.S.No.56 of 1951 among the parties. That Judgement acts as res judicata and prevents me from giving any

contrary finding in the present appeal. The said Judgment has admittedly attained finality. In view of the above, I hold that the appeal has to be

allowed. However, in view of the relationship among the parties and also in view of the fact that the original appellant and first respondent had

died, orders regarding cost are not passed. The Appeal Suit is allowed and the Judgement and Decree in O.S.No.79 of 1992 is reversed and the suit is dismissed. No costs. M.P.(MD)No.1 of 2010 is allowed.