

(1933) 09 MAD CK 0015
In the Madras High Court

V. Veeravagu Pillai

APPELLANT

Vs

M. Manikkavasagam Pillai and Others

RESPONDENT

Date of Decision : 22-09-1933

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 1, Order 7 Rule 6

Citation : AIR 1934 Mad 68 : 147 Ind. Cas. 684

Hon'ble Judges : Bardswell, J

Bench : Division Bench

Judgement

Bardswell, J.—The plaintiff brought a suit to recover certain properties. The suit was dismissed on the ground of res judicata by both the

first Court and the appellate Court. It was held to be res judicata with reference to two previous decisions, one in O.S. No 505 of 1923 on the file

of the District Munsif's Court, Srivaikantam, and the other in O.S. No. 270 of 1925 on the file of the same Court. With regard to O.S. No. 505 of

1923 there has been a great deal of misapprehension and a great deal of unnecessary discussion owing to the wrong way in which that suit was

regarded and also owing to a mistranslation of the plaint in that earlier suit as it appears in the printed papers. In the plaint in this suit it was stated

that the earlier suit was one for enforcing an award and this is how it has been treated in both the two lower Courts. It has even been referred to in

the judgment in that suit itself as a suit to enforce an award. It has therefore been agreed that as the suit was one to recover possession, the right of

possession should have been based not only upon the award but upon the two yadasbs that preceded it, and upon which the present claim is

based. It is however ojeared from the prayer in the plaint in O.S. No. 505 of 1923 that what was prayed for was that the award should be filed

under para. 20, Schedule 2, Civil P. C. There is no doubt but that a suit to enforce an award is quite a different thing from an application to file an

award, which application has to be treated as a suit; and even though the District Munsif in his judgment in O.S. No. 505 of 1923 has referred to

the suit as being one to enforce an award, he refers to it in the same sentence as being brought under paras. 20 and 21, Schedule 2, and under

these paragraphs the suit can only be one for filing an award. It has been pointed out that the plaint in the earlier suit is referred to as brought under

Order 7, Rules 1 to 6, Civil P.C., but nothing can be drawn from that to show that it was not a suit to file an award, which specifically it was, as

under para. 20 an application to file an award has to be numbered and registered as a suit and naturally the application in such a case would take

the form of a plaint. As then, that earlier suit was only a suit for filing an award, no other relief could be asked for at that time in the application.

Therefore this ground of res judicata is the result of misapprehension and there is no res judicata as far as suit O.S. No. 505 of 1923 is concerned.

2. With regard to the other suit O.S. No. 270 of 1925, the position is different. That was a suit in which the present defendants 1 to 3, who alone

matter, as defendant 4 is only a tenant of the plaintiff, brought a suit against the present plaintiff for an injunction to prevent his interfering with their

possession and enjoyment of the suit properties. Defendant 1 raised the plea that by a family arrangement these properties had fallen to him and

were in his possession, and two issues were framed as to this, the burden of which was upon the plaintiff as the then defendant. However no

evidence was brought in regard to these issues and in fact the defendant adduced no evidence at all. On the other hand he gave up in that suit his

fight with regard to possession. He filed a statement to the effect that he undertook not to disturb the possession of the then plaintiffs in the

property till the disposal of the present suit and that he specifically referred all the issues in the case to be determined in that suit, O.S. No. 285 of

1925, on the file of the Palamcottah District Munsif's Court, and prayed that justice may be done without any prejudice to defendant's right in

that suit. It has been held, and it is now contended for the respondents, that he had no legal right, so to give up his defence in that suit and that

therefore is a matter of res judicata with reference to Section 11, Civil P.C. and Expl. & of that section. It has been held in *Bayyan Naidu v.*

Suryanarayana AIR 1914 Mad 399 that a ground of defence which might or ought to have been raised by the defendant, must be deemed to have

been raised and decided within the meaning of Section 11, Bxpl. 4, even if it was not directly in question. And the same opinion has subsequently

been expressed by the Privy Council in AIR 1925 55 (Privy Council) . The question however is whether such a contest can be given up in one suit

and reserved for being made in another. In this connexion the learned advocate for the appellant-plaintiff has quoted from a passage of Sundaram

Ayyar, J's., judgment, Bayyan Naidu v. Suryanarayana AIR 1914 Mad 399 in which : he says:

Of course it is open to the parties to show that the contest on any matter was subsequently waived or that the Court refused to decide the matter,

but if neither of these events took place, a decision by the Court on the matter must necessarily be implied if it was not expressly decided.

3. Now it is to be observed that these remarks were not directly necessary for the disposal of that particular suit, nor am I quite certain what the

learned Judge meant when he said that it was open to the parties to show that the contest on any matter was subsequently waived. But if it is

intended to signify that by consent of parties a point that should be taken for the defence could be given up and afterwards raised in another suit,

that is contrary to the decision that appears in Subbarayadu v. Lakshmanyia AIR 1916 Mad 554. In that case there was a suit for money. A plea

of discharge was raised but with consent of parties the Court decreed the full claim, reserving to the defendant the right to bring a separate suit for

the amount pleaded in discharge. Subsequently it was held, on that defendant bringing his suit, that his suit was barred by res judicata because he

had not raised the plea in the previous case. The condition here is different in two respects. One is that the suit now under notice had already been

filed at the time when the suit for the injunction was decided but this, I think, makes no difference to the principle. Another point of difference is

that it is not by consent of both parties that the point of title was not gone into in the earlier suit but that it was only at the instance of one of the

parties. It seems to me perfectly clear that the present plaintiff ought to have taken the point and that in the light of these authorities it was not

competent for him to give the point up and leave it to be decided in another suit. Nor can it be held that the District Munsif who decided O.S. No.

270 of 1925 refused to decide the point of title. He has indeed stated thus:

I do not decide the question of title in this suit as that would prejudice the present defendants in the suit brought by them after this suit.

4. But he goes on to say : ""As requested by the defendants, I leave open the question of title."" Further he has noted that the defendants had not let

in any evidence. It was not then a matter of the learned District Munsif having to decide the issues as to title, but it was one of the issues having

already decided themselves. As the burden was upon the defendants in that suit, and when they let in no evidence, the issues were decided

automatically against them. All that the District Munsif has failed to do is to record a decision which was inevitable and which was in fact implied by

his decision in the suit. I agree with the Courts below that in the matter of O.S. No. ,270 of 1925 the suit was barred by res judicata. I therefore

dismiss the appeal with costs.