

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

SECOND APPEAL NO.1445 OF 2004

JUDGMENT:

The appellant in A.S.No.28 of 2003 on the file of the Court of Senior Civil Judge, Kandukur, who is the 24th defendant in O.S. No.150 of 1997 on the file of the Court of Principal Junior Civil Judge, Kandukur, filed this second appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'CPC') challenging the concurrent finding recorded by the trial court and affirmed by the first appellate court regarding his possession.

02. For convenience of reference, the ranks given to the parties in the suit will hereinafter be adopted throughout the Judgment.

03. The case of the plaintiff is to the effect of the schedule property belong to Ummadisetti China Rosamma and she died intestate issueless. He filed suit in O.S. No.150 of 1997 on the file of the Court of Junior Civil Judge for partition of item 1 of schedule property into six shares and item 2 of schedule property into 7/72 shares and to allot due share to him contending that the first defendant is the grand son of Venkataiah. The said Venkataiah is the brother of China Rosamma. The 24th defendant came on record by filing a petition under Rule 10 of Order I of CPC claiming that he is the legal heir of the husband of Chinna Rosamma and that he is an exclusive owner of item 2 of the schedule property. The other facts are not necessary for deciding the real controversy between the parties.

04. The trial court framed initially two issues, after impleading the 24th defendant, framed an additional issue and again framed an additional issue.

05. During trial, on behalf of the plaintiff, P.Ws.1 and 2 were examined and Exs.A.1 to A.7 were marked. On behalf of the

defendants, D.Ws.1 to 7 were examined and Exs.B.1 to B.13 were marked and also marked Exs.X.1 to X.10.

06. The trial court concluded that the 24th defendant is not entitled to claim any right in item 1 of schedule property and he is entitled to claim item 2 of the schedule property, but failed to establish possession.

07. Aggrieved by the Decree and Judgment of the trial court, the 24th defendant preferred an appeal in A.S. No.28 of 2003 on the file of the Court of Senior Civil Judge, Kandukur, but it was dismissed by Judgment dated 12.04.2004 confirming the Decree and Judgment passed by the trial court. Hence, the second appeal.

08. The only contention before this Court is that the finding recorded by the trial court and affirmed by the first appellate court that item 2 of the schedule property was not in possession of the 24th defendant, while holding that it is in possession of 4th defendant, is unwarranted and therefore requested this Court to set aside the unwarranted finding, since it operates as *res judicata* and it is a Decree within the meaning of Section 2(2) of CPC and prayed to set aside the same.

09. Whereas Sri V.L.N.G.K. Murthy, learned counsel for the first respondent/plaintiff, contended that the concurrent finding recorded by the trial court and the first appellate court are based on material on record, and therefore, the same need not be set aside, as it is only incidental finding.

10. The only substantial question of law that arise for consideration before this Court is that,

Whether the finding as to possession of item 2 of the schedule property is warranted in a suit for partition of schedule property? If not, whether such finding is liable to be set aside?

In Re. Question:

11. Undisputedly, Dasari Venkateswarlu, the plaintiff filed the suit claiming 1/6th share in item 1, and 7/72 share in item 2, of the schedule property being the grand son of Chinna Rosamma's brother. The 24th defendant claiming to be the legal heir of husband of China Rosamma came on record vide orders in I.A.No.1963 of 2001 dated 27.02.2002 claiming exclusive right over item 2 of the schedule property and filed written statement contending that he is in possession and enjoyment of the property. 12. On the strength of the pleadings, more particularly, the plaint, and the written statement filed by the 24th defendant the trial court framed an additional issue which is as follows:

“Whether the 24th defendant got any right in the suit schedule property?”

13. The trial court, after appreciation of evidence, concluded that the 24th defendant is entitled to claim right in item 2 of the schedule property, but he failed to establish his possession. The said finding was affirmed by the first appellate court. The issue is with regard to right of the 24th defendant, but not with regard to his possession, over item 2 of the schedule property.

14. In a suit for partition, when a party to the suit set up a claim that he is an exclusive owner of schedule property, he is not required to prove that he is in exclusive possession of the property by the date of filing the suit. But the trial court travelled beyond pleadings and framed issues and recorded finding that the 24th defendant is not in possession of the schedule property. In fact, when no issue was framed by the trial court regarding possession of the 24th defendant, he is not expected to adduce evidence to prove his possession, but based on material on record, the trial court recorded the finding, keeping the

24th defendant totally in darkness. Such finding is totally unwarranted in a suit for partition, since additional issue framed by the trial court is limited to right of 24th defendant but not with regard to possession.

15. The only apprehension of the 24th defendant herein is that such finding amounts to Decree within the meaning of Section 2(2) of CPC which means formal expression of an adjudication which, so far as regards the Courts expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and determination of any question within meaning of Section 144 of CPC, but shall not include- a) any adjudication from which an appeal lies as an appeal from an order, or b) any order of dismissal for default.

16. The trial court conclusively determined the rights of the 24th defendant, while holding that he is not in possession of item 2 of the schedule property, therefore, it amounts to a Decree within the meaning, such finding amounts to conclusive determination of the rights of the parties.

17. Learned counsel for the appellant/24th defendant drawn the attention of this Court to a Judgment of this Court in an appeal between **STATE OF A.P. REP. BY COLLECTOR, HYDERABAD AND OTHERS V. B.RANGA REDDY (DIED) PER L.RS. 2 TO 6 AND OTHERS**^[1], while considering similar circumstances, it was held that determination of right in a property amounts to Decree within the meaning of Section 2(2) of CPC and it would operate as *res judicata*. Therefore, where the court has conclusively determined the issue, it cannot be said that it is mere finding, but it has to be treated as Decree within the meaning of Section 2(2) of CPC. He also contended that such finding, which is substantially not in issue, is unwarranted.

18. One of the contentions of the learned counsel for the first

respondent/plaintiff is that this finding would not operate as *res judicata* and the appellant/24th defendant is not entitled to file an appeal, but as per the principle laid down by Madras High Court in **N. VENKATESWARLU V. B.LINGAYYA AND OTHERS**^[2], where the point adversely decided to the defendant is correctly and substantially in issue, and where in other proceedings, the matter would be *res judicata*, it would be contrary to all principles of justice and equity to hold that he is precluded from agitating the matter in appeal merely because the suit was decided in his favour on some other ground. In suits where declaration and consequential relief are sought, and the consequential relief is refused, because the finding is against the plaintiff's right which he seeks to declare, it would be better if the decree formally embodied the result of the declaration; but even if it does not do so, but simply dismiss the suit, the decree in substance is one where the declaration is refused. The principle laid down in the above Judgment is that when an adverse finding is recorded, a party to the suit is entitled to file an appeal questioning the adverse finding.

19. Even Rule 1 of Order XLI of CPC permits the person even third party to file an appeal, who is aggrieved by the judgment, after obtaining leave of this Court. But here the 24th defendant is the party to the suit against whom concurrent finding was recorded, though it was not in issue, and such finding is unwarranted in view of specific issue framed by the trial court.

20. Learned counsel for appellant/24th defendant while contending that the aggrieved party may file cross-objections or a separate appeal and drawn the attention of this Court to a judgment of the Apex Court in **BANARSI AND OTHERS V. RAM PHAL**^[3] wherein, at paragraphs 10 and 11, it was held that in view of amendment of CPC in 1976, it is permissible to file cross-objection against a finding. The difference which has resulted in short, a

respondent may defend himself without filing any cross-objection to the extent to which decree is in his favour; however, aggrieved party may either file separate appeal or cross-objection and the plaintiff is entitled to support the decree, if appeal is filed by the respondent even without filing any cross-objection. But here the first respondent/plaintiff did not file any separate appeal challenging the main decree and did not dispute the decree passed against the 24th defendant. However, in the absence of any challenge as to who is in possession, both before the trial court and the first appellate court, recording such finding regarding possession of item 2 of the schedule property is unwarranted and it is beyond the scope of the suit, such finding does not operate as *res judicata*.

21. The learned counsel for the appellant/24th defendant while contending that such finding would operate as *res judicata* placed reliance on the judgment of the Apex Court in **REGIONAL MANAGER, SBI v. RAKESH KUMAR TEWARI**^[4], wherein while deciding a similar issue, at paragraph 14, the Apex Court held as follows:

“14. Section 25G requires the employer to "ordinarily retrench the workman who was the last person to be employed in a particular category of workman unless for reasons to be recorded the employer retrenches any other workman". This "last come first go", rule predicates. 1) that the workman retrenched belongs to a particular category; 2) that there was no agreement to the contrary; 3) that the employer had not recorded any reasons for not following the principle. These are all questions of fact in respect of which evidence would have to be led, the onus to prove the first requirement being on the workman and the second and third requirements on the employer. Necessarily a fair opportunity of leading such evidence must be available to both parties. This would in turn entail laying of a foundation for the case in the pleadings. If the plea is not put forward such an opportunity is denied, quite apart from the principle that no amount of evidence can be looked into unless such a plea is raised. [See Siddik Mahomed Shah vs. Mt. Saran AIR 1930

PC 57 (1); Bondar Singh & Or. Vs.Nihal Singh and Ors.
(2003) 4 SCC 161]”

22. A similar view was taken by the Jammu and Kashmir High Court in **STATE OF JAMMU AND KASHMIR V. SANNA ULLAH MIR**^[5] and held that general principle of *res judicata* has been applied to suits even though the decision on the same matter in controversy had been previously given by a competent court in proceedings which were not suits under the code of civil procedure. Once in any proceeding a plea is raised and is decided against a party it operates as *res judicata* in a subsequent suit irrespective of the nature and character of the previous proceedings placing reliance on **GULABCHAND V. STATE OF GUJRAT** (AIR 1965 SC 1153).

23. Similarly in **ARJUN SINGH AND OTHERS V. TARA DAS GHOSH AND OTHERS**^[6], the Patna High Court held that where a suit is dismissed by the trial court deciding all the issues including the preliminary issues regarding the maintainability of the suit for want of notice under Section 80, Civil P.C. and for absence of cause of action for the suit and the appellate court while confirming the decree of dismissal of suit on the preliminary issues gave adverse findings on the other issues, the decision on those issues being of no effect, cannot operate as *res judicata* in a subsequent suit or proceeding and as such the defendant has no right to file a second appeal against the decision. If this principle is applied to the present facts, the appeal is not maintainable. But in view of the principle laid down by the Apex Court in **REGIONAL MANAGER, SBI** referred to supra, it would operate as *res judicata*.

24. Similarly, in **STATE OF PUNJAB (NOW HARYANA) AND OTHERS v. AMAR SINGH AND ANOTHER**^[7], the Apex Court held that a person who is not a party to a decree or order may, with the leave of the Court, prefer an appeal from such decree or order if he is either bound by the order or is aggrieved by it or is prejudicially

affected by it. As a rule, leave to appeal will not be refused to a person who might have been made and further held that finding recorded by the courts will operate as *res judicata* against a party to the suit, but not against a third party to it. Here the appellant/24th defendant is a party to the suit and in view of the principle laid down by the Apex Court in **AMAR SINGH** referred to supra, it is binding and it operates as *res judicata*, but the principle laid down by the Patna High court, in **ARJUN SINGH AND OTHERS** referred to supra, is against the contention of the counsel for the appellant/24th defendant. However, the Judgment of the Apex Court is binding precedent, following the same principle, I hold that it would operate as *res judicata*.

25. Since the appeal was dismissed by the first appellate court only on the sole ground that the said finding would not operate as *res judicata* and thereby the appeal is not maintainable, but in view of the judgments referred to supra, the finding would operate as *res judicata* and consequentially the appeal can be maintained.

26. In those circumstances, this court has no option except to allow the appeal setting aside the finding of the first appellate court as regard to maintainability of appeal and operation of applicability of *res judicata* while remanding the appeal to the first appellate court, directing the first appellate court to decide the appeal on merits with regard to finding against the appellant/24th defendant after affording reasonable opportunity to both parties.

27. Accordingly, the appeal is allowed and matter is remanded to the first appellate court with a direction to restore the appeal to its original number in the appeal register and both parties are directed to appear before the first appellate court on 14.09.2016 and further directed the first appellate court to decide the appeal, as expeditiously as possible, in all probabilities within 6 months. No costs.

28. Miscellaneous petitions, if any, pending in this appeal shall

stand closed.

M. SATYANARAYANA MURTHY, J

Date: 08.08.2016

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[\[1\]](#) 2013 (1) ALT 556

[\[2\]](#) AIR 1924 Madras 689

[\[3\]](#) AIR 2003 SC 1989

[\[4\]](#) (2006) 1 SCC 530

[\[5\]](#) AIR 1966 J&K 45 (V.53 C14)

[\[6\]](#) AIR 1974 PATNA 1 (V.61, C1)

[\[7\]](#) AIR 1974 SC 994