



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 30.07.2019

CORAM:

THE HONOURABLE **MR. JUSTICE S.S.SUNDAR**

WEB COPY

S.A(MD)No.166 of 2017

- 1.Paripooranam
- 2.Renuka
- 3.Sathiyavathi
- 4.Parvathi @ Eswari : Appellants/1st Respondent/Plaintiff

(Appellants 2 to 4 are impleaded vide this Court order dated 30.07.2019 in CMP(MD)No.5355 of 2018)

Vs.

- 1.Chellathal
- 2.Tamilarasi
- 3.Chellathal : 1 to 3 Respondents/3rd, 1st, 2nd Defendant

Prayer: Second Appeal is filed under Section 100 of Civil Procedure Code, against the common judgment and decree dated 03.06.2016 in A.S.No.24 of 2010 and A.S.No.26 of 2010 on the file of Sub Court, Palani reversing and partly confirming the judgment and decree dated 26.02.2010 in O.S.No.393 of 2007 on the file of District Munsif Court, Ottanchathiram.

For Appellants	: Mr.H.Lakshmi shankar
For R1	: Mr.T.LeninKumar
For R2 and R3	: No Appearance

JUDGMENT

This Second Appeal is directed against the judgment and decree of the lower Appellate Court (Sub Court, Palani) in A.S.No.24 of 2010 and A.S.No.26 of 2010 on the file of Sub Court, Palani, reversing the judgment and decree of the trial Court (District Munsif Court, Ottanchathiram) in O.S.No.393 of 2007.

2. The first appellant / plaintiff filed a suit in O.S.No.393 of 2007 on the file of the District Munsif Court, Palani for declaration that the suit properties belonged to the plaintiff and her three daughters. The suit is also for permanent injunction restraining the defendants from interfering with her peaceful possession and enjoyment of the suit property.

3.The case of the plaintiff is that the suit properties belonged to one Velusamygounder. The plaintiff is the second wife of the said Velusamygounder. The first defendant in the suit is the



daughter of the second defendant. Though it is admitted that the second defendant was married to Mr.Velusamy, it is admitted that in a petition for divorce filed by the said Velusamy, the first marriage between the second defendant and Velusamy was dissolved.

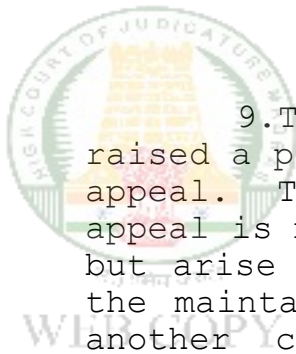
4.It is also stated that the decree for divorce was granted on the ground that the second defendant was living in adultery and that the first defendant is not the daughter of second defendant through Velusamy.

5.The case of the plaintiff was also that her husband Velusamy executed a Will dated 18.02.1999 bequeathing the entire properties in favour of the plaintiff till her life and after her life time to vest in favour of her three daughters. In the plaint, it is stated that the plaintiff's daughters are entitled to the suit properties as absolute owners, after the life time of the plaintiff as per the Will. Since the said Velusamy died on 17.06.1999, it is stated that the Will came into effect and the plaintiff and her daughters became the absolute owners of the suit property. Before the civil Court, though several issues were framed, the suit was decreed as prayed for by holding that the property belonged to the said Velusamy and that the Will was proved in the manner known to law. Since the properties originally belonged to the father of Velusamy, the trial Court has also held that the suit properties belonged to Velusamy and that the said Will is the only Will executed by Mr.Velusamy bequeathing all the properties in favour of plaintiff and her three daughters. Aggrieved by the judgment and decree of the trial Court, the third defendant, who is the sister of Thiru.Velusamy preferred an appeal in A.S.No.24 of 2010 before the Sub Court, Palani. Similarly, the defendants 1 and 2 preferred an appeal in A.S.No.26 of 2010 on the file of the Sub Court, Palani.

6.The lower Appellate Court after holding that the suit without impleading the three daughters of plaintiff is not maintainable, dismissed the suit and allowed both the appeals. The first defendant has preferred a counter claim as if she is also the daughter of Velusamy and entitled to a share in the property. However, it is to be noted that the appeal preferred by the defendants 1 and 2 was allowed, but the judgment of trial Court dismissing the counter claim preferred by the first defendant was confirmed.

7.During the pendency of the appeal, the appellant has filed a petition in C.M.P(MD)No.5355 of 2018, before this Court for impleading her three daughters as appellants 2 to 4 and the petition is allowed by this Court today ie., on 30.07.2019.

8.Hence, there is no impediment for deciding the suit or appeal on merits. Though the daughters of the plaintiff came on record as appellants, it is stated that the plaintiff may be given liberty to amend the plaint to include them as parties to avoid



9.The learned Counsel appearing for the respondents, however, raised a preliminary objection as to the maintainability of a single appeal. This Court has already held in several cases that a single appeal is maintainable even though the appeal is against two decrees but arise only against a single judgment in one suit. Considering the maintainability of an appeal that was raised by the office in another case, this Court has held that a single appeal is maintainable while answering the question raised by the office. That was a case where the appellant's mother as plaintiff filed a suit in O.S.No.418 of 1986.This Court in the said proceedings has held as follows:

"2)In the suit, preliminary decree was passed. Against the decree in the suit, the defendants 26 and 29 to 31 preferred an appeal in A.S.No.17 of 2006 before the Subordinate Court, Kuzhithurai. The 19th defendant also filed independent appeal in A.S.No.118 of 2007 before the Subordinate Court, Kuzhithurai.

3)The appeals in A.S.Nos.17 of 2006 and 118 of 2007 were allowed. As a result, the suit filed by the plaintiff is dismissed.

3.As against the judgment and decree in both the appeals, the appellants, who are the legal heirs of original plaintiff, filed the above second appeal. Since single appeal has been preferred, and there are two decrees in A.S.No.70 of 2006 and 118 of 2007 on the file of the Subordinate Court, Kuzhithurai, the Registry has raised an objection, as to the maintainability of a single appeal, even though it is stated in the memorandum of grounds that the decrees in both appeal in A.S.Nos.17 of 2006 and 118 of 2007 are challenged in the second appeal.

4.The learned Counsel for the appellants submitted that there was only one suit. Though the appeals were filed by two sets of defendants, the decrees in the appeal are only one suit and therefore, two separate appeals need not be filed. In support of his contention, he relied upon a judgment of Division Bench of this Court in the case of **Appa and others vs Kachai Bayyan Kutti and others**, reported in **A.I.R. 1932 Madras 689**, wherein, it has been held as follows:

"There was one original suit, against the decree, in which in favour of the plaintiffs, two appeals were preferred to the lower appellate Court by two sets of defendants. The result of the appeals was that the suit was dismissed by the lower appellate Court and a decree dismissing the suit was passed. In such circumstances, the plaintiffs need not file two second appeal- it is enough if the plaintiffs file one second appeal."



5.He also relied upon another judgment of Honourable Supreme in the case of **Narhari and others vs Shankar and others**, reported in **A.I.R.1953 S.C.419**, wherein, the view of this Court in **A.I.R. 1932 Madras 689**, was quoted with approval by Honourable Supreme Court and the Honourable Supreme Court has settled the position in the following lines:

"(4)..... It is now well settled that where there has been one trial one finding, and one decision, there need not be two appeals even though two decrees may be two appeals even though two decrees may have been drawn up. As has been observed by Tek Chand J. In his learned judgment in AIR-1927 Lah 289 (H)", mentioned above, the determining factor is not the decree but the matter in controversy. As he puts it later in his judgment, the estoppel is not created by the decree but it can only be created by the judgment. The question of res judicata arises only when there are two suits. Even when there are two suits, it has been held that a decision given simultaneously cannot be a decision in the former suit. When there is only one suit, the question of res judicata does not arise at all and in the present case, both the decrees are in the same case and based on the same judgment, and the matter decided concerns the entire suit. As such, there is no question of the application of the principle of res judicata. The same judgment cannot remain effective just because it was appealed against with a different number or a copy of it was attached to different appeal. The two decrees in substance are one."

6.The judgment of this Court and the Honourable Supreme Court above referred to, has been considered and reiterated by several High Courts and Honourable Supreme Court in various judgments. The position in a different situation was considered by the Honourable Supreme Court in the case of **Sheodan Singh vs Daryao Kunwar**, reported in **AIR 1966 SC 1332**. That was a case, where two suits and two decrees were drawn. As against the judgment and decree in one suit, the appeal was filed and the same was dismissed, not on merits, but on the ground of limitation. The question before the Honourable Supreme Court was whether the dismissal of the appeal would operate as *res judicata* in the other suit, as against which, a separate appeal was filed.

7.The Honourable Supreme Court though relied upon of this Court in the case reported in



A.I.R. 1932 Madras 689, made a distinction and summarized the position as follows:

"12) Then it is urged that all the four suits were consolidated and decided on the same day by the same judgment and there can therefore be no question that

suits Nos. 77 and 91 were former suits and thus the decision as to title in those suits became res judicata. It is not in dispute that the High Court's decision in the appeals arising from suits Nos. 77 and 91 was earlier. Reliance in this connection is placed on the decision of this Court in *Nahari v. Shankar*(1). 1. [1950] S.C.R. 754. That case however has no application to the facts of the present case, because there the suit was only one which was followed by two appeals. The appeals were heard together and disposed of by the same judgment though separate decrees were prepared. An appeal was taken against one of the decrees. In those circumstances this Court held that as there was only one suit, it was not necessary to file two separate appeals and the fact that one of the appeals was time-barred did not affect the maintainability of the other appeal and the question of res judicata did not at all arise. In the present case there were different suits from which different appeals had to be filed. The High Court's decision in the two appeals arising from suits Nos' 77 and 91 was undoubtedly earlier and therefore the condition that there should have been a decision in a former suit to give rise to res judicata in a subsequent suit was satisfied in the present case. The contention that there was no former suit in the present case must therefore fail."

8. Since, the latter judgment of Honourable Supreme Court has no application to the present case, this Court is convinced that the appellants need not file two different appeals and they can challenge the findings of the lower appellate Court and the decree in both appeals by filing a single appeal, in view of the legal position reiterated by this Court in *A.I.R. 1932 Madras 689*, and the Honourable Supreme Court in *AIR 1953 SC 419*.

10. This Court is of the view that the appeal may be disposed of giving an opportunity to the plaintiff/appellant to amend the plaint by impleading petitioners 2 to 4 as plaintiffs 2 to 4 in the

<https://hcservices.eportal.gov.in/hcservices>



11.From the reading of the pleadings, the case of the appellant/plaintiff is that the suit property belonged to the husband of appellant/plaintiff and on the basis of a Will alleged to have been executed by Velusamy. As such the respondents are only strangers and cannot question the plaintiff on the ground that she has not impleaded the other daughters. Since the daughters have now been impleaded, this Court is of the view that the suit can be effectively adjudicated and the daughters of plaintiff, who are now appellants 2 to 4 in the appeal can be impleaded in the suit as necessary parties. Since the appellate Court has not considered the issues on merit, it will be in the interest of both parties to remit the matter to the lower appellate Court.

12.In that view of the matter, this Court is inclined to pass the following order:

(i) The second appeal is allowed;

(ii) The judgment and decree in A.S.Nos.24 and 26 of 2010 on the file of Sub Court, Palani, are set aside;

(iii) Having regard to the facts narrated before this Court, this Court is inclined to *suo motu* implead appellants 2 to 4 herein as plaintiffs 2 to 4 in the suit in O.S.No.393 of 2007 on the file of the District Munsif Court, Ottanchathiram Taluk;

(iv) Having regard to the nature of title pleaded by the plaintiff and to avoid further complication, the Appeal suit in A.S.Nos. 24 and 26 of 2010 shall be heard and disposed of in the presence of newly impleaded plaintiffs;

(v) This appeal is allowed and the matter is remitted to the first appellate Court, namely Sub Court, Palani. The first appellate Court is directed to dispose of the appeal on merits and in accordance with law after hearing both parties within a period of 4 months from the date of receipt of a copy of this order.

13.Since the defendants 1 and 2 have not filed any second appeal as against the dismissal of the counter claim of first defendant, the appellant is permitted to raise her objection with regard to the sustainability or with regard to the right of first defendant to agitate her counter claim.

Sd/-

Assistant Registrar (CS-III)

/TRUE COPY/

Sub Assistant Registrar

das

To

1.The Subordinate Judge, Palani

<https://hcservices.ecourts.gov.in/hcservices/>



2.The District Munsif, Ottanchathiram.

3.The Section Officer, V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2 copies)

+1 CC to M/s.H.LAKSHMI SHANKAR, Advocate (SR-78745[F] dated
31/07/2019)

+1 CC to M/s.T.LENIN KUMAR, Advocate (SR-78799[F] dated
31/07/2019)

S.A(MD)No.166 of 2017
30.07.2019

JM/25.10.2019/7P/7C