

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.02.2020

PRONOUNCED ON : 20.02.2020

CORAM:

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

S.A.No.119 of 2008
& MP.No.1 of 2008

Rathina Mudaliar(died)

1.Arumugha Mudaliar

2.Vadivel Mudaliar

3.R.Raji

4.R.Saraswathi

5.R.Paramasivam

... Appellants/Plaintiffs

Vs.

Govindaraja Mudaliar(died)

1.Amaravathy Ammal

2.Lalitha Ammal

3.Selvichammal

4.G.Sundaramurthy

5.Ponnambalam

6.Lakshmi

... Respondents/Defendants

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 20.07.2007 passed in A.S.No.96 of 2000 on the file of the learned Subordinate Judge, Kancheepuram confirming the judgment and decree dated 28.08.1998 made in O.S.No.181 of 1989 on the file of learned District Munsif, Kancheepuram.

For Appellants : Mr.V.Prabhu for
M/s.P.Veeraraghavan

For Respondents : Mr.T.P.Manoharan,
Sr.counsel for M/s.M.Sriram

JUDGMENT

This Second Appeal has been filed against the Judgment and decree dated 20.07.2007 passed in A.S.No.96 of 2000 on the file of the learned Subordinate Judge, Kancheepuram confirming the judgment and decree dated 28.08.1998 made in O.S.No.181 of

1989 on the file of learned District Munsif, Kancheepuram.

2. The facts which gave raise to the filing of the present Second Appeal are stated hereunder:

The deceased 1st appellant herein is the 1st plaintiff. The deceased 1st respondent is the 1st defendant. For the sake of convenience, the parties are described as per the litigative status in the trial proceedings.

3. The plaintiffs have approached the Civil Court in O.S.No.181 of 1989 seeking for declaration of title to ABCD portion of the suit schedule properties and for a consequential direction to the defendants to deliver the possession of the said portion of the property to the plaintiffs. The plaintiffs also prayed for mandatory injunction to remove the super structure if any, put up by the defendants in the suit schedule property which according to the plaintiffs, was commonly enjoyed by the plaintiffs. The suit was resisted by the defendants on the ground that the property in question was assigned to one Kanniammal way back in 1935 and the defendants were the legal heirs of the said Kanniammal. According to them, assignment patta was given to the said Kanniammal and the property was in their occupation ever since. Although, the plaintiffs claimed to have title over the suit schedule property by virtue of Sale Deeds dated 30.07.1975, 24.10.76 and 24.10.76 in favour of all the three plaintiffs, the defendants asserted that the assignment patta was given as early as in 1935 and therefore, the claim of the plaintiffs was unsustainable. The trial Court after framing the issues and on the basis of the evidence and the pleadings placed on record, has ultimately held that the plaintiffs did not establish that they have a common right over ABCD portion of suit schedule property and dismissed the suit. As against that, the plaintiffs preferred an appeal in A.S.No.96 of 2000 on the file of the Sub Court Kancheepuram. The lower Appellate Court, which dealt with the appeal filed by the plaintiffs, had completely concurred with the findings of the trial Court and dismissed the appeal. In fact, the lower Appellate Court has held that the Advocate Commissioner's report and the sketch marked as Exs.C1 to C4 clearly mentioned that there was no such property as alleged by the plaintiffs namely ABCD portion of the suit schedule property. The Advocate Commissioner noted the psychical features including the house and other materials and reported that the plaintiffs had no title in the alleged ABCD portion. The lower Appellate Court has further held that Ex.B2 assignment Patta was given in favour of one Kanniammal and the other documents marked on behalf of the defendants namely, Exs.B3 to Ex.B18 proved that Kanniammal was in continuous psychical possession and also her successors. By relying on those impeachable materials, both the Courts below have dismissed the suit filed by the plaintiffs. As against

that, the present Second Appeal has been filed.

4. When the Second Appeal came up for final hearing, on behalf of the appellants/plaintiffs, a Memo dated 15.11.2019 was filed stating that the first appellant/plaintiff is reported to have dead. However, the Memo states that the correct date of death and other particulars were not available. The memo further states that abatement is only in respect of the first appellant and the other appellants may be allowed to continue with the appeal as they have right to sue under Order 22 Rule 2 of CPC. This memo filed on behalf of the appellants was strongly objected to by the respondents/defendants. Therefore, the memo was taken up along with the final hearing of the present Second Appeal.

5. When the matter was taken up today, the learned counsel for the respondents/defendants would submit that in case like this, when one appellant dies, the entire appeal is to be dismissed as having abated. The learned counsel would submit that a Constitution Bench of the Hon'ble Supreme Court has held that in property issues, where the same is not separable or divisible, if one litigant dies, the entire proceeding is to be held abated. He would rely on a decision of the Hon'ble Supreme Court reported in "(2003) 3 SCC 272 (Sardar Amarjit Sing Kalra (dead) by L.Rs., and others versus Pramod Gupta (Smt.) (Dead) by L.Rs., and others)". The learned counsel would draw the attention of this Court particularly, paragraph 34, which is extracted hereunder:

"34. In the light of the above discussion, we hold:-

(1) Wherever the plaintiffs or appellants or petitioners are found to have distinct, separate and independent rights of their own and for purpose of convenience or otherwise, joined together in a single litigation to vindicate their rights, the decree passed by the Court thereon is to be viewed in substance as the combination of several decrees in favour of one or the other parties and not as a joint and inseverable decree. The same would be the position in the case of defendants or respondents having similar rights contesting the claims against them.

(2) Whenever different and distinct claims of more than one are sought to be vindicated in one single proceedings, as the one now before us, under the Land Acquisition Act or in similar nature of proceedings and/or claims in assertion of individual

rights of parties are clubbed, consolidated and dealt with together by the Courts concerned and a single judgment or decree has been passed, it should be treated as a mere combination of several decrees in favour of or against one or more of the parties and not as joint and inseparable decrees.

(3) The mere fact that the claims or rights asserted or sought to be vindicated by more than one are similar or identical in nature or by joining together of more than one of such claimants of a particular nature, by itself would not be sufficient in law to treat them as joint claims, so as to render the judgment or decree passed thereon a joint and inseverable one.

(4) The question as to whether in a given case the decree is joint and inseverable or joint and severable or separable has to be decided, for the purposes of abatement or dismissal of the entire appeal as not being properly and duly constituted or rendered incompetent for being further proceeded with, requires to be determined only with reference to the fact as to whether the judgment/decrees passed in the proceedings vis--vis the remaining parties would suffer the vice of contradictory or inconsistent decrees. For that reason, a decree can be said to be contradictory or inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other."

6. Mr.T.P.Manoharan, learned Senior counsel appearing for the respondents/defendants would submit that the above judicial principle evolved by the Hon'ble Supreme Court would squarely apply to the factual matrix of this case. The learned Senior counsel would submit that once a common right is claimed and the property is not demarcated in respect of each of the plaintiffs, if one plaintiff dies, the suit abates and so is the position in the Second Appeal as well.

7. The learned Senior counsel would submit that following the above Constitution Bench judgment, recently the Hon'ble Supreme Court in a decision reported in "(2019) 11 SCC 352 (Goli Vijayalakshmi and others versus Yendru Sathirraju (dead) by L.Rs. and others) has held as under in paragraphs 2, 3, 7 and 22 to 26:

2. When the aforesaid civil appeals were taken up for adjudication, the respondents/plaintiffs raised a preliminary objection to the prosecution of the appeals on the ground that the civil appeals have abated in toto. It is to be further noticed that the defendant no. 2 Goli Sathiraju died on 21 st February, 2006 and his legal heirs have not chosen to come on record and when the matter was listed before the Chamber Judge, it was observed vide Order dated 24th July, 2009 as follows:-

1. IA No. 2 in SLP(C) No. 9401/2006 is for deletion of petitioner no. 2 who is stated to have died on 21/2/2006 and his LRs have not chosen to come on record. Hence, the matter abates insofar as petitioner no. 2 is concerned.

2. I.A. No. 2 is allowed.

3. Petitioner no. 2 in SLP(C) No. 9401/2006 is the respondent no. 2 in the connected SLP(C) No. 19919/2006.

4. SLP(C) No. 9401/2006 insofar as petitioner no. 2 is concerned stands abated. In view thereof, petitioner is permitted to delete respondent no. 2 from the array of parties. I.A. No. 3 is allowed."

3. When the matter came before the Court on 10 th May, 2018, taking note of the view expressed by the Chamber Judge dated 24th July, 2009, it was observed that in view of the appeal stood abated qua the appellant no. 2, therefore, the appeal in entirety stands abated. Learned counsel for the appellants sought time to examine the issue regarding the abatement of the proceedings in view of the fact that the appeal stood abated qua appellant no. 2 in terms of order dated 24th July, 2009.

4. to 6.

7. It reveals from the record that the defendants/appellants jointly filed SLP(C) No. 9401 of 2006 before this Court on 30 th March, 2006. At the same time, plaintiffs/respondents also preferred SLP (C) No. 19919 of 2006 against the rejection of suit schedule 'C' properties. The factum of the death of appellant no. 2 was brought to the notice of this Court on 7 th May, 2007 and learned counsel sought time to bring on record his legal representatives but on failure to bring on record the legal

representatives of the appellant no. 2, the Chamber Judge vide order dated 24th July, 2009 pleased to treat the special leave petition/appeal as abated so far as appellant no. 2 is concerned and this Court vide order dated 6 th September, 2010 rejected the application filed to implead the legal representatives of appellant no. 2 as proforma respondents. Further, it was specifically observed that the consequence of the abatement of the appeal qua the appellant no. 2 was left open for consideration at the time of final hearing of the appeal.

"8. to 21.

"22. If the instant appeals were to be allowed, the same would result in a situation where the enforcement of the two decrees would be in executable and the enforcement of one would negate or render impossible the enforcement of the other and to further simplify, the plaintiffs/respondents would be entitled to the share of the appellant no. 2 (defendant no. 2) in the suit schedule 'A' and 'B' properties and there is no way he could enforce the same without negating the enforcement of the other decree viz. dismissal of the suit qua appellant nos. 1 & 3 (defendant nos. 1 & 3) since the suit schedule properties each constitute a single unit and the same has not yet been demarcated and/or divided amongst the defendants and without such clear demarcation and delineation of the properties, indisputedly, which has not yet happened, it would be impossible for the plaintiffs/respondents to enforce decree qua the appellant no. 2 (defendant no. 2) without impinging on the rights of the appellant nos. 1 & 3 (defendant nos. 1 & 3).

23. The submission of learned counsel for the appellants that even if the appeal stood abated qua the appellant no. 2, the other appellants would be entitled to prosecute the appeals relying on the principle of Order 41 Rule 4 & 33 CPC. Suffice it to say that once the appeal stood abated against the appellant no. 2 (defendant no. 2) and the decree which stands confirmed qua the appellant no. 2 (defendant no. 2) cannot indirectly be reopened to challenge at the behest of persons claiming through him by relying on provisions of Order 41 R 4 & 33 CPC as prayed for."

24. Learned counsel for the appellants has made efforts to persuade us that the plaintiff himself has acknowledged in the plaint regarding the internal division/demarcation of the suit schedule properties,

the submission appears to be factually incorrect as nowhere in the plaint, the plaintiff has acknowledged any such internal division/ demarcation of the suit schedule properties. Although there was a statement made by the appellants/defendants in para 11 of the written statement that the schedule 'A' property has fallen to the share of the appellant no. 1 (defendant no. 1) and schedule 'B' property has fallen to the share of appellant no. 2 (defendant no. 2) but the assertion has no foundation/basis and there was no issue framed by the trial Court and admittedly no finding has been rendered in this regard. In the absence of such finding being rendered by the trial Court, the self-serving assertion made by the defendants/appellants cannot be an evidence of the fact that the suit schedule properties have been divided and demarcated among the defendants/appellants.

25. After going through the decree of the trial Court and confirmed by the High Court in appeal, of which a reference has been made by us in detail and taking note of the tests laid down by this Court, in our considered view both the appeals stand abated in toto.

26. We find substance in the preliminary objection raised by the respondents and both the appeals stand abated and accordingly dismissed."

8. The learned Senior counsel would submit that the facts of the above case and the ultimate decision of the Hon'ble Supreme Court of India would support the contention that in the case on hand, by virtue of the fact that the first appellant died, it is not open to other appellants to continue the Second Appeal and therefore, he would request this Court to dismiss the Second Appeal as abated.

9. In response to the legal objections raised by the learned Senior counsel on behalf of the respondents, the learned counsel for the appellants/plaintiffs would submit that the surviving appellants have right to sue under Order 22 Rule 2 CPC. But when the learned counsel was confronted by this Court about the Constitution Bench decision and also the recent decision of the Hon'ble Supreme Court which are extracted above, this Court did not get any convincing answer whether the case laws relied on by the learned Senior counsel are distinguishable on the factual matrix of the case on hand.

10. As it could be seen from the facts of this case, the

suit schedule ABCD portion of the property, is being claimed commonly by the plaintiffs and the sketch which is annexed to the typed set of documents, would show that the vacant land is being enjoyed commonly by the plaintiffs. When such is the case, there is scope for considering the claim of the remaining plaintiffs/appellants. As held by the Hon'ble Supreme Court, once the property is not divisible or separable and the rights of the parties are interlinked and common, if one party dies, the other party/parties cannot claim to have a right to sue for common enjoyment of the property. In such view of the matter, this Court is convinced that the Memo filed on behalf of the appellants/plaintiffs to permit the remaining appellants/plaintiffs to continue the Second Appeal has to be discountenanced in law by applying dictum laid down by the Hon'ble Supreme Court by following the judgment of the Constitution Bench as extracted above.

11. In the above said circumstances, this Court has no other option except to dismiss the Second Appeal as having abated in view of the reported death of the first appellant/plaintiff. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

dn

To

1.The learned Subordinate Judge,
Kancheepuram

2.The District Munsif,
Kancheepuram

+1 cc to M/s.Sriram, Advocate, S.R.No.15723

Pre-Delivery Judgment in
S.A.No.119 of 2008

RR(CO)
RN(20/05/2020)

