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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :15.02.2021
PRONOUNCED ON :26.02.2021

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.1259 of 2008
and
M.P.No.1 of 2008

Mayilvel
S/o, late Kumaran,
115-A Perumanur Main Road,
Salem - 636 007. ... Appellant/3rd Respondent/3rd Defendant

Vs.

1. Chitra
W/o, M.Anbarasu
115-C Omalur Main Road,
Salem -7. ... 1st Respondent/Appellant/Plaintiff
2. Rajammal
W/o late Kumaran
3. Gunavathy
W/o, Sigamani
4. Nesamani,
S/o late Kumaran
5. Vijayaraghavan
S/o, late Kumaran
6. Rama Venkatesan
S/o, late Kumaran ... 2 to 6 Respondents/Respondents
1, 2, 4 to 6/Defendants 1, 2, 4 to 6

All residing at
115-A Kumaran Road,
Salem-7
[Respondents 2 to 6 herein
given up as unnecessary parties]

Prayer:

Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 27.02.2008 made in A.S.No.71 of 2007 on the file of the Principal District Court, Salem, reversing the judgment and decree dated 14.10.2006 made in O.S.No.891 of 1995 on the file of the Principal Sub Court, Salem.



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For Appellant : Mr.T.Murugamanickam, SC
For M/s.Zeenath Begum

For R1 : Mr.R.Venkatavaradan

For R2 to R6 : Given up

J U D G M E N T

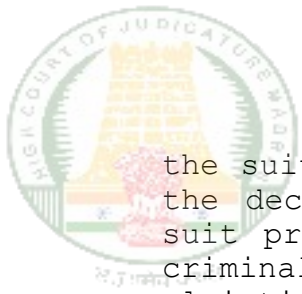
Challenge in this second appeal is made to the judgment and decree dated 27.02.2008 passed in A.S.No.71 of 2007 on the file of the Principal District Court, Salem, reversing the judgment and decree dated 14.10.2006 passed in O.S.No.891 of 1995 on the file of the Principal Subordinate Court, Salem.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

3. The third defendant in O.S.No.891 of 1995 is the appellant in this second appeal.

4. Suit for partition and declaration.

5. Briefly stated the case of the plaintiff is that she is the daughter of the first defendant and the sister of the defendants 2 to 6 and the defendants 7 to 30 are the tenants in the suit properties. The plaintiff and the defendants 1 to 6 are the legal heirs of the deceased Kumaran and the suit properties are the ancestral and self acquired properties of the deceased Kumaran who died intestate on 27.02.1992 leaving his Lrs as aforestated. The items 1 to 3 of the suit properties are the self acquired properties and the item 4 is the ancestral property of the deceased Kumaran and till his demise, it was only Kumaran who had been in the possession and enjoyment of the suit properties as the Karta of the family, by leasing out certain portion of the same to the defendants 7 to 30 and after his demise, the plaintiff and the defendants 1 to 6 are in the joint possession and enjoyment of the suit properties and the third defendant has been collecting the rents from the tenants and not gave any share to the plaintiff in the rental income and the plaintiff was also necessitated to levy the suit against the third defendant in O.S.No.420 of 1995 on the file of the Additional District Munsif Court, Salem, seeking for the relief of permanent injunction and the third defendant filed the suit against the plaintiff on untenable grounds in O.S.No.432 of 1995 on the file of the Additional District Munsif Court, Salem, for the eviction of the plaintiff from the suit properties. The third defendant had created a forged Will dated 19.01.1992 said to have been executed in his favour by the deceased Kumaran qua

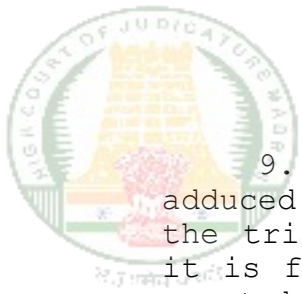


the suit properties, however, the abovesaid Will is not true and the deceased Kumaran had not executed any Will bequeathing the suit properties to any one. The third defendant is involved in criminal activities and not cooperating with the family. The plaintiff as one of the legal heir of the deceased Kumaran, is entitled to obtain 1/7 share in the item No. 1 to 3 of the suit properties and 1/35 share in the item 4 of the suit properties and as the defendants had failed to effect the partition and allot the due share of the plaintiff in the suit properties, according to the plaintiff, she has been necessitated to institute the suit against the defendants for appropriate reliefs.

6. The third defendant resisted the plaintiff's suit contending that the relationship between the parties is correct and it is false to state that the items 1 to 3 are the self acquired properties of the deceased Kumaran and on the other hand according to him, the items 1 to 3 of the suit properties had been acquired by the joint efforts of the third defendant and the deceased Kumaran and the third defendant has spent Rs.10 lakhs for the construction of the building in item No.1 of the suit properties and with reference to the item 1, O.S.No.1552 of 2008 has been contested only by the third defendant and the plaintiff and the other defendants had remained exparte in the abovesaid suit and it is only the third defendant who is in the possession and enjoyment of the first item. The deceased Kumaran had executed a Will in favour of the third defendant on 19.01.1992 and by way of the said Will, it is only the third defendant who had acquired the absolute title over the suit properties and the second item of the suit properties are poramboke lands and the item 4 of the suit properties is the ancestral property and it is false to state that the plaintiff is in the joint possession and enjoyment of the suit properties along with other defendants. The third defendant has filed a suit in O.S.No.432 of 1995 on the file of the Additional District Munsif Court, Salem against the plaintiff and obtained the order of injunction. The third defendant is the owner of the suit properties and the plaintiff is not entitled to secure any share in the same and there is no cause of action for the suit and the suit is liable to be dismissed.

7. It is found that the suit laid by the plaintiff for partition in O.S.No.891 of 1995 and the suit laid by the third defendant in O.S.No.285 of 2003 for permanent injunction had been jointly tried by the trial court and the common evidence had been recorded in both the suits.

8. In support of the plaintiff's case, P.W.1 was examined. Exs.A1 to A15 were marked. On the side of the third defendant, D.Ws.1 and 2 were examined. Exs.B1 to B66 were marked.



9. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions put forth, the trial court was pleased to dismiss the plaintiff's suit and it is further noted that by way of a common judgment, the trial court has decreed the suit in favour of the third defendant as prayed for in O.S.No.285 of 2003. Against the dismissal of her suit in O.S.No.891 of 1995, the first appeal has been preferred by the plaintiff. It is to be noted that the plaintiff has not preferred any appeal against the judgment and decree passed by the trial court in O.S.No.285 of 2003.

10. The first appellate court, on appreciation of the materials placed on record and the submissions put forth by the respective parties, was pleased to entertain the appeal preferred by the plaintiff and after setting aside the judgment and decree of the trial court, proceeded to declare that the plaintiff is entitled to secure 1/7 share in the item 1 to 3 of the suit properties as well as the relief of declaration as prayed for by her qua the Will dated 19.01.1992 and dismissed the plaintiff's suit in respect of the item 4 of the suit properties. Impugning the judgment and decree of the first appellate court, the second appeal has been preferred by the third defendant.

11. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration.

i. Whether the Appeal in A.S.No.71 of 2007 filed by the first respondent herein is barred by resjudicata since, against, the common judgment rendered in O.S.No.891 of 1995 and O.S.No.283 of 2003, the first respondent herein has challenged only the decree in O.S.No.891 of 1995 but has not challenged the decree in O.S.No.283 of 2003.

ii. Whether the suit is bad for partial partition for failure to take steps to implead the legal heirs in respect of suit item No.4.

iii. Whether Section 69 of the Indian Evidence Act contemplates that the propounder of the Will has to prove the signatures of the attesting witnesses who are not alive, even when the sole surviving attesting witness has been examined.

12. From the pleas and materials placed on record, both oral and documentary put forth by the respective parties, it is found that the item 1 to 3 are the self acquired properties of the deceased Kumaran and the item 4 of the suit properties is the self acquired property of the deceased Kumaran. The first defendant is the wife and the plaintiff and the defendants 2 to



6 are the children of the deceased Kumaran. The plaintiff's claim of share in the item 4 of the suit properties had been dismissed by the first appellate court as also by the trial court and it is noted that the first appellate court has rejected the claim of the partition sought for by the plaintiff in respect of the item 4 of the suit properties on the footing that the plaintiff has failed to implead the other joint sharers of the item 4 of the suit properties. As against the dismissal of her suit qua the item 4 of the suit properties, no challenge has been made by the plaintiff.

13. In the light of the abovesaid position, now we are only concerned with the items 1 to 3 of the suit properties. Admittedly, the items 1 to 3 of the suit properties are the self acquired properties of the deceased Kumaran. Therefore, according to the plaintiff, she being one of the legal heirs of the deceased Kumaran and Kumaran having died intestate, it is putforth that the plaintiff is entitled to obtain 1/7 share in the abovesaid items. Resisting the abovesaid claim of share in the items 1 to 3 of the suit properties, the third defendant who is the only contesting defendant would project the Will dated 19.01.1992 said to have been executed by the father, the deceased Kumaran, bequeathing the suit properties in his favour. The abovesaid Will has been marked as Ex.B11. The Ex.B11 is found to be unregistered Will. Be that as it may, the trial court has believed and upheld the truth and validity of Ex.B11 Will. On the other hand, the first appellate court has disbelieved the truth and validity of the Ex.B11 Will and on that footing, proceeded to grant 1/7 share in the items 1 to 3 of the suit properties in favour of the plaintiff.

14. As above pointed out, the common judgment had been rendered by the trial court in the suit laid by the plaintiff in O.S.No.891 of 1995 and in the the suit laid by the third defendant in O.S.No.285 of 2003. On a reading of the common judgment, it is found that the trial court, after upholding the truth and validity of Ex.B11 Will, on that premise, holding that it is only the first defendant who is in the possession and enjoyment of the item 2 of the suit properties being the subject matter of O.S.No.285 of 2003, on that footing held that the third defendant is entitled to obtain the relief of permanent injunction sought for in the said suit. It is thus found that only after upholding the truth and validity of Ex.B11 Will, the trial court has granted the relief of permanent injunction in favour of the third defendant in O.S.No.285 of 2003.

15. When it is noted that the common judgment had been rendered by the trial court in both O.S.Nos.891 of 1995 and 285 of 2003, when it is found that the plaintiff has not thrown a challenge to the judgment and decree passed in O.S.No.285 of



2003, pointing to the same, according to the learned Senior Counsel appearing for the third defendant, the plaintiff's suit is barred by resjudicata and for sustaining the abovesaid argument, he would rely upon the decision of the Apex Court reported in 2015 (3) SCC 624 [Sri Gangai Vinayagar Temple and another Vs. Meenakshi Ammal and others].

16. Per contra, according to the plaintiff's counsel, the first appellate court, on the basis of the appreciation of the oral and documentary evidence adduced in the matter and in accordance with law held that the third defendant has failed to dislodge the suspicious circumstances surrounding Ex.B11 Will , as held by the first appellate court and therefore according to him, the abovesaid determination of the first appellate court do not warrant interference and in support of the proof to be required for the establishment of the truth and validity of the Will, he would rely upon the decisions reported in

(1) 1998 (4) Supreme Court Cases 384 [Gurdial Kaur and Others Vs. Kartar Kaur and others]

(2) 1990 (1) Supreme Court Cases 266 [Kalyan Singh Vs. Chhoti and Others]

(3) 1990 (3) Supreme Court Cases 364 [Ram Piari Vs. Bhagwant and Others]

(4) 1999 SCC Online Mad 217 [Packiyam Ammal and others Vs. Pattu Ammal and Others]

17. However, as rightly contended by the learned Senior Counsel appearing for the third defendant, when multiple suits had been disposed of by one common judgment, but by separate decrees, the principles of resjudicata would apply, when the appeal had been preferred only against the decree passed in one suit and no appeal has been preferred against the other decree and therefore according to him, the suit in respect of which the decree had been passed, but no appeal had been preferred there against, the judgment and decree passed in the said suit, assumes the character of former suit and therefore the findings of such decree having attained finality would operate as resjudicata. The abovesaid argument putforth by the learned Senior Counsel appearing for the third defendant is found to be acceptable particularly, when the abovesaid position of law has been outlined by the Apex Court in the decision relied upon by him reported in 2015 (3) SCC 624 [Sri Gangai Vinayagar Temple and Another Vs. Meenakshi Ammal and Others]. On a reading of the principles of law outlined in the abovesaid decision, it is evident, when the plaintiff having failed to throw a challenge to the judgment and decree rendered in O.S.No.285 of 2003 which



was also disposed of by the trial court by way of the common judgment along with O.S.No.891 of 1995, in such view of the matter, it is found that the cause of the plaintiff in O.S.No.891 of 1995 on account of her failure to challenge the judgment passed in O.S.No.285 of 2003 becomes permanently sealed and foreclosed since resjudicata apply against her and the principles of law pointing to the same had been outlined by the Apex Court in the abovesaid decision which are extracted below:

A. Civil Procedure Code, 1908 -S.11- Res judicata - Mutiple suits disposed of by one common judgment but by separate decrees - Applicability of principles of resjudicata - "Former suit" in such context - What is - Principles explained in detail - Question(s) directly and substantially raised in all suits being the same - Appeal preferred against decree passed in one suit only - Suit in respect of which decree passed but no appeal filed there against, held, assumes character of former suit - Hence findings in such decree having attained finality would operate as resjudicata.

On the issue of applicability of resjudicata in cases where two or more suits have been disposed of by one common judgment but separate decrees, and where the decree in one suit has been appealed against but no appeal has been filed against the others, the following principles are clear:

(i) The phraseology "suit" in Section 11 CPC is not limited to the court of first instance or trial court but encompasses within its domain proceedings before the appellate courts;

(ii) Non-applicability of resjudicata may lead to inconsistent decrees and conflicting decrees, not only due to multiplicity of decrees but also due to multiplicity of the parties, and thereby creating confusion as to which decree has to be given effect to in execution;

(iii) A decree is valid unless it is a nullity and the same cannot be overruled or interfered with in appellate proceedings initiated against another decree;

(iv) The issue of resjudicata has to be decided with reference to decree, which are appealable under Section 96 CPC and not with reference to the judgment (which has been defined differently), but with respect to decrees in CPC;



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(v) Non-confirmation of a decree in appellate proceedings has no consequence as far as it reaching finality upon elapsing of the limitation period is concerned in view of Explanation II of Section 11 Cpc, which provide that the competence of a court shall be determined irrespective of any provisions as to right of appeal from the decision of such court; and

(vi) Section 11 CPC is not exhaustive of the doctrine of resjudicata, which springs up from the general principles of law and public policy. Procedural norms, technicalities and processual law evolve after years of empirical experience, and to ignore them or give them short shrift inevitably defeats justice.

27. Procedural norms, technicalities and processual law evolve after years of empirical experience, and to ignore them or give them short shrift inevitably defeats justice. Where a common judgment has been delivered in cases in which consolidation orders have specifically been passed, we think it irresistible that the filing of a single appeal leads to the entire dispute becoming sub judice once again. Consolidation orders are passed by virtue of the bestowal of inherent powers on the courts by Section 151 CPC, as clarified by this Court in Chitivalasa Jute Mills v. Jaypee Rewa Cement. In the instance of suits in which common issues have been framed and a common trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments. While so, opining we do not intend to whittle down the principle that the appeals are not expected to be filed against every inconvenient or disagreeable or unpropitious or unfavourable finding or observation contained in a judgment, but that this can be done by way of cross objections if the occasion arises. The decree not assailed thereupon metamorphoses into the character of a "former suit". If this is not to be so viewed, it would be possible to set at naught a decree passed in Suit A by only challenging the decree in Suit B. Law considers it an anathema to allow a party to achieve a result indirectly when it has deliberately or negligently failed to directly initiate proceedings towards this purpose. Laws of procedure have picturesquely been referred to as handmaidens to justice, but this does not mean that they can be wantonly ignored because, if so done, a miscarriage of



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justice inevitably and inexorably ensues. The statutory law and the processual law are two sides of the judicial drachma, each being the obverse of the other. In the case in hand, had the tenant diligently filed an appeal against the decree at least in respect of O.S.No.5 of 1978, the legal conundrum that has manifested itself and exhausted so much judicial time, would not have arisen at all.

18. Applying the abovesaid principles of law outlined by the Apex Court to the case at hand, when it is found that only by way of the common judgment, the trial court had dismissed the plaintiff's suit and decreed the suit laid by the third defendant and when it is found that the third defendant's suit has been upheld only based upon the Will projected by him marked as Ex.B11 and further holding that based on the said Will, it is only the third defendant, who is in the possession and enjoyment of the subject matter covered in the said suit, which subject matter is the item 2 of the suit properties in the suit laid by the plaintiff in O.S.No.891 of 1995, all put together, it is seen that the failure of the plaintiff to challenge the judgment and decree passed in O.S.No.285 of 2003 would render her suit in O.S.No.891 of 1995 as barred by resjudicata in the light of the decision of the Apex cited supra and the substantial question of law No.1 formulated in the second appeal is accordingly answered in favour of the third defendant and against the plaintiff.

19. Inasmuch as, the suit laid by the plaintiff is found to have been barred by resjudicata, following the principles of law outlined by the Apex Court in the decision referred to supra, it is unnecessary to go into the aspect as to whether the determination of the first appellate court disbelieving the truth and validity of Ex.B11 Will for the reasons assigned by it as well as whether the determination of the first appellate court that the plaintiff's suit is bad for partial partition for failure to take steps to implead the legal heirs in respect of item 4 of the suit properties are just and correct and therefore the substantial questions of law No.2 and 3 centering on the same are not required to be answered as such.

20. Inasmuch as the substantial question No.1 is answered against the plaintiff and in favour of the third defendant and consequently the suit laid by the plaintiff in O.S.No.891 of 1995 being found to be barred on the principle of resjudicata as enunciated by the Apex Court in the decision rendered to supra, the judgment and decree of the first appellate court are liable to be set aside and consequently the common judgment and decree of the trial court are to be upheld, though not for the reasons assigned by the trial court but only on the premise that the plaintiff's suit is barred by res judicata.



21. For the reasons aforesated, the judgment and decree dated 27.02.2008 passed in A.S.No.71 of 2007 on the file of the Principal District Court, Salem are set aside and resultantly the judgment and decree dated 14.10.2006 passed in O.S.No.891 of 1995 on the file of the Principal Subordinate Court, Salem are confirmed only on the premise that the plaintiff's suit is barred by res judicata and not for the reasons assigned by the trial court and consequently the second appeal is allowed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge,
Principal District Court,
Salem.
2. The Principal Subordinate Judge,
Principal Subordinate Court,
Salem.

Copy to

The Section Officer,
VR Section, High Court,
Chennai.

+1cc to Mrs.Zeenath Begum, Advocate, S.R.No.11757
+1cc to M/s.C.Uma, Advocate, S.R.No.12040

S.A.No.1259 of 2008
and
M.P.No.1 of 2008

SSI (CO)
GN(29/09/2021)