
(1935) 03 MAD CK 0043

Madras High Court

Case No: None

Keesari Santamma

APPELLANT

Vs

Kanumathareddi
Venkatramireddi and
Others

RESPONDENT

Date of Decision: March 13, 1935

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 1

Citation: AIR 1935 Mad 909 : (1935) 42 LW 843 : (1935) 69 MLJ 401

Hon'ble Judges: Madhavan Nair, J

Bench: Division Bench

Judgement

Madhavan Nair, J.

The plaintiff is the appellant. She is the daughter of one Rami Reddi, a divided brother of defendants 1 and 2 and

another Seethareddi deceased. The suit out of which this second appeal arises was instituted by her for partition and recovery of possession of half

a share of various items of properties. In this second appeal we are concerned only with her right to certain portions of items 1 and 2.

2. The plaintiff's case is that her father and his brothers became separated about thirty years ago, that the properties of her father and Seethareddi

were kept joint and that she is now entitled to get half a share in the suit properties. It is not necessary for the purpose of this second appeal to

state anything about the merits of the plaintiff's case or of the case of the defendant: for, the case of the plaintiff has been dismissed by the lower

appellate Court on the ground that the suit is not maintainable except in so far as her claim was admitted by the defendant.

3. In the first Court, the plaintiff obtained a decree partitioning the property in certain definite shares. In appeal the learned Judge agreed with the

findings of the District Munsiff on the merits, but in his opinion the entire suit was liable to be dismissed as he held that the suit was not

maintainable. However, as the defendants admitted the plaintiff's claim to a certain extent the decree in plaintiff's favour given by the District

Munsiff was allowed to stand with the modifications indicated in paragraph 14 of his judgment.

4. The only question for determination in this second appeal is whether the suit is maintainable.

5. The above question arises on the following facts. Rami Reddi died in or about 1921. Some of the properties belonging to him were divided in

1924. There was a dispute regarding some others, amongst which were included the present suit properties also. In respect of them, the plaintiff

instituted O.S. No. 552 of 1925, for establishing her right and for partition against the present defendants in the District Munsiff's Court of Ellore.

It was dismissed as ""adjusted"" in September, 1925. The order dismissing the suit is as follows:

The suit is reported adjusted. It is hence dismissed without costs.

6. (See Ex. V.) It will be observed that no permission to institute a fresh suit was reserved in the order. Alleging that the defendants did not carry

out their promise and give her all the properties she was entitled to get under the adjustment the plaintiff instituted the present suit for partition and

delivery of her full share of the property. The question of the maintainability of the suit arises with reference to the order dismissing the previous

suit, O.S. No. 552 of 1925. The question was raised in the Munsiff's Court in two issues, namely, issues 3 and 4. Issue 3 is ""whether the suit is

barred by res judicata by virtue of the decision in O. Section No. 552 of 1925"". Issue 4 is ""whether the suit is maintainable without setting aside the

said decree".

7. In the District Munsiff's Court both the above issues were dealt with together, apparently on the basis that though there were two issues both of

them, refer to the same question whether the decree in O.S. No. 552 of 1925 would operate as a bar by res judicata to the present suit. In

paragraph 11 of his judgment, the District Munsiff held that the dismissal of O.S. No. 552 of 1925 did not operate as res judicata. On this plea of

res judicata, the learned Subordinate Judge agreed with the District Munsiff, but he held that the suit was not maintainable on the ground that, as

the previous suit was withdrawn without permission to bring a fresh suit, Order 23, Rule 1 of Act V of 1908 operated as a bar to the present suit.

He also held that the proper remedy for the plaintiff is to institute a suit to enforce "such rights as spring out of the adjustment " which would give

the plaintiff a different cause of action unaffected by the dismissal of the previous suit.

8. In second appeal it is argued that the suit is not maintainable on account of the provisions of the Order 23, Rule 1, Civil Procedure Code, is a

new point and should not have been allowed to be raised for the first time in the lower appellate Court. It is also argued that the decision of the

question by the learned Judge is wrong. It is clear that issues 3 and 4 contemplated only one question, namely, whether the suit is barred by res

judicata by reason of the decision in O.S. No. 552 of 1925. At any rate in the District Munsiff's Court, there was no doubt about it because

nowhere in the judgment is there any reference to Order 23, Rule 1, Civil Procedure Code. Both issues 3 and 4 refer in my opinion to the bar

created by the decree in O.S. No. 552 of 1925 and to no other bar. If the defendants wanted to put forward Order 23, Rule 1 as a bar, a specific

issue would have been raised about it, or a reference to the order withdrawing the suit as distinguished from the decree in O.S. No. 552 of 1925

would have been made in issue 4. Issue 4 might well have been worded thus:

Whether the suit is maintainable without setting aside that decree or in view of the order withdrawing the suit.

9. In paragraph 9 of the written statement where the legal objections to the maintainability of the suit are mentioned after stating that the suit is

barred by res judicata, this is what the defendants says:

This suit for partition is not maintainable unless the plaintiff got the decree in O.S. No. 552 of 1925 set aside in a suit.

10. It is the decree in the suit that the parties have in view and not the order withdrawing the suit as distinguished from the decree. In these

circumstances I am not quite sure whether the lower appellate Court was right in allowing the defendants to raise the question whether the suit is

not barred by Order 23, Rule 1, Civil Procedure Code. However as the question has been dealt with, and as the facts bearing on it are not much

in dispute, I will now proceed to discuss it.

11. As already mentioned, Ex. V, the order dismissing O.S. No. 552 of 1925 says that the ""suit is reported adjusted. It is hence dismissed without

costs"". It may be mentioned here that the plaintiff allowed the suit to be dismissed without even serving the defendants with summonses. This is

clear from the judgment of the learned District Munsiff. In paragraph 7 he says:

Even the defendants in that case were not served. No summonses were taken out to the defendants.

12. In paragraph 11, the learned District Munsiff again says:

It is admitted by the defendants that they had no knowledge of the suit and it appears to have been dismissed without defendants summons being

taken out in that case.

13. Mr. Govindarajachari on behalf of the respondents disputed this fact somewhat faintly, in view of the statement of the learned Subordinate

Judge in the first sentence in paragraph 6 of his judgment:

It is not plaintiff's case now that an incorrect representation was made to the Court and really no adjustment was made at all, and that the

nonpayment of batta for service of suit summonses on certain of the defendants was due to an accident or involuntary omission.

14. In my opinion from this it cannot be inferred that summonses must have been served on some defendants. It is nowhere stated in the appellate

Court's judgment that, before the suit was dismissed, summonses were served on the defendants. The written statement of the defendant leaves

the matter beyond any doubt. In paragraph 9 the defendant says:

On enquiry made by these defendants regarding these facts, it is known that the said suit was dismissed.

15. Obviously they discovered, according to their case, that the suit, O.S. No. 552 of 1925, was dismissed, on enquiry. On reading the plaint and

the written statement together there is nothing to show that summonses were actually served on the defendants. However in view of the statements

contained in the District Munsiff's judgment, which are very clear it must be taken that the plaintiff got O.S. No. 552 of 1925 dismissed without

even serving the defendants with notice of the suit. No case directly deciding the question whether in such circumstances the withdrawal of the suit

without obtaining permission from the Court to institute a fresh suit would be a bar to a subsequent suit, has been brought to my notice. But the

question has been decided impliedly in favour of the appellant in a few decisions of the Allahabad High Court on facts precisely similar to those of

the present case.

16. In T.C. Mukerji v. Afzal Beg I.L.R.(1914) 37 All. 155 the facts were as follows. In the year 1905 the plaintiff brought a suit for partition of a

house held in joint tenancy. This suit was dismissed as it was compromised. On the fact of the compromise being intimated to the Court, the Court

passed the following order:

Parties have executed an agreement by which defendant agrees to transfer to plaintiff all his rights and title in the property in dispute, and they ask

accordingly that the suit be dismissed. Parties to bear their own costs. Suit therefore dismissed.

17. It may be observed that in this case the defendants had official notice of the suit for both the parties joined in getting it withdrawn, and that the

order dismissing it states the gist of the compromise. The question was whether this order would operate as a bar u/s 373 of Act XIV of 1882

(corresponding to Order 23, Rule 1 of the present Code of Civil Procedure) to a subsequent suit instituted by the plaintiff for a partition of the

same house on the ground that the compromise was not carried out. The lower Court held, following a previous decision of the Allahabad High

Court, reported in Gulkandi Lal v. Manni Lal I.L.R.(1901) 23 All. 219 that as no leave was granted for a fresh suit when the previous suit was

withdrawn, the subsequent suit was barred. This decision was set aside by the High Court on the following ground:

As soon as the defendants or their predecessor in title failed to carry out the compromise, the parties were relegated to their rights as they existed

prior to the compromise. The right to bring a suit for partition unlike other suits is a continuing right, incidental to the ownership of joint property. It

may be that at one time the desire for partition may cease, circumstances may again occur which make it desirable or necessary that partition

should take place.

18. Assigning this reason, the learned Judges refused to follow the decision in Gulkandi Lal v. Manni Lal I.L.R.(1901) 23 All. 219 and held that

the second suit was not barred. In doing so, they followed an earlier decision in Nasrat-ullah v. Mujib-ullah I.L.R.(1891) 13 All. 309 and a

subsequent decision of the same Court in Bisheshar Das v. Ram Prasad ILR (1906) 28 All. 627 and also a decision of the Calcutta High Court

Madon Mohon Mondul v. Baikanta Nath Mondul 10 C.W.N. 839 which followed the decision in Nasrat-ullah v. Mujib-ullah I.L.R.(1891) 13 Al.

309. In Gulkandi Lal v. Manni Lal I.L.R.(1901) 23 All. 219 which the learned Judges overruled in T.C. Mukerji v. Afzal Beg I.L.R.(1914) 37 All.

155 before the suit was dismissed the parties came to Court and represented that the matter in dispute between them had been adjusted""--The

Court set forth in its order that both the parties before it expressed the wish that the suit should be struck off and proceeded to strike off the case

in accordance with this wish. The learned Judges held that the subsequent suit brought by the plaintiff, after some ineffectual efforts to enforce the

compromise, was barred by Section 373 of the CPC (Act XIV of 1882), as no permission to institute a fresh suit had been obtained when the

previous suit was dismissed. It was this decision that was overruled in T.C. Mukerji v. Afzal Beg I.L.R.(1914) 37 All. 155. It is not disputed that

the facts of the case before us are similar to the facts of this case. The present case is, if anything, stronger than these cases, because the dismissal

of the previous suit in the case before us, was before notice was even served on the defendants. The decision in T.C. Mukerji v. Afzal Beg I.L.R.

(1914) 37 All. 155 was followed in Radhe Lal v. Mul Chand I.L.R.(1924) 46 All. 820. In that case, the previous suit with respect to the same

cause of action which was the basis of the subsequent suit, was dismissed by the following order: ""It is ordered and decreed that according to

compromise, this case is struck off. The parties to bear their own costs"". The terms of the compromise are not given. The learned Judges held,

following the previous decisions in Nasrat Ullah v. Mujib Ullah I.L.R.(1891) 13 All. 309, Bisheshar Das v. Ram Prasad I.L.R.(1906) 28 All. 627

and T.C. Mukerji v. Afzal Beg I.L.R.(1914) 37 All. 155 that the subsequent suit was not barred, though when the previous suit was withdrawn, no

permission to institute a fresh suit had been given. All these are cases in which both the suits were for partition of the same property. The

proposition of law established by these cases is that, with respect to the application of Order 23, Rule 1, CPC a suit for partition should be treated

differently, and that a subsequent suit for partition of the same property involved in the previous suit is not barred under Order 23, Rule 1 by the

dismissal of the previous suit, even though no permission to institute a fresh suit was obtained when the previous suit was dismissed on the ground

of compromise, the reason being as mentioned in T.C. Mukerji v. Afzal Beg I.L.R.(1914) 37 All. 155 that the right to bring a suit for partition

unlike other suits is a continuing right, and as soon as the defendant failed to carry out the compromise, the parties are relegated to their rights as

they existed prior to the compromise. If this principle is given effect to, the appellant should succeed, especially so, having regard to the fact that

the withdrawal of the previous suit was even before the defendants had notice through Court. It is very doubtful whether the prohibition contained

in Order 23, Rule 1, Civil Procedure Code, can apply to cases where both the parties are not before Court. However that may be, if the

Allahabad decisions lay down the correct law, the dismissal of the previous suit in the case before us cannot operate as a bar to the plaintiff's suit.

In this connection I may also state the decision in Madon Mohan Mondul v. Baikanta Nath Mondul I.L.R.(1906) 28 All. 627 relied on in T.C.

Mukerji v. Afzal Beg 10 C.W.N. 839 is referred to with approval in Madhura Gramani v. Sesha Reddi I.L.R.(1914) 37 All. 155 wherein it is

stated that a right to partition is a right which accrues from time to time and the principle on which the decision in T.C. Mukerji v. Afzal Beg I.L.R.

(1926) 49 Mad. 939 is based. Mr. Govindarajachari argues that the decision in T.C. Mukerji v. Afzal Beg I.L.R.(1914) 37 All. 155 should not be

followed. His contention is that, whether a suit is in the nature of a partition suit or not, once it is compromised and a new cause of action arises,

the remedy of the aggrieved party is only to institute a suit for the enforcement of the compromise and not to enforce the rights which the parties

had before the compromise. In support of his contention he relied on two cases, namely, Ram Sahae Singh v. Dhunookdharree Singh (1864) 1

W.R. 266 and Bishnu Coomar Roy v. Moharaj Joy Hurish Chunder Deb Roy I.L.R.(1865) 49 Mad. 939 of which only the former dealt with a

case of partition. In both the cases it was held that, if the compromise which terminated the previous suit was not performed by one of the parties,

the other party should sue for its enforcement. In neither of them was the question whether the subsequent suit was barred by the withdrawal of the

previous suit, raised or considered; and further, in both the cases we know the full terms of the compromise which terminated the previous suit

though those terms had not been embodied in the order of the Court. This was not done in *Ram Sahae Singh v. Dhunookdharree Singh* (1864) 1

W.R. 266 as stated in it probably to get a refund of the Stamp duty having regard to the proviso to Section 98 of the CPC (Act VIII of 1859).

For practical purposes the previous order in that case was treated as decree which contained the terms of the compromise and it was held that a

breach of the term of the compromise does not enable the parties to rescind the arrangement and revert to their original rights. In *Vadlamaneti*

Srinivasa Dikshatulu v. Vadlamaneti Venkatramiah Pantulu (1913) 20 I.C. 908 a decision of our own Court which followed *Ram Sahae Singh v.*

Dhunookdharree Singh (1864) 1 W.R. 266 and *Bishnu Coomar Roy v. Moharaj Joy Hurish Chunder Deb Roy* (1865) 2 W.R. 209 the partition

of the properties in the previous suit was carried out by the order of the Court by a Commissioner and the allotment made by him was approved

also by an order of the Court.

19. The only omission was a final decree had not been passed by the Court. It was held that the order already passed was binding on the parties

and that they cannot go back upon it. No case of bar by the withdrawal of the previous suit seems to have arisen in that case. No doubt the

learned Judges state as a supplemental reason in support of their order that the rule that in case of mere contracts specially where the rights and

obligations of both the parties are in future a repudiation of the contract by one party assented to by the other might be sufficient to put an end to

the contract is not applicable to rights of property, but the facts show that in the case before them rights of property had already been clearly

settled by the previous order of the Court and this is the true basis of the decision, for the learned Judges say that:

Mere repudiation by any of the parties of the allotment already confirmed by the Court would not be sufficient to extinguish the rights created by

the Court's order.

20. No such binding order by the Court dividing the properties and setting the rights had been passed in the case before us. The order Ex. V was

simply "the suit reported adjusted" and nothing more. We know nothing about the terms of the adjustment. In *Krishna Venamma v. Venkata*

Mukunda Row (1909) 4 I.C. 303 (2), referred to in *Vadlamaneti Srinivasa Dikshatulu v. Vadlamaneti Venkatramiah Pantulu* (1913) 20 I.C. 908

the Court held that the parties were bound by the terms of a previous compromise embodied in a document and the conduct on the part of the

executant inconsistent with it does not justify the plaintiff in repudiating it. The present case is, on the facts, totally different from the cases relied on

by Mr. Govindarajachari. Except the vague allegation contained in the order, Ex. V, that the suit had been adjusted, we do not know what the

terms of the adjustment were. It is now said on behalf of the defendants that some of the terms of the compromise were carried out subsequently

and reference is made in support of the statement to some portions of the judgment, but that is not the ground on which the lower Court had

disposed of the case. The plaintiff's suit is admittedly not to enforce the terms of the compromise. Her case is that the defendant persuaded her to

withdraw the case, telling her that they would divide the properties, but declined to carry out their promise in full, and that she should now be given

the full relief which she is entitled to on partition of the properties.

21. On the whole I am inclined to hold that the present suit should be decided on the principle of the decisions in *T.C. Mukerji v. Afzal Beg* I.L.R.

(1914) 37 All. 155 and *Radhe Lal v. Mul Chand* I.L.R.(1924) 46 All. 820, which as I have already stated are precisely similar to this case,

especially so, as the specific point on which the lower Court based its decision was not raised in the first Court by the defendant, and as the

withdrawal of the previous suit was carried out at a very early stage even before summonses were served on the defendants. In the result the lower

Court's, decree is set aside and the District Munsiff's decree is restored with costs here and in the Court below with the direction added to it that

the half share of defendants 1 and 2 in item 2 may be so allotted as to include the two godowns recently constructed in defendants' share if

possible.