

(2011) 08 MAD CK 0353

Madras High Court

Case No: Second Appeal No. 199 of 1997

Mani, Krishnan,
Saliyan and Ramaiah
Gounder

APPELLANT

Vs

Chinnathambi
Gounder (deceased)
and Others

RESPONDENT

Date of Decision: Aug. 26, 2011

Hon'ble Judges: R.S. Ramanathan, J

Bench: Single Bench

Advocate: V. Raghavachari, for the Appellant; A.N. Thambidurai, for RR2 to 6, for the Respondent

Final Decision: Dismissed

Judgement

R.S. Ramanathan, J.

Defendants in O.S. No. 210 of 1987 are the Appellants.

2. The first Respondent/plaintiff filed the suit for declaration that the suit properties belonged to him and for recovery of possession and for mesne profits. The case of the first Respondent/plaintiff was that the suit properties were originally purchased in the name of Veerammal, his mother and they were treated as joint family properties and in the year 1956, a partition was effected among the sons of Veerammal and in that partition, items 1 and 2 were allotted to the share of the Plaintiff and the third item was kept reserved for the purpose of meeting the marriage expenses of the Plaintiff and the plaintiff out of his own earnings met his marriage expenses and therefore, the third item also belonged to him and the plaintiff's mother Veerammal was also having 33 cents in the same survey number namely first item of the suit property and she executed the settlement deed in respect of that property in favour of the sons of the Plaintiff under a registered settlement deed dated 7.11.1981 and that settlement deed came into effect and

thereafter, Defendants 1 to 3, who are his deceased brother's sons and his own brother, the fourth Defendant, by practising fraud on his mother, created documents as if the settlement deed dated 7.11.1981 was cancelled by Veerammal and Veerammal executed another settlement deed in favour of Defendants 1 to 3 and the sons of the fourth Defendant and thereafter, the defendants attempted to interfere with the possession and enjoyment of the properties by the Plaintiff and therefore, the Plaintiff, as the father and next friend of his sons, filed O.S. No. 1023 of 1982 and that suit was decreed and in that suit, it was held that the suit properties were allotted to the share of the Plaintiff and Veerammal executed a settlement deed in respect of 33 cents of property in favour of the Plaintiff's sons and even thereafter, the Defendants are in unlawful possession and are questioning the title of the Plaintiff and therefore, the suit was filed.

3. The fourth Defendant filed written statement which was adopted by Defendants 1 to 3 and it was contended that the third item of the properties was not allotted to the plaintiff and it was reserved for his marriage expenses and the fourth Defendant and the other brother viz., the father of Defendants 1 to 3 conducted the marriage and therefore, they are entitled to the property and in O.S. No. 1023 of 1982, it was only held that Veerammal, the mother of the plaintiff and the fourth Defendant was entitled to 33-1/2 cents of property and the settlement executed by Veerammal in favour of the sons of the Plaintiff was upheld in that suit and the other findings in that suit are not binding on the Defendants and therefore, the Plaintiff is not entitled to the relief prayed for.

4. The Trial Court framed ten issues and answered all the issues except the additional issue in favour of the plaintiff and held that there was an oral partition in the year 1956 and in that oral partition, the suit properties were allotted to the Plaintiff and the third item of property was reserved to meet the marriage expenses of the plaintiff and that was met by the Plaintiff and therefore, he is entitled to that property. Nevertheless the Trial Court dismissed the suit holding that the suit is barred by res judicata by reason of the judgment in O.S. No. 1023 of 1982.

5. Therefore, the first Respondent/plaintiff filed appeal in A.S. No. 262 of 1994 and the first appellate court allowed the appeal and aggrieved by the same, the second appeal is filed.

6. The following substantial question of law was framed while admitting the second appeal:

Whether the lower appellate Judge is correct in holding that the present suit is hit by res judicata in view of the judgment in O.S. No. 1023 of 1982?

According to me, the substantial question of law must be "whether the finding in O.S. No. 1023 of 1982 will operate as res judicata against the Appellant as held by the lower appellate court?"

7. Mr. Raghavachari, Learned Counsel for the Appellant submitted that the lower appellate court erred in holding that the suit is not barred by the judgment in O.S. No. 1023 of 1982 and submitted that though the first Respondent was not a party to O.S. No. 1023 of 1982, the Plaintiffs in that suit were the sons of the first Respondent herein and the first Respondent only conducted the suit as their next friend and therefore, any finding rendered in that judgment will operate as res judicata insofar as the Appellants are concerned as O.S. No. 1023 of 1982 was filed for declaration by the sons of the first Respondent in respect of three items of properties and the first item was an extent of 70 cents in S. No. 185/2 in Panamalai village and decree was passed in respect of 33-1/2 cents in favour of the plaintiffs in that suit and the suit was dismissed in respect of other two items of properties and therefore, any finding rendered in O.S. No. 1023 of 1982 cannot be taken advantage by the Respondent herein and the present appellants, though they were parties in that suit, the suit in O.S. No. 1023 of 1982 was dismissed in respect of present suit properties and therefore, they could not have filed any appeal against those findings and hence, the judgment in O.S. No. 1023 of 1982 will not operate as res judicata against the Appellants. In other words, he had submitted that the findings in O.S. No. 1023 of 1982 about the oral partition in the year 1956 and allotment of third item in favour of the Plaintiff are not necessary to decide the issue involved in O.S. No. 1023 of 1982 and those adverse findings cannot operate as res judicata against the appellants herein as the suit was dismissed as against the plaintiffs in that suit in respect of the suit properties. He further submitted that no appeal will lie against that findings and in support of his contention, he relied upon the judgment reported in [Corporation of Madras Vs. P.R. Ramachandriah and Others](#), , [Madhavan Vs. Muniammal and Others](#), and [Smt. Ganga Bai Vs. Vijay Kumar and Others](#), .

8. On the other hand, the Learned Counsel for the respondent Mr. A.N. Thambidurai submitted that the first respondent was not a party in O.S. No. 1023 of 1982 and the plaintiffs in that suit were the sons of the first respondent, the Appellants were parties to that suit and in that suit, specific issues were framed regarding oral partition in the year 1956 in respect of the third item of properties as to whether it belonged to the Plaintiff herein or not and in that suit, the court gave a finding that there was an oral partition in the family wherein the plaintiff first item therein was allotted to the share of the plaintiff and those findings were rendered in the presence of the Appellants and therefore, the findings in that judgment will operate as res judicata in this case. He further submitted that as per the judgment in R. Srinivasa Row v. Kaliaperumal (Minor) By Father and Maternal Guardian Veeran and Anr. AIR 1966 Mad 321, when the finding so rendered in the earlier suit was necessary for the disposal of the suit, the said findings will operate as res judicata in the subsequent suit when parties are the same in both the suits.

9. It is the admitted fact that the Plaintiff, fourth defendant and Govindasamy Gounder, father of Defendants 1 to 3 were the sons of Veerammal. It is the specific case of the Plaintiff/first Respondent that the suit properties were treated as joint

family properties of the Plaintiff and his brothers and there was an oral partition in the year 1956 in their family and in the said oral partition, items 1 and 2 were allotted to the share of the Plaintiff and the third item was reserved for the marriage expenses of the Plaintiff and the Plaintiff met the marriage expenses out of his own earning and therefore, he also became the owner of the third item of the properties and as the Defendants are in possession and enjoyment of the same, the suit was filed for declaration and recovery of possession.

10. It is also admitted that Veerammal, mother of the plaintiff was the owner of 33-1/2 cents in S. No. 185/2 and the total extent of S. No. 185/2 is 70 cents and the remaining 36-1/2 cents was allotted to the Plaintiff in the oral partition that took place in the year 1956. It is further admitted that in O.S. No. 1023 of 1982 a declaration was sought for in respect of the entire 70 cents in S. No. 185/2 and also item Nos. 2 and 3 of the present suit properties and in O.S. No. 1023 of 1982 decree was granted in respect of 33-1/2 cents in S. No. 185/2 out of 70 cents on the basis of the settlement deed executed by Veerammal in favour of the Plaintiff's sons in the year 1991.

11. It is further admitted that the Defendants herein viz., the Appellants herein were also parties to O.S. No. 1023 of 1982. In O.S. No. 1023 of 1982, a specific issue was framed as to whether the gift deed dated 7.11.1981 executed by Veerammal and his sons was valid and whether there was an oral partition dated 6.8.1956 among the members of the family and while deciding those issues and other issues, the learned District Munsif held that there was an oral partition among the members of the family in the year 1956 and in that oral partition, present items 1 to 3 were allotted to the present Plaintiffs and Veerammal was having only 33-1/2 cents in S. No. 185/2 and she executed a settlement in respect of that portion and therefore, the settlement deed executed by Veerammal on 7.11.1981 in favour of the Plaintiff's sons is valid and decreed the suit in respect of 33-1/2 cents in S. No. 185/2.

12. As per the judgment rendered by this Court in AIR 1966 MAD 321 cited supra, when a finding rendered in the earlier suit was necessary for the disposal of the subsequent suit, the said findings will operate as res judicata in the subsequent suit when parties are the same in both the suits. The said view was also upheld in the judgment reported in (1995) 3 SCC 673 *Mehaboob Shar v. Syed Ismail and Ors.*. In the judgment reported in [Smt. Ganga Bai Vs. Vijay Kumar and Others](#), it is held that an appeal lies only as against a decree and no appeal can be against the findings. Nevertheless, having regard to the facts of that case, it was held that the issue relating to partition was not directly and instantly in issue in the earlier suit, that finding will not operate as res judicata. But, in this case, the facts are otherwise. In O.S. No. 1023 of 1982, issue No. 4 was whether the oral partition and written partition dated 6.8.1956 are true and binding on the Plaintiffs (respondents 3 to 5 herein) and issue No. 1 was whether the gift deed dated 7.11.1981 in favour of the plaintiffs namely Respondents 3 to 5 herein was true and valid. In that suit, the

partition was upheld and also the gift deed dated 7.11.1981. Further, in the suit in O.S. No. 1023 of 1982, the present suit issue No. 3 was also mentioned as third item and it was held that it was reserved for the 1st Respondent herein and he is entitled to the same. In the suit in O.S. No. 1023 of 1982, the present appellants were Defendants 1, 2, 3 and 6 and the 5th defendant was Veerammal, the mother of the first Respondent and 4th Appellant and there was conflict of interest between the Defendants in the suit in O.S. No. 1023 of 1982 and to resolve the conflict and to give the relief to the plaintiffs in that matter, a finding was given that there was an earlier partition and the suit properties were allotted to the first Respondent herein and settlement dated 7.11.1981 was valid and hence that finding will operate as res judicata against the Appellants herein as per the judgment in (1995) 3 SCC 673 (cited supra).

13. According to me, the findings in O.S. No. 1023 of 1982 about the oral partition of the year 1956 and the allotment of the present three items of properties in favour of the present Plaintiffs are vital for deciding the issues in that suit and parties were at issues and those issues were fully heard and decided finally by the court in O.S. No. 1023 of 1982 and therefore, those findings regarding oral partition in the year 1956 are binding on the plaintiffs as they are parties to the said suit. No doubt, no appeal can be filed against that finding. However, in this case, it is not a case of adverse finding and in the earlier suit viz., O.S. No. 1023 of 1982, the parties were at issues regarding the oral partition in the year 1956 and the allotment of properties in the oral partition and after hearing both the parties in O.S. No. 1023 of 1982, it was held that the present first Respondent/plaintiff was allotted the present suit items of the properties in the oral partition and the Appellants were also parties in the earlier suit and hence, the finding in the earlier suit operates as res judicata in the present suit as against the appellants and on the basis of that, the lower appellate court has rightly allowed the appeal. Hence, the substantial questions of law is answered against the appellant and the findings in O.S. No. 1023 of 1982 operates as res judicata in the present suit.

14. In the result, the second appeal is dismissed. No costs.