

Ammanamma and Others Vs. Thimaiah and Others

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Court : Karnataka

Decided On : Sep-26-2014

Judge : The Honourable Mr.Justice R.B. Budihal

Appeal No. : Regular Second Appeal No.887 of 2006 (DEC/INJ)

Appellant : Ammanamma and Others

Respondent : Thimaiah and Others

Judgement :

(Prayer: This R.S.A. is filed under Section 100 of CPC, against the Judgment and Decree dated 25.11.2005 passed in R.A.No.20/98 on the file of the Addl. Civil Judge (Sr. Dn.), Srirangapatna, dismissing the appeal and confirming the Judgment and Decree dated 24.2.1998 passed in O.S.No.4/93 on the file of the civil Judge (Jr. Dn.) and JMFC, Krishnarajapet.)

1. This regular second appeal is preferred by the appellants-plaintiffs being aggrieved by the judgment and decree of the Civil Judge (Sr.Dn.), Srirangapatna dated 25.11.2005 passed in R.A.No.20/1998, by which, the judgment and decree dated 24.2.1998 passed in O.S.No.4/1993 by the Civil Judge (Jr.Dn.), K.R.Pet, dismissing the suit, has been confirmed in the said appeal.

2. The facts leading to the present appeal are that the appellants-plaintiffs filed the suit seeking declaration of title to the suit properties as owners in possession and also for permanent injunction to restrain the defendants, their agents and servants

from entering upon and interfering with the plaintiffs' peaceful possession and enjoyment of the suit schedule properties. The suit schedule properties are the four items of dry lands as mentioned at Sl.Nos.1 to 4 in the schedule to the plaint. Further averments in the plaint are that the suit properties have fallen to the share of the plaintiffs in a division which took place about 23 years back between the first plaintiff's husband, the first defendant and his brothers as these properties are ancestral joint family properties and since then, plaintiffs are in possession and enjoyment of the schedule properties as owners without interruption. As the defendants and others gave trouble to the plaintiffs taking advantage of their inabilities and poverty, to enjoy the schedule properties peacefully, plaintiffs have approached an Advocate in the month of November 1979 who has wrongly advised them to file a suit for general partition. Accordingly, they filed the suit in O.S.No.217/1979 on the file of the Munsiff Court at K.R.Pet and said suit was dismissed, against which, they preferred an appeal in R.A.No.10/1982 which was dismissed and then they preferred R.S.A.No.270/1984 before this Court and the same was also dismissed confirming the judgments of both the Courts below. After the dismissal of the said R.S.A. by this Court, the defendants who are inimical with the plaintiffs are trying to interfere and enter upon the plaint schedule properties with an evil intention to knock off the same since the last week of August 1992. The plaintiffs being ladies have no money and men of their own to protect their right in respect of the suit schedule properties, have filed the suit for the above said reliefs.

3. Defendant Nos.1, 5 and 6 have filed their written statement contending that the paragraph 1 of the plaint averments that plaintiffs are the owners in possession of the suit schedule properties fallen to their share in the division between the first plaintiff's husband, the first defendant and his other brothers and they are in possession and enjoyment as owners are all false and baseless. It is also false that defendants gave trouble to the plaintiffs as pleaded in plaint paragraph No.2. The averments that plaintiffs filed suit O.S.217/1979 then R.A and R.S.A. is true. Plaintiffs filed the suit by making false allegations to make unlawful gain. Averments in paragraph 3 of the plaint are false and baseless. The genealogy of the family is as shown in paragraph 5 of the written statement. Late Venkataiah and late Chinnaguruvaiah, Sons of Thimmaiah have divided their properties and

were living separately enjoying their respective shares. The husband of plaintiff No.1 namely Thammaiah, pre-deceased leaving behind him his father, plaintiff No.1 and his daughter Rathnamma as legal heirs. Plaintiff No.3 is not the daughter of late Thammaiah. Venkataiah died leaving behind him plaintiffs 1 and 2 as his legal heirs. Since the division of properties taken place during the lifetime of Venkataiah and Chinnaguruvaiah, the question of partition between the plaintiff's husband, the first defendant and his brothers does not arise. First plaintiff has sold some of the properties under two sale deeds dated 26.11.1976 and 6.4.1977. Suit schedule properties are not the properties of the plaintiffs. The schedule properties were not assigned to the share of late Venkataiah. Plaintiffs have deliberately and intentionally given wrong boundaries and are claiming right over them. Schedule properties were the properties of Chinnaguruvaiah. Now the first defendant and his other brothers have divided the properties in question along with other properties and they are enjoying their shares respectively. Items Nos.2, 3 and 4 of the schedule properties are the self acquired properties of late Chinnaguruvaiah who was also called as Guruvaiah @ Guruvegowda. Defendants are owners in possession and enjoyment of the suit schedule properties. Suit is bad for non-joinder of necessary parties. There is no cause of action to file the suit. Court fee paid on the plaint is insufficient. The properties described in the plaint schedule and in the previous suit O.S.No.217/1979 are one and the same and between the same parties. Hence, the suit is hit by the principles of res-judicata. The defendants Nos.2, 3 and 4 have adopted the written statement of defendant 1, 5 and 6 as their written statement by filing the memo dated 12.4.1994.

4. On the basis of the said pleadings, the trial Court has framed the following issues:

- (i) Whether the plaintiffs prove their title to the suit schedule properties?
- (ii) Whether the plaintiffs prove their lawful possession over the suit schedule properties as on the date of the suit?
- (iii) Whether the plaintiffs prove the alleged interference?

(iv) Whether the plaintiffs are entitled for the relief of declaration and permanent injunction?

(v) What decree or order?

Additional Issue:

(Iv)(a) Whether the suit is hit by the principles of res-judicata in view of the judgment in O.S.No.217/1979?

After considering the merits of the case, ultimately, the trial Court has dismissed the suit of the plaintiffs.

5. Being aggrieved by the same, plaintiffs have preferred an appeal in R.A.No.20/1998 on the file of the Additional Civil Judge (Sr.Dn), Srirangapatnam and the said first appellate Court after considering the merits in the appeal has ultimately, dismissed the appeal by judgment and decree dated 25.11.2005 in R.A.No.20/1998. Aggrieved by the said judgment and decree of the first appellate Court, the present regular second appeal has been preferred.

6. While admitting the appeal, this Court has framed the following substantial question of law:

"Whether in the facts and circumstances of the case, the Courts below were justified in holding that the appellants have not proved partition and title to the suit schedule property in view of the finding recorded by this Court in R.S.A.No.270/1984?"

7. Heard the arguments of the learned counsel appearing for appellants-plaintiffs and also the learned counsel appearing for the respondents-defendants.

8. Learned counsel for the appellants during the course of arguments has submitted that for the first time the defendants have taken the contention in para No.9 of the written statement that the schedule properties were the properties of late Chinnaguruvaiah and now the first defendant and his other brothers have divided the properties along with other properties and are enjoying their shares. In the earlier proceedings this contention was not raised. Both the Courts below have

not properly appreciated oral and documentary evidence adduced in the case. The cross-examination of D.W.1 and the admissions made by D.W.1 were ignored by the Courts below, which leads to mis-carriage of justice. Hence, it is submitted that the suit schedule properties were fallen to the share of the first plaintiff's husband in the partition between himself, defendant No.1 and his other brothers. This aspect of the matter which was specifically pleaded and even deposed in the oral evidence have not been taken into consideration by both the Courts below. Looking to the materials placed on record both oral and documentary, appellants-plaintiffs have proved their case. Hence, the judgment and decree passed by both the Courts below are illegal, perverse and capricious. Accordingly, it is submitted to allow the appeal and to set aside the judgment and decree of the first appellate Court and also the trial Court.

9. As against this, learned counsel appearing for the respondents during the course of his arguments submitted that when the earlier suit filed for partition has been dismissed throughout, till the regular second appeal before this Court, how the plaintiffs can maintain the present suit. Hence, it is submitted that the suit is hit by principle of res-judicata. The materials placed on record clearly show that plaintiffs sold the properties fallen to their share and to prove the same defendants have produced the documents as per Exs.D2 and D3, which has been considered by both the Courts below. The suit schedule item Nos.2, 3 and 4 are not at all the ancestral joint family properties and they are the self acquired property of Chinnaguruvaiah and hence, plaintiffs cannot claim that they are the owners of the said properties. It is further submitted that plaintiffs have not produced any document to show that suit schedule properties have fallen to their share. The trial Court has taken all the aspects into consideration and has rightly dismissed the suit, which has been confirmed by the first appellate Court. Neither any illegality has been committed nor there is any perverse or capricious view taken in passing the said judgments and decree. There are no valid and justifiable grounds to interfere into the concurrent findings of the Courts below. Accordingly, it is submitted that the appeal is liable to be dismissed.

10. In reply, learned counsel for the appellants submitted that 'B' schedule properties in the earlier suit O.S.No.217/1979 and the present suit schedule

properties are not one and the same. Hence, the principle of res-judicata cannot be made applicable to the facts and circumstances of this case. Accordingly, it is submitted to allow the appeal and to set aside the judgment and decree of both the Courts below.

11. I have perused the averments made in the pleadings of the parties submitted before the trial Court, oral evidence of P.Ws.1 to 3, D.W.1, the documents Exs.P.1 to P.11 and D.1 to D.12. I have also perused the judgment and decrees passed by both the Courts below and the grounds urged in the appeal memorandum of this appeal.

12. The appellants plaintiffs filed the suit seeking the relief of declaration that they are the owners in possession of the suit schedule properties at Sl. Nos.1 to 4 mentioned in the schedule to the plaint and also for permanent injunction against the defendants, their agents and servants from entering upon and interfering with their peaceful possession and enjoyment of the suit schedule properties. When the plaint averments are perused, it is mentioned by the plaintiffs that about 23 years back, there was a partition between the 1st plaintiff's husband, 1st defendant and his brothers in respect of the family properties and in the said partition, the suit schedule properties were fallen to the share of the plaintiffs. To prove this aspect, plaintiffs have not entered into the witness box, but one Venkate Gowda- P.W.1 said to have Power Attorney Holder of plaintiff No.1, in his evidence, has firstly deposed that there was partition of the family properties about 15 years back in between husband of the 1st plaintiff and 1st defendant. But again at another breadth, he has deposed that the said partition was about 30 years back. It is also his say that it was the oral partition and no documents effected in respect of the said partition. P.W.1 has also deposed that in the said partition, the suit schedule properties are fallen to the share of the husband of the 1st plaintiff. But this aspect has been denied by the defendants in their written statement so also in the evidence of D.W.1. When plaintiffs have approached the Court seeking relief of declaration, burden is upon them to prove that the suit schedule properties are fallen to the share of the husband of the 1st plaintiff in the alleged partition. As I have already observed, none of the plaintiffs have entered into the witness box and it is only P.Ws.1 to 3 who are said to be the relatives of plaintiff NO.1 gave

their evidence before the Court. It is also the evidence of P.Ws.2 and 3 that there was oral partition between the husband of the 1st plaintiff, 1st defendant and his brothers. P.W.1 in his evidence has admitted that plaintiff No.1 was attending to the court proceedings and as she could not attend the proceedings regularly, she has executed power of attorney in his favour. When the plaintiffs have alleged in the plaint that the alleged partition took place about 23 years back, it requires personal knowledge of the plaintiffs to come before the court and to depose in support of the said contention. Looking to the evidence of P.Ws.1 to 3 at one breadth, they are deposing that the said partition was between 1st plaintiff's husband, 1st defendant and his brothers. But at another breadth, they depose that the said partition in respect of the family properties was between Venkataiah, the father in law of the 1st plaintiff and Chinnaguruvaiah, the father of the 1st defendant. So there is no consistency in the evidence of P.Ws.1 to 3 and also there is no pleading in the plaint as to when exactly the said partition has taken place and between whom. It is an admitted fact according to both the sides that even earlier, the present plaintiffs filed the suit in O.S No.217/1979 for the relief of partition and separate possession in respect of the suit schedule properties and in the said suit, they contended that as there was no partition in the family, they filed the suit for general partition. After considering the merits, the said suit O.S.No.217/1979 was dismissed, against which the present plaintiffs preferred an appeal before the Civil Judge S.R. Patna in R.A NO.10/1982 which also came to be dismissed on 28.6.1983. Then, the plaintiffs preferred a regular second appeal before this Court in RSA No.275/1984, and the same was also dismissed. Therefore, looking to the earlier proceedings, it is the contention of the plaintiffs that there was no partition in the family and hence, they filed the suit for partition. Perusal of the judgment in R.S.A. 275/1984, it goes to show that according to the Plaintiffs in the earlier suit, though there was a partition, no fertile lands were given to them and the partition was not equitable. Now in the present suit, their claim is that there was a partition and the suit schedule properties are fallen to their share, but no consistent, cogent and satisfactory materials have been placed before the Court. Even with regard to the alleged interference, the witnesses P.Ws.1 to 3 have admitted in the cross examination that they do not know as to on which date, month and year, the defendants interfered with the plaintiffs' possession and

enjoyment of the suit schedule properties. It has come on evidence and it is also the contention of the defendants in the written statement that plaintiff No.1 has sold two properties on 26.11.1976 and 6.4.1977 and the defendants have produced the documents as per Exs.D2 and D3. About these sale transactions, the plaintiffs have not at all whispered anything in the suit. The materials placed on record also go to show that the entries in the RTC extract are standing in the name of defendants and their father Chinnaguruvaiah. It is also the contention of the defendants that the suit schedule Item Nos.2 to 4 are the self acquired properties of Chinnaguruvaiah. So all these aspects of the matter have been extensively considered by both the Courts below and then the trial court dismissed the suit which has been confirmed by the first appellate court.

13. Looking to the judgment and decrees of the Courts below, I am of the opinion that no illegality has been committed by the courts below nor there is any perverse or capacious view has been taken by the Courts below. There is concurrent findings of the courts below regarding the material facts involved in the case. Hence, there are no valid and justifiable grounds for this Court to interfere into the judgment and decrees of the Courts below. As there is no merit in the appeal, the same is hereby dismissed.

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