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Court : Chennai

Decided On : Oct-26-2016

Judge : Dr. G. Jayachandran

Appeal No. : Second Appeal No. 451 of 2008 & M.P. No. 1 of 2008

Appellant : Anjila and Another

Respondent : Chellammal and Others

Judgement :

Dr. G. Jayachandran, J.

1. This is a defendants' appeal. The suit filed for partition was allowed by the trial Court and confirmed by the First Appellate Court. Aggrieved by the concurrent judgment, this second appeal is filed primarily on the ground of res judicata and ouster.

2. The parties before this Court are legal heirs of late Mr. K. Veerasamy and Late Mr. K. Kuppusamy who are the blood brothers. The suit properties were jointly purchased by Mr. K. Veerasamy and Mr. K. Kuppusamy in the year 1955. During their life time, the suit properties were managed by Mr. K. Kuppusamy, the father of the defendants since, Mr. K. Veerasamy, the father of the plaintiffs settled in Ooty. In the year 1999, when Mr. K. Veerasamy came to know that his brother Mr. K. Kuppusamy has not deposited his share of rental income in his bank account as

promised, he requested for partition of the suit properties by metes and bounds and also caused pre-suit notice on 03.11.1999. In response to the said notice, Mr. K. Kuppusamy replied denying his brother's right seeking partition. Therefore, Mr. K. Veerasamy filed a suit for partition in O.S. No. 105 of 2000 which was re-numbered as O.S. No. 192 of 2004. Unfortunately, pending suit, both Mr. K. Veerasamy and Mr. K. Kuppusamy died and the suit was dismissed for default on 09.04.2003. The restoration petition filed by the plaintiffs in O.S. No. 104 of 2005 which is the subject matter of this appeal was dismissed on 30.11.2004. To avoid multiplicity of proceedings and delay, a fresh suit for partition was filed by the legal heirs of Mr. K. Veerasamy against the legal heirs of Mr. K. Kuppusamy.

3. The appellants herein in their written statement contested the suit on the ground that under Section 11 of C.P.C., the subsequent suit is barred by the principle of res judicata in view of the dismissal of the former suit O.S. No. 192/2004. In the statement, it is averred by the appellants that, dismissal of the restoration petition filed under Order 9, Rule 9 of C.P.C., not challenged by the respondents, so they have lost their right to file a fresh suit for the same relief.

4. The further contention of the appellants was that, in the sale deed dated 15.07.1955, the name of Mr. K. Veerasamy was mentioned without assigning any right or interest in the suit properties. In the year 1957-1958, Mr. K. Veerasamy left Coonoor and settled down permanently at Ooty. Thereafter, till the date of his death, he ever visited the suit properties or claimed right over the same until he issued notice in the year 1999. Therefore, the appellants' father has perfected his title by ouster. In support of this contention, the appellants claim that the mortgage of the suit properties jointly by Mr. K. Veerasamy and Mr. K. Kuppusamy in favour of one Mr. Mari under Document No. 589/1955 was redeemed later by Mr. K. Kuppusamy exclusively after Mr. K. Veerasamy settled permanently at Ooty and the subsequent mortgage made in favour of one Mrs. Sangiliammal by him exclusively vide registered mortgage No. 810/1961 and redeemed exclusively by him.

5. The Courts below, on examining Ex.A.1, the title deed, mortgage deeds in favour of Mr. Mari and Mrs. Sangiliammal marked as Ex.A.2 and Ex.B.1 and other

connected documents has held that the plea of ouster had not been proved by the appellants. The Courts below have concurrently held that there is no substantial proof to show that the appellants have perfected title by adverse possession on the premise of ouster.

6. With regard to the plea of res judicata, it has been held by both the Courts below that the earlier suit in O.S. No. 192/2004 was not heard and decided finally but, dismissed for default.

7. The learned counsel for the appellants contended that though the earlier suit was dismissed for default, it was dismissed after completion of pleadings. The present respondents filed restoration of the suit and that was also dismissed. Under such circumstances, Section 11 of C.P.C., squarely applies, which the Courts below failed to consider. In support of the above contention, the learned counsel for the appellants relied upon the following judgments.

"(i) In Govindasami v. Sivarama Rao (AIR 1934 Madras 292) ;

(ii) In Janki Gope v. Jangbahadur (AIR 1935 Patna 458);

(iii) In Gulam Muhammad v. Bakhtawaram (AIR 1937 Lahore 614) and

(iv) In M. Subramania Mudaliar v. K. Janarthanam (1993 (2) LW 209)".

8. Invariably, in all the above judgments, cited by the learned counsel in the former suits, Courts have heard the parties and had recorded their findings on the contested facts unlike the case in hand where, in O.S. No. 192/2004 there is no finding on the facts contested. In a suit for partition dismissed for default and no decision of the Court is recorded on the facts controverted. Such decree does not come under the cover of Section 11 C.P.C., since, no issue is heard and finally decided in the former suit.

9. Per contra, it is pointed out by the learned counsel for the respondents that for a partition suit, the cause of action for subsequent suit continues in the absence of division between the parties. In Chandrapal Sharma v. Sumathi Devi (2013 (2) CTC 875), this Court, after relying upon the judgments of the Andhra Pradesh

High Court and the Patna High Court, has held as follows :-

"10. Admittedly, there was no division among the parties. Further, the plaintiffs have specifically pleaded in their plaint that the earlier decree could not be executed as some of the defendants in the present suit are not parties and one of the defendants viz., Bansilal Sharma died on 06.12.1995 i.e., even prior to the decree and the said fact is not in dispute. The ex-parte decree was passed in C.S. No. 1460 of 1993 on 30.01.2004 without impleading his legal heirs. Both the earlier suit and the present suit have been filed only before this Court. Therefore, we do not find any substance in the submissions made by the learned counsel for the appellants. Further more, the plaintiffs are seeking higher share than that was granted earlier. Considering the said issue, the learned single Judge of Andhra Pradesh High Court in Abdul Kareem Sab v. Gowlivada S. Silar Saheb and Another (AIR 1957 AP 40 : (V 44 C 19 Mar.) (1)) has held as follows :

When a preliminary decree declaring a right to partition or the shares of the parties, has not been given effect to by the parties proceeding to partition in accordance with it and the property continues to be jointly held by the co-sharers, their right to partition continues. So long as they continue to be interested in the joint property as co-sharers, it is competent for them to bring a suit for declaration of their right and for partition in case their right to partition is denied or challenged. Such a suit is not barred by res judicata.

11. A Division Bench of Patna High Court in Santan Narain Tewari v. Saran Narain Tewari and others (AIR 1959 Patna 331 (Vol. 46 C. 89) was pleased to hold in the following manner.

A co-sharer has got a right to seek fresh partition if for some reason the previous decree for partition becomes unenforceable so that there has not been actually breaking up of the title and possession of the co-sharer by actual delivery to each of them of the specific portion of the joint property allotted to him by that decree. This principle follows from the fundamental concept of joint ownership and possession giving each joint owner a right to transfer from this joint ownership and possession into several and independent ownership and possession, but this transformation cannot in the eye of law be held to have been brought about unless

and until the entire process of transformation starting from the ascertainment of the share of each joint owner, and ending in the actual delivery to him of the property given to him forming his share of the joint property, has been gone through; no long as this does not take place, the title and possession of all the co-sharers continues to be joint. It is only when the last stage has been completed that each owner ceases to be a co-sharer with the other. The matter, of course, might be different if in a particular case the facts proved show that the person seeking fresh partition is guilty of any conduct amounting to fraud on his co-sharers or on the court, preventing directly or indirectly thereby the completion of the previous partition suit by actual delivery of the properties allotted to each co-share by the previous decree. Where the parties treated the previous decree to be infructuous and continued to remain in possession as co-sharers of the properties as before, a fresh suit for partition is not barred.

12. After going through the ratio laid down in the above said pronouncements, we are in respectable agreement with the same. A co-owner has every right to get his share, when previous decree has become unenforceable. Further more, when there is no actual division of status leading to delivery of each share to a co-owner, then a subsequent suit is maintainable as the cause of action still continues. Therefore, we do not find any scope for application of Section 11 of the Code of Civil Procedure in such a situation."

10. From the above judgments, the underlining spirit of the law high lighted is that, to attract the principle of res judicata in a suit for partition, the substantial issue regarding apportionment of property ought to have been not only heard and decided finally in the earlier suit but, same should have been executed.

11. In the light of the above discussion, it is held that, there is scope to apply Section 11 of C.P.C., in this case and the question of law on this point is answered in negative.

12. Regarding the plea of perfecting the title by ouster and adverse possession, the First Appellate Court relying upon the judgment reported in Subbathal v. Arunachala Gounder (2007 (1) L.W. 514) has confirmed the judgment and decree of the trial Court with regard to the plea of ouster. For the sake of convenience, the

relevant portion of paragraph No.27 of the said judgment is extracted below :-

"27..............Assuming the appellant herein has proved her long possession, mere possession of the land, however long it may be, would not ripen into possessory title unless the possessor has animus possidendi to hold the land adverse to the title of the co-sharer................"

13. This Court has nothing more to add to the finding of the Courts below except to extract the dicta laid down by the Hon'ble Supreme Court in P. Lakshmi Reddy v. L. Lakshmi Reddy (AIR 1957 SC 314).

"4. ....It is a settled Rule of Law that as between co-heirs, there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster....."

14. Thus, having failed to prove the fact of visible, exclusive hostile and undisturbed possession, over and above the statutory period, the appellants are bound to lose the case and the Courts below have rightly held so.

15. In the result, the second appeal is dismissed and the decrees and judgments passed by the Courts below are confirmed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Appeal dismissed.

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