

Kaliyaperumal and Another Vs. Lakshmiammal and Others

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Court : Chennai

Decided On : Aug-29-2016

Judge : M.V. Muralidaran

Appeal No. : C.R.P. (PD). No. 1181 of 2012

Appellant : Kaliyaperumal and Another

Respondent : Lakshmiammal and Others

Judgement :

(Prayer:Civil Revision Petition filed under Section 115 of the Civil Procedure Code, against the judgment and decree in C.M.A.No.9 of 2010 on the file of the Sub-Court, Panruti, dated 31.01.2012 in confirming the order in I.A.No.162 of 2010 in O.S.No.146 of 1999 on the file of the District Munsif Court, Panruti, dated 05.10.2010.)

1. This civil revision petition has been filed against the judgment and decree in C.M.A.No.9 of 2010 on the file of the Sub-Court, Panruti, dated 31.01.2012 in confirming the order in I.A.No.162 of 2010 in O.S.No.146 of 1999 on the file of the District Munsif Court, Panruti, dated 05.10.2010.
2. The petitioners are the plaintiffs in this case. The plaintiffs filed the suit in O.S.No.146 of 1999 against the respondents / defendants for declaration and for permanent injunction.

3. The case of the plaintiffs is that the property in old Survey No.130, there are 66 cents in which the first defendant is entitled to 23 cents, the second defendant is entitled to 3 cents, third defendant is entitled to 6 cents and fourth defendant is entitled to 9 cents and remaining extent of 24 cents belongs to the plaintiff as his ancestral property.

4. The further case of the plaintiffs is that apart from the above 24 cents, another 13 cents belongs to the plaintiff, which is absolute ancestral property. The plaintiff has sold an extent of 6 cents to the third defendant and 6 cents to the fourth defendant by way of sale deed. Therefore, the defendants 3 and 4 were impleaded as parties in the present suit for proper adjudication. The plaintiff has also further states that originally the first defendant owned the land to an extent of 29 cents in Survey No.130, which she sold an extent of 3 cents to the second defendant and 3 cents to the fourth defendant. Therefore, the first defendant is entitled to remaining extent of 23 cents only.

5. The first defendant has denied the plaintiffs' right and trying to trespass into the 'B' Schedule property to an extent of 5 cents. In fact, the first defendant has tried to trespass into the 'B' Schedule property in denial of plaintiffs' right on 10.05.1999 and the same was prevented by the plaintiffs.

6. The plaintiffs further states that the plaintiffs property was re-surveyed as 57/6 and then latter as 57/6A and 57/6B (Part). The property of the first defendant was re-surveyed as 57/6B. The property of the second defendant was re-surveyed as 57/6D. The property of third defendant was re-surveyed as 57/6 C/1 and the property of fourth defendant was re-surveyed as 57/6E and 57/6 C/2. Therefore, the plaintiffs approached the Court viz. The District Munsif Court, Panruti and filed the suit in O.S.No.146 of 1999 against the defendants for declaration and for permanent injunction.

7. The case of the respondents / defendants is that the third defendant has filed the written statement stating that the third defendant has owned 3885 Sq. feet vacant site in Old Survey Nos.122, 123 and 124, which has been purchased from the plaintiff on 25.10.1997 by a registered sale deed for a valuable consideration, which has been made separate sub-divisions as new Survey Nos.57/6c and

57/11B. In pursuance of the sale deed the third defendant has been in exclusive possession and enjoyment of the extent what she purchased from the plaintiff. The property purchased by the third defendant is no way connected nor related to the suit property and the plaintiff is estopped to claim against the property purchased by the third defendant. The third defendant has also states that the real dispute in respect of the suit 'B' schedule property is between the plaintiff and the first defendant and the third defendant has impleaded as unnecessary party in this suit. Hence, she prayed for dismissal of the suit.

8. On filing of the written statement, the suit was posted in the special list on 26.11.2009. But on that day, this plaintiffs have not appeared. Hence, the suit was dismissed for default. The petitioners / plaintiffs have filed an application in I.A.No.162 of 2010 in O.S.No.146 of 1999 for setting aside the exparte order dated 26.11.2009 in O.S.No.146 of 1999.

9. In the application, the petitioners stated that when the matter was posted in the special list and while he was prepared for trial, he came to know that certain important particulars are omitted to be mentioned in the plaint. Instead of amending the plaint, this petitioner was advised to withdraw the suit and to file fresh suit on the same cause of action. Therefore, he filed a petition in I.A.No.974 of 2009 for withdrawing the suit with liberty to file a fresh suit on the same cause of action, the trial Court has dismissed the said application on 23.11.2009.

10. Therefore, he was advised his counsel to prepare an appeal against the order in I.A.No.974 of 2009 and taking appropriate action to amend the plaint and proceed with the case. As per the above advise given by his counsel, he approached his counsel on 28.11.2009, but at that time, he came to know that the suit was dismissed for default on 26.11.2009 itself, due to his absence. Therefore, only on the above reasons, he stated that he was not appeared on 26.11.2009. Hence, the said suit was dismissed for default. In the above circumstances, he filed the above application under Order 9 Rule 9 of C.P.C. for restoring the suit on his file and permit the petitioner to conduct the suit.

11. On receipt of the notice in the above I.A.No.162 of 2010, the first respondent / first defendant has filed his counter stated that the application is not maintainable

since earlier suit was dismissed for default on 11.07.2007. Hence, the petitioners / plaintiffs have filed application to restore the said suit and the same was allowed with cost of Rs.300/-. But, this time the suit was dismissed on merits on 23.11.2009 and hence he filed the present application which is the 2nd application. Therefore, the petitioners / plaintiffs were wanted to drag on the proceeding of the trial of the case. The respondents / defendants also stated that though the suit was filed in the year 1999, which was pending for more than 11 years. In fact, the first respondent, who is the senior citizen has filed the petition to dispose the case immediately before the learned District Court and the learned District Court has also given a direction on 04.07.2009, directing the trial Court viz. The District Munsif Court to dispose the suit within a period of two months i.e. on or before 04.10.2009, but the suit was not disposed. Apart from this, the petitioners have not given any valid reasons for restoring of the suit and dismissed for 2nd time. Therefore, he sought for dismissal of the suit.

12. Considering both side cases, the learned District Munsif, Panruti, by an order dated 05.10.2010, dismissing the said application in I.A.No.162 of 2010 in O.S.No.146 of 1999, on the ground that only to drag on the proceedings, the petitioners / plaintiffs have filed the suit and the same was dismissed for 2nd time and they filed application and also they have not given any grounds for restoring the suit, on his file, which is dismissed for default on 26.11.2009. The learned District Munsif has also states that the fair opportunity was given to the plaintiffs to proceed the case. But, even then, he was not utilised the opportunity to proceed the case. Therefore, the District Munsif was dismissed the application without cost. Challenging the said order, the petitioners / plaintiffs have filed an appeal in CMA.No.9 of 2010 before the learned Subordinate Judge, Panruti, the said CMA has also dismissed on 31.01.2012, against which the present civil revision petition has been filed.

13. Heard Mr.V.Raghavachari, learned counsel appearing for the petitioners and Mr.C.Prasanna Venkatesh, learned counsel appearing for the first respondent. No representation on behalf of the respondents 2 and 3.

14. It is the case of the petitioners / plaintiffs that they have filed the application to restore the suit, which was dismissed for default on 26.11.2009. In the present civil revision petition, whether the application filed by the petitioners / plaintiffs to restore the suit filed in I.A.No.162 of 2010 has to be allowed or not?

15. Admittedly in the year 2007 itself, the suit was dismissed for default. On first occasion the same was allowed with cost. This is the 2nd time, the suit was dismissed for default on 26.11.2009. In fact, the application filed by the petitioners / plaintiffs in I.A.No.974 of 2009 for withdrawal of the suit, which was dismissed for default. The plaintiffs are entitled to challenge the order dated 23.11.2009 in I.A.No.974 of 2009. The reasons given by the petitioners / plaintiffs is that their counsel has also advised the petitioners either to file an appeal against the order in I.A.No.974 of 2009 dated 23.11.2009 or to file an application to amend the prayer since some important particulars are omitted to be mentioned in the plaint.

16. Apart from this, the application has also filed within the time limit of 30 days since the suit filed by the plaintiffs for declaration of the title of the suit schedule of the property and also for permanent injunction. Like the suit for declaration, the same should be decided only on merits. Because of lack of appearance on the part of the petitioners or their counsel would not take away the right of declaration of the plaintiffs. In fact, this is the 2nd time, the petitioners have not appeared before the Court and let out the suit dismissed for default.

17. This Court and the Hon'ble Apex Court on various cases clearly held that the suit should not be let it decided for simple reason of non appearance of the parties, but the case like declaration should be decided only on merits and fair opportunity should be given to both the parties and that would be the ends of justice. Accordingly, restoring the suit would not be taken away the legal rights of the defendants, but in the interest of justice, it is just and necessary to give opportunity to the petitioners to decide the case on merits, in fact, that would be helpful to decide the case on merits in respect of both the parties. Accordingly, I am inclined to allow the civil revision petition by setting aside the order passed both in I.A.No.162 of 2010 in O.S.No.146 of 1999 dated 05.10.2010, on the file of the District Munsif Court, Panrui and C.M.A.No.9 of 2010 dated 31.01.2012, on the

file of the Subordinate Court, Panruti.

18. In the above circumstances, I am passing the following orders:

(a) the civil revision petition is allowed by setting aside the order passed both in I.A.No.162 of 2010 in O.S.No.146 of 1999 dated 05.10.2010, on the file of the District Munsif Court, Panrui and C.M.A.No.9 of 2010 dated 31.01.2012, on the file of the Subordinate Court, Panruti.

(b) with a further direction to the trial Court is directed to dispose of the suit in O.S.No.146 of 1999 within a period of two months from the date of receipt of a copy of this order and conduct the case on day-to-day basis and both the parties are hereby directed to give their fullest co-operation for early disposal of the suit without getting any adjournment.

19. Hence, the Civil Revision Petition is allowed with the above direction. No costs.

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