Modgi Krishna and Others Vs. Modgi Krishna Bai and Others

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Court : Andhra Pradesh

Decided On : Jul-27-1993

Reported in : AIR1994AP16

Judge : M.N. Rao and;Subhashan Reddy, JJ.

Acts : Code of Civil Procedure (CPC), 1908 - Sections 11, 35, 80 and 96 - Order XLI, Rule 33; Evidence Act, 1872 - Sections 115

Appeal No. : Letters Patent Appeal No. 384 of 1988

Appellant : Modgi Krishna and Others

Respondent : Modgi Krishna Bai and Others

Advocate for Def. : N. Balakrishna Rao, Adv.

Advocate for Pet/Ap. : Sanaka Venkateswara Rao, Adv.

Judgement :

M.N. RAO, J.

1. This Letters Patent Appeal by defendants 2 to 10 in O.S. No. 20 of 1976 is from the judgment and decree of a learned single Judge in A.S. No. 441 of 1980 partly allowing the appeal by remanding the case for fresh enquiry in regard to the movable properties covered by plaint 'B' schedule and affirming the judgment and

decree of the trial Court to the extent of the claim of the plaintiff for 1/4th share in the immovable properties covered by plaint 'A' schedule.

2. This case has a long history. The plaintiff in O.S. No. 20 of 1976 is the widow of one Tayappa who died intestate on 16-7-1959 surviving him his two widows -- the plaintiff and another widow, the first defendant. Defendants 2 to 9 are the sons and daughters of one Dasarath and defendant No. 10 is the widow of Dasarath, the cousin brother of Tayappa. The said Dasarath died on 9-2-1974. Alleging that Tayappa and Dasarath constituted members of a joint family owning plaint 'A, B, C & D' schedule properties and the other widow, the first defendant, abandoned her rights in respect of the plaint schedule properties, the suit was laid by the plaintiff for partition of the entire properties into two equal shares and allotment of one such share to her. In the written statementthe plea, taken was that the movable properties mentioned in 'B' schedule were not in existence and 'C' and 'D' schedule properties -- wearing apparel and other items -- were the exclusive properties of the defendants.

3. The trial Court held that Dasarath and Tayappa were entitled to the joint family properties in two equal shares and the plaintiff, as the widow of Tayappa, was entitled to the extent of half share in the share of Tayappa and in that view, granted decree to the extent of /4th share of the plaint 'A' and 'B' schedule properties. Aggrieved by that, the defendants carried the matter in appeal -- A.S. No. 441 of 1980, which as already stated supra, was allowed in part by the learned single Judge.

4. Before adverting to the finding of the learned single Judge in A.S. No. 441 of 1980, it is necessary to refer to the earlier litigation between the parties. After the death of Tayappa on 16-7-59, Modgi Baloji, one of the sons of Dasarath filed an application before the Municipal Commissioner, Narayanpet on 18-11-1959 for mutation of his name in the Municipal records on the basis that he was the adopted son of late Tayappa -- the date of adoption being 12-5-1959. Challenging that adoption, the first respondent herein, Krishna Bai filed O.S. No. 2 of 1967 in the Court of the District Judge, Mahabubnagar for a declaration that the adoption was not true and valid and for consequential relief of recovery of the entire suit

properties alleging that the other co-widow has abandoned her rights. In that suit, Issues Nos. 5 and 9 are as follows:

'Issue No. 5 : Whether defendant No. 6 is the validly adopted son of the deceased Tayappa?

Issue No. 9: Whether the properties held by deceased Tayappa were his exclusive and self-acquired properties?'

The learned District Judge held on Issue No. 5 that Baloji -- defendant No. 6 in that suit (D-5 in O.S. No. 20 of 1976) was not the adopted son of late Tayappa and that the adoption was not true and valid. On Issue No. 9 the finding recorded was that the properties were not the self-acquired proper-ties of Tayappa, but they were the joint family properties of Tayappa and Dasarath. Nonetheless, the suit was dismissed without costs as the plaintiff came to the Court alleging that Tayappa was the exclusive owner of the suit properties when the finding was that the properties were acquired by both Tayappa and Dasarath. The plaintiff carried the matter in appeal -- A.S. No. 270 of 1972 -- which was eventually dismissed. As regards the findings relating to the adoption, no appeal was preferred by D-6 in that suit. Subsequently, O.S. No. 20 of 1976 was instituted by Krishna Bai for partition and separate possession, from out of which, the present L.P.A. arises.

5. As already stated, the learned District Judge has taken the view that the plaintiff is entitled to 1/4th share in the plaint 'A' and 'B'schedule properties -- movables and immovables -- since the entire plaint schedule properties were the joint family properties of Tayappa and Dasarath and as one of the two widows of Tayappa, the plaintiff was entitled to the half share of Tayappa. One of the issues in O.S. No. 20 of 1976 was whether the finding in O.S. No. 2 of 1967 as to the validity of the adoption constitutes as res judicata. The trial Court answered that issue in the affirmative. The learned single Judge on appeal in A.S. No. 441 of 1980 affirmed that view. As regards the movables covered by plaint 'B' schedule properties, the decree was set aside and the matter was remitted observing:

'The only question now looms large is what are the properties that are in existence regarding items 2 to 7 and whether 175 tolas do exist apart from the existence of

125 tolas as admitted by Dasarath in his evidence. Unfortunately, there is no tangible evidence and I cannot give any finding in that regard. Both the counsel in fairness admitted that this is a matter to be gone into by the lower Court and an opportunity shall be given to the parties to adduce evidence and the Court below may be directed to consider the issue afresh and give a finding. I find that the submission made by the counsel is very fair. Accordingly, the decree with regard to movables of 'B' schedule in O.S. No. 2 of 1967is set aside. The matter is remitted to the Court below to give an opportunity to the parties to adduce evidence afresh regarding the existence of movable items 2 to 7 of 'B' schedule in O.S. No. 2 of 1967 and regarding the existence of 175 tolas of gold other than 125 tolas admitted by late Dasarath in that suit as on the date of the suit O.S. No. 2 of 1967 and then decide the matter afresh according to law.'

No decree was granted in regard to 'C' and 'D'schedule properties which relate to wearing apparel and other trivial items. Aggrieved by that, the present appeal was brought by D-2 to D-10, the sons and wife respectively of late Dasarath.

6. Sri Sanaka Venkateswara Rao, learned counsel for the appellants has contended that the finding as to the issue relating to adoption in O.S. No. 2 of 1967 did not become res judicata; since the suit was dismissed, the successful defendant could not prefer an appeal and therefore, any finding recorded adverse to the defendant could not be construed as res judicata. As regards the movable properties covered by plaint 'B' schedule, he says that the finding of the learned single Judge as to the existence of 125 tolas of gold is not supported by any evidence and that the remand also should have covered that aspect. The cause of action in respect of both the suits being the same and when the former suit, O.S. No. 2 of 1967 was dismissed, the learned counsel says, the view taken by the learned single Judge that the enquiry in respect of movable properties should be determined as on the date of the suit, O.S. No. 2 of 1967 is clearly unsustainable. In opposition to this, Sri Balakrishna Rao, learned counsel for the first respondent-plaintiff says that there was no legal embargo for the defendant in O.S. No. 2 of 1967 to prefer an appeal against the finding on the issue relating to adoption and as the finding became final, it constitutes res judicata in all subsequent proceedings between the same parties. As regards 'B' schedule properties, the

cause of action in respect of the two suits being different, the view taken by the learned single Judge that the enquiry pursuant to theremand should be with respect to the date of the suit O.S. No. 2 of 1967. Warrants no interference.

7. The first question that falls for our consideration is whether the finding on the issue relating to adoption in O.S. No. 2 of 1967 constitutes res judicata. There is little doubt that both the parties went to trial in O.S. No. 2 of 1967 on the question of adoption. The provocation for instituting the suit was the claim by Modgi Baloji (D-6 in O.S. No. 2 of 1967) that he was adopted by late Tayappa and his representation before the Municipal authorities for mutation of his name in the records. On that issue, both parties let in evidence and the finding recorded was that it was not a valid adoption. When the basis for the suit was the alleged adoption, the trial Judge, in our considered opinion instead of dismissing the suit, ought to have decreed it in part granting the declaration sought, viz., the adoption was null and void. However, the finding as to the invalidity of the declaration in our view constitutes res judicata. It was directly and substantially in issue in the subsequent suit, O.S. No. 20 of 1976 between the same parties. Merely because the suit was dismissed, could it be said that failure on the part of the defendant in that suit to carry the matter in appeal, would not result in the application of the principle of res judicata as incorporated in S. 11 of the Civil Procedure Code? We do not think so. There was no legal impediment for Modgi Baloji (D-6 in O.S. No. 2 of 1967) to carry the matter in appeal and for getting rid of the finding in regard to the issue relating to adoption. The trial Court did not grant costs because the main plea of the plaintiff regarding the invalidity of the adoption was sustained. At least, on the question of costs, Modgi Baloji, the 6th defendant, had the right of appeal as decided by this Court in Vissavas-julu Mahadeva Sastri v. Pothulu Sreerama-murthy, : AIR 1955 AP282 . Subba Rao, the learned Chief Justice of this Court (as he then was) after reviewing the case law on the subject, expressed the opinion (at page 285):

'From the aforesaid discussion of the case law, the following principle emerges. Thougha suit is dismissed the adverse finding against the defendant would be 'res judicata' in a subsequent suit between the same parties, if on the basis of that finding, costs in whole or in part were disallowed to the plaintiff or awarded to the

defendant,(sic) for, in such a case, there is a decree against the defendant and it becomes final unless he prefers an appeal against the same.

In the present case, the finding that the defendant was entitled to an equal right in the suit property was the basis for disallowing half the costs to the defendant. The defendant could have preferred an appeal against that part of the decree. The finding, therefore, certainly operates as 'res judicata' in the present case.'

Sambasiva Rao, J. (as he then was) in Bansilat Ratwa v. Laxminarayan, 1969 (2) Andh WR 246, dealing with a similar fact situation held:

'..... a part to a suit can maintain anappeal against a decision of the trial Court, when certain findings which would be res judicata in other proceedings are against him, though the suit is decided in his favour for other reasons.'

This principle, we think, was also recognised by the Supreme Court in Gangappa v. Rachawwa, : [1971]2SCR691 , wherein it was observed (at page 446):

'If the Court decides the various issues raised on the pleadings, it is difficult to see why the adjudication of the rights of the parties, apart from the question as to the applicability of S. 80 of the Code and absence of notice thereunder should not operate as res judicata in a subsequent suit where the identical questions arise for determination between the same parties.'

8. The decisions cited by Sri Venkateswara Rao, learned counsel for the appellants in Madras Corporation v. P. R. Rama-chandraiah, : AIR1977 Mad25 and Bhima Jally v. Nata Jally, : AIR1977 Ori59 , are not of any assistance to the appellants. In Madras Corporation's case (supra) it was observed by the Division Bench of Madras High Court (at page 26):

'It is by now well-settled by high authority that a party not aggrieved by a decree was not competent to appeal against the decree on the ground that an issue was found against him.'

This statement of law is unexceptionable, but has no application to the facts in the instant case. It cannot be said that Modgi Baloji was not aggrieved by the finding

of the trial Court in O.S. No. 2 of 1967 that his adoption was null and void. The test is whether the defendant could have attacked the decree with regard to costs. The costs were not awarded in O.S. No. 2 of 1967 on the ground that the plaintiff succeeded on the main issue with regard to the invalidity of the adoption. The 6th defendant Baloji had a right to carry the matter in appeal on the question of non-awarding of costs. In the appeal preferred by the unsuccessful plaintiff in O.S. No. 2 of 1967, the sixth defendant could have preferred cross-objections. But he did not do so. Therefore, it cannot be said that he was not competent to prefer an appeal against the decree. The judgment in its entirety should be considered while deciding whether a finding on the issue constitutes res judicata in subsequent proceedings. The statement of law laid down by the Madras High Court has no application. The decision in Bhima Jally's case (supra) concerns the situation where the defendants had no opportunity to appeal because the decree was in their favour. Clearly, it has no application to the instant case.

9. We must also mention that in dealing with the question as to whether a finding recorded on an issue which was directly and substantially in issue in the earlier suit becomes res judicata in a subsequent suit between the same parties, thejudgment rendered in the earlier suit must be fully considered from all aspects. The plaintiff in O.S. No. 2 of 1967 claimed two reliefs; (i) declaration that the adoption was invalid and (ii) the consequential relief of possession of the properties. She succeeded as to the main relief, but because of the finding that the properties were not the exclusive properties of her late husband, but joint family properties, she could not get the consequential relief. In such asituation, the contention that the declaration as to the invalidity of the adoption would not operate as res judicata in subsequent proceedings, would be totally unacceptable. Reading the judgment as a whole, we are of the view that the trial Court in the operative portion of the judgment had committed a mistake in saying that the suit was dismissed. The nature of the reliefs granted by the trial Court clearly show that the plaintiff succeeded to a great extent.

10. On the second question relating to movable properties covered by plaint 'B' schedule, while remanding the matter, the learned Judge said that the enquiry should be with reference to the date of O.S. No. 2 of 1967. He also held that the

appellants are liable to account for 125 tolas of gold and the enquiry should be confined to the existence of 175 tolas other than 125 tolas of gold and also movables -- items 2 to 7 of 'B' schedule in O.S. No. 2 of 1967. The learned Judge observed that there was no tangible evidence as to the existence of movables other than the 125 tolas of gold. We are of the view that at this distance of time, no useful purpose would be served by remanding the matter for enquiry as to the existence or otherwise of the movables and 175 tolas of gold. When the parties had opportunity to lead evidence and when the evidence brought on record was not sufficient to record a clear finding, it would not serve any better purpose by remitting the matter after a lapse of nearly 20 years; by doing so we would be unnecessarily prolonging the litigation. We are, therefore, of the view that the matter does not require remand to the trial Court. The movables found by the Commissioner in 1976 are all small house-hold items like tiffin boxes, plates, spoons, buckets etc. We do not think, at this stage, the first respondent-plaintiff, who is aged 66 years, is really in need of any share in these articles. It is also highly doubtful whether these articles found to have been in existence in 1976 are fit for partition now or whether they are at all in existence.

11. Now we come to the important question as to the existence of 125 tolas of gold for which the appellants, according to the learnedsingle Judge, are liable to account for, to the extent of the share of the first respondent-plaintiff. Sri Venkateswara Rao, learned counsel for the appellants says that there is no evidence as to the existence of the gold on the date of the suit and therefore, the appellants should not be fastened with the liability to account for the same. In support of this, he relies' upon the report of the Commissioner which does not advert to the existence of the gold. We do not agree. In the earlier suit, O.S. No. 2 of 1967, Dasarath, the father of the appellants herein who was defendant No. 7 in his evidence as D.W. 6 -- by the date of the subsequent suit, O.S. No. 20 of 1976, he was no more and his evidence in the earlier suit was marked as Ex.A-2 -- admitted :

'When Tayappa died, (husband of the first respondent-plaintiff herein) our family was having 125 tolas of gold and two shops.....After the death of Tayappa, I checked the gold and locked it.'

In the cross-examination it was elicited from him:

'The entire property which was in possession of Tayappa is in my possession. I did not give anything to Jamnabai. (the other widow of Tayappa)'

He also admitted:.... 'the account books of Tayappa are with me and I have not filed them into the Court'. These admissions clearly and unmistakably show that the father of the appellants was in possession of 125 tolas of gold belonging to the joint family. As the appellants are the successors in interest and legal representatives of Dasarath, the statement of Dasarath regarding the possession of gold clearly binds them. No evidence was adduced by the appellants as to what happened to the gold subsequently. In the normal course, it must be presumed that the gold remained with the family. Merely because the Commissioner's report does not advert to the existence of gold, we cannot ignore the admission made by Dasarath (father of appellants 1 to 9 and the husband of the 10th appellant) as to the possession of the gold. We therefore hold that on the date of the suit, the family of the appellants was inpossession of 125 tolas of gold, if not more, which belonged to the joint family comprising Tayappa and Dasarath.

12. In view of the old age of the first respondent-plaintiff and the pendency of the litigation for over 30 years in exercise of our power under Order XLI, Rule 33, C.P.C. we set aside the finding of the remand ordered by the learned single Judge and pass a preliminary decree entitling the first respondent-plaintiff for 14th share in plaint 'A' schedule properties and 1/4th share in 125 tolas of gold in respect of 'B' schedule properties. The trial Court will complete the final decree proceedings as expeditiously as possible, in any event not later than six months from the date of receipt of a copy of this judgment.

13. The Letters Patent Appeal is dismissed with the modification as stated above. The first respondent-plaintiff is entitled to costs throughout.

14. Order accordingly.