

Devanbu Vs. Sundara Raj,

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Court : Chennai

Decided On : Feb-02-2005

Reported in : 2005(1)CTC563; (2005)2MLJ41

Judge : S. Sardar Zackria Hussain, J.

Acts : [Constitution of India](#) - Article 227

Appeal No. : Civil Revision Petition (PD) Nos. 366 of 2004 and C.M.P. No. 3952 of 2004

Appellant : Devanbu

Respondent : Sundara Raj, ;susai Raj, ;ramanujam and Gnanarathnam

Advocate for Def. : G. Jeramiah, Adv.

Advocate for Pet/Ap. : I. Paranthamen, Adv.

Disposition : Petition allowed

Judgement :

ORDER

S. Sardar Zackria Hussain, J.

1. The revision petitioner is the plaintiff in O.S. No. 439 of 1999 on the file of the District Munsif Court, Tiruvallur. The Civil Revision Petition is filed against the

order dated 30.12.2003 made in I.A. No. 810 of 2003 in O.S. No. 439 of 1999.

2. The plaintiff filed the above suit for declaration and for permanent injunction in respect of the suit properties, which are six items in Senji Village, Tiruvallur Taluk, claiming that though 32/45 share in item No. 1 with the well therein, item No. 2 and northern portion of item No. 6 were allotted to the share of the first defendant, who is the brother of the plaintiff, in the partition suit in O.S. No. 318 of 1963 and pursuant to the final decree in I.A. No. 700 of 1964 dated 18.9.1965, the delivery of the said items were also recorded on 9.8.1966, the plaintiff continued to be in possession in respect of all the items of the suit properties. The suit was filed in the year 1999. The suit was resisted by the defendants 1 to 4 in the written statement filed on 31.8.2000.

3. The trial of the suit was commenced and the plaintiff has also been examined as P.W.1 and at the time of cross-examination, the defendants 1 to 4 have filed I.A. No. 810 of 2003 seeking permission to file additional written statement. The petition was filed on 30.7.2003. In the said petition, the defendants have stated in the affidavit filed by the third defendant on behalf of all the defendants that some mistakes have crept in and the survey numbers of the suit items in the partition suit O.S. No. 318 of 1963 filed by the plaintiff herein against the first defendant were amended as per order in I.A. No. 740 of 1965 and the present survey numbers for suit items were incorporated. In the sale deed dated 7.6.1981 executed by the first defendant to the fourth defendant, the old survey numbers were given and the said mistake also followed in the sale deed dated 26.4.2000. The facts have also been mentioned in the counter filed in I.A. No. 274 of 1999. The defendants came to know about the non-mentioning of details in the original written statement filed when the defendants have to cross examine P.W.1. It is also stated in the affidavit that the plaintiff has not taken the plea of adverse possession as pleaded now, in the suits O.S. Nos. 177 of 1982, 201 of 1983 and 355 of 1987. It is for the said grounds, the defendants sought the permission to file additional written statement, which was contested by the plaintiff by filing counter.

4. The trial Court accepting the case of the defendants allowed the petition I.A. No. 810 of 2003 permitting the defendants to file additional written statement. Such

order is under challenge in this revision.

5. The learned counsel for the plaintiff/revision petitioner argued that the defendants cannot be allowed to raise the new plea of res judicata, which has not been raised in the written statement already filed and after commencement of trial and after the examination of P.W.1, who is to be cross-examined. The learned counsel for the plaintiff/revision petitioner also submitted that if the old survey numbers were mentioned in the sale deeds dealt with by the first defendant in favour of other defendants, on that plea no permission is to be granted to file additional written statement and it is for the parties to the said sale deeds to seek rectification of the sale deeds mentioning the correct survey numbers, if any.

6. The learned counsel for the respondents/defendants argued that inasmuch as old survey numbers have been mentioned by mistake in the sale deeds conveyed by the first defendant in favour of other defendants, which facts have also been mentioned in the counter filed in I.A. No. 274 of 1999, and as such, no new case is set up by filing additional written statement. The learned counsel for the respondents/defendants further contended that plea of res judicata is not new plea and as such, the defendants are entitled to raise such a case by filing additional written statement.

7. The plaintiff has come forward with the suit O.S. No. 439 of 1999 for declaration and for permanent injunction in respect of the suit properties which are six items in Senji Village, Tiruvallur Taluk mentioning the new survey numbers with the old paimash numbers. The suit was filed in the year 1999. Though the defendants took time and filed the written statement only on 31.8.2000 and though a clear stand has been taken in the plaint that in any event the plaintiff had perfected title to the suit property by adverse possession, no plea has been taken in the written statement filed by the defendants that in the earlier suits in O.S. Nos. 177 of 1982, 201 of 1983 and 355 of 1987 such a plea was not taken by the plaintiff and as such, the present suit is barred by res judicata. In that view, the defendants cannot be allowed to raise such a plea by filing additional written statement.

8. As regards the stand taken by the defendants that the properties, subject matter of the partition suit in O.S. No. 318 of 1983 of 1963, were amended by giving new

survey numbers as per order in I.A. No. 740 of 1965, the first defendant in the sale deeds conveyed by him to the defendants 2 to 4, has failed to give the new survey numbers and only old survey numbers have been mentioned in the sale deeds. The said facts, according to the defendants, have been mentioned in the counter filed in I.A. No. 274 of 1999. If really, the mistakes have crept-in and old survey numbers alone have been mentioned in the sale deeds executed by the first defendant in favour of the defendants 2 to 4, it is open to the parties concerned to the said sale deeds to take necessary steps for rectification of the said sale deeds. The defendants have to contest the present suit with the stand and plea already taken in the written statement. Though when the defendants filed written statement, the plea of res judicata was available to them, but they failed to take such a stand in the written statement. Therefore, such plea is deemed to have been waived. Now, it is not open to the defendants to file additional written statement mentioning the facts that the first defendant failed to mention the new survey numbers in the sale deeds executed by him in favour of the defendants 2 to 4, which according to him, have been stated in the counter filed in I.A. No. 274 of 1999.

9. Therefore, the petition filed in I.A. NO. 810 of 2003 for the purpose of receiving the additional written statement, being without any merits, the order of the trial Court allowing the said petition after commencement of the trial and when P.W.1 is to be cross-examined, is erroneous and not proper. It follows the order is to be set aside.

10. In the result, the Civil Revision Petition is allowed with costs. The order and decretal order dated 30.12.2003 made in I.A. No. 810 of 2003 in O.S. No. 439 of 1999 passed by the District Munsif, Tiruvallur are set aside. Consequently, the petition in C.M.P. No. 3952 of 2004 is closed.