

Subbian Vs. Siva Kumar

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SooperKanoon Citation : sooperkanoon.com/800666

Court : Chennai

Decided On : Oct-09-2000

Reported in : 2000(4)CTC205

Judge : K. Raviraja Pandian, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) -- Sections 115(2) and 151 -- Order 18, Rule 3-A

Appeal No. : C.R.P. No. 2317 of 2000

Appellant : Subbian

Respondent : Siva Kumar

Advocate for Def. : Mr. M.A. Sadanand, Adv.

Advocate for Pet/Ap. : Mrs. Krishnaveni, Adv.

Judgement :

ORDER

1. The above civil revision petition is filed under Section 115 of the Civil Procedure Code and directed against the order of the Court of the District Munsif, Thiruppur dated 17.7.2000 and made in E.A. No.121 of 2000 in E.A.No.19 of 2000 in E.P.No.72 of 1996 in O.P.No.256 of 1973. The facts of the case leading upto the filing of the above revision petition are as follows:

The petitioner herein Subbian, and one Rengasami are brothers and sons of one Muthusami Naicher, who had four daughters besides the above said two sons. Kannammal, one of the daughters is the mother of Siva Kumar, the respondent herein. Muthusami Naicker died on 21.3.1973. Subbian filed a suit in O.S.No.256 of 1973 on the file of the Subordinate Judge of Thiruppur, for partition. The preliminary decree was passed. It was followed by the passing of the final decree on 10.2.1993 by compromise. It seems, there was no appeal against the said decree, obviously, because the said decree was one of compromise. The petitioner Subbian, got his properties as per the decree and sold some of them. Similarly, the sisters of the petitioner herein, also got their property as per the decree and dealt with them in their own name and title. The said Rangasami filed E.P.No.72 of 1993 for delivery of possession of the properties as per the decree and ultimately, possession was taken through court on 21.10.1998. In the mean time, the two sons of the petitioner herein, Venkatachalam and Marappan, filed a suit in O.S.No.534 of 1994 for partition of the very same properties all over again, impleading the petitioner herein. Rangasami, and other sisters, who were all arrayed as defendants in the suit in O.S.No.256 of 1973, bringing out the case of ancestorality of the property and their share in them. It is pertinent to state that in the suit filed by the sons of the petitioner, i.e. in O.S.No.534 of 1994, the properties which fell into the share of the petitioner herein which has been sold by him, subsequently, was not included for partition. It is the further case of the respondent herein, that on 22.10.1998. Immediately after taking possession of the property, which are agricultural lands, on 21.10.1998, the said Rangasami executed an registered a will, bequeathing the suit properties to the respondent. While so, the two sons of the petitioner who filed O.S.No.534 of 1994 filed a transfer petition in E.P.No.72 of 1993, for transfer of the E.P. to the Sub Court, Thiruppur for hearing it with O.S.No534 of 1994. It was dismissed by the E.P.Court. However, on revision, the High Court permitted the transfer which was later sets aside by the Supreme Court in Civil Appeal No.6725 of 1999 on 18.9.1999. While that being so, the said Rangasami became ill on 26.11.1999 and died on 3.12.1999 at Sri Ramakrishna Hospital, Coimbatore. Thereupon, the respondent came to know about the will in his favour through one Saravanan, who propounded the will. After gathering particulars about the will, the respondent

herein filed E.A.No.19 of 2000 in E.P.No.72 of 1993 to implead him as 3rd party petitioner. In the said petition, one Saravanan and Palanisami, who are the attesting witnesses of the will, were examined as witnesses on behalf of the respondent herein and they spoke about the execution of the will by Rangasami. The respondent, the legatee, who has admitted the said Rangasami in the Hospital, wanted to give his evidence, which was stoutly objected to, by the petitioner herein. Hence the respondent filed a petition in E.A.No.121 of 2000 seeking permission of the court to permit him to adduce evidence under Order 18 Rule 3-A of the Civil Procedure Code. In the affidavit filed in support of the above petition, the respondent averred that the said Rangasami filed the above execution petition for delivery of possession and delivery was taken in pursuance of the order of the E.P.Court. Meanwhile, the said Rangasami died on 3.12.1999. It appears that he has executed a registered will and last testimony in his favour. The said will was propounded by Saravanan on the third day of death of Rangasami and the respondent herein filed E.A.No.19 of 2000 to continue the proceedings as he is the person becoming entitled to the estate of the deceased Rangasami, that he is in possession and enjoyment of the properties. In order to prove the same on the side of the respondent, two witnesses namely, Saravanan and Palanisami were examined and they spoke in respect of the execution and registration of the will. Since the respondent has no personal knowledge of the will, the said two witnesses were examined, who are the scribe, i.e., the attesting witnesses of the will. The respondent evidence is only a formality. He is not going to fill up any lacuna in the evidence of PWs 1 and 2 and he is going to speak about the fact that Rangasami Naicker became ill and was admitted in the Ramakrishna Hospital, Coimbatore for treatment and the respondent was attending on him and also about his death in the hospital on 3.12.1999 and about his cremation: It is further averred in the affidavit that Order 18, Rule 3-A is not applicable to the execution proceedings. The said application was stoutly opposed by the petitioner herein on the ground that the respondent has not stated any reason in the affidavit as to why his evidence was withheld, when the evidence on his side commenced. He has not filed a petition prior to commencing of the oral evidence, seeking permission of the Court. Further the petitioner herein has also denied the factum of death of Rangasami and also the genuineness of the will. The Execution Court

after hearing the parties has permitted the petitioner to give evidence. The reasoning given by the Execution Court is as follows:-

2.

3. The correctness of the said order is now questioned into the present revision petition. Mrs.Krishnaveni, learned counsel appearing for the petitioner, though admitted all the facts during her arguments, would contended vehemently that the order of the Execution Court permitting the respondent herein to give evidence after completion of the evidence of other witnesses on the side of the respondent is not correct and on the question whether the permission as contemplated under Order 18, Rule 3-A is a prior permission or permission subsequent to the conclusion of other witnesses there are divergent views of decision of this court and in view of the conflicting judgment Sathasivam,J., in a similar matter referred the issue to a larger bench which has been reported in S.Srinivasan v. Balambal and 3 others, : 2000(1)CTC646 , and made a request that this case also be referred to a larger Bench, since the issue involved is similar to the one involved in the case which has been dealt with by Sathasivam, J.

4. On notice of motion, the respondent herein appeared through counsel, Mr.M.A.Sadanand and filed a detailed counter, contending inter alia that the present revision petition deserves in limine dismissal as it is not maintainable under Section 115 of the Civil Procedure Code on the premise that the order impugned in the present revision petition is being not one 'that has decided any case' but has only permitted the adduction of evidence in relation to certain facts for the purpose of impleading the respondent in E.A.No.19 of 2000 in E.P.No.72 of 1993 and hence the revision petition is still born and therefore, it is not maintainable. It is the further contention of the learned counsel Mr.M.A.Sadanand that the respondent herein was forced to invoke Order 18 Rule 3-A and Section 151, C.P.C. because of the vehement protest by the petitioner herein to examine the respondent. But pointedly taking a stand in that application that Order 18, Rule 3-A is not applicable to the execution proceedings and reinforced the same in his arguments by pointing out that Order 18, Rule 3-A is only applicable to prior to decree proceedings because the Order 18, Rule 3-A appears in the heading of

'Hearing of the Suits and examination of witnesses in C.P.C. and speaks about suits'. The case relied on by the learned counsel for the petitioner is a decision in a case arising out not in the course of execution proceedings and the said order of reference is not a precedent so much so that case was not arising in the course of execution proceedings that the situation in the present case is not analogous to the case referred to, by the learned counsel for the petitioner.

5. It is further contended by Mr.Sadanand that even presuming that Order 18, Rule 3-A is applicable to execution proceedings that applies only in respect of the 'person', who must already be a party to such proceedings to incur the prohibition and he has vehemently contended that the present revision petition is not maintainable as the order impugned is not one which can be considered as a 'case decided'. For that purpose he also relied on an unreported judgment of this Honourable Court in C.L.Ramaiah Thevar v. P.C.Balarama Raja, : 2000(4)CTC201 , passed by S.S. Subramani, J.

6. From the facts and the contentions raised by the learned counsel for the parties, the following points arise for consideration:

1. Whether the order impugned does not amount to a 'case decided', within the purview of Section 115 of the Civil Procedure Code so as to maintain a Revision before this Court?

2. Whether this court is obliged to refer this revision petition to a larger Bench as done in the case reported in S.Srinivasan v. Balambal and 3 others, : 2000(1)CTC646

7. Let me first discuss the question of maintainability of the revision petition, since it is in the nature of a preliminary Objection. The question whether the interlocutory order in a suit or proceeding amounts to a 'case decided', for the purpose of Section 115 of Civil Procedure Code, is arisen in several cases before different Courts.

8. In the case of Baldev Das Shivilal and another v. Filimistan India Pvt. Ltd., : [1970]1SCR435 the Apex Court interpreted the term 'case' as a word of

comprehensive import including any order in civil proceeding and not restricted to the entirety of the proceedings, under Civil Procedure Code and observed as follows 'But every order of the court in the course of the suit does not amount a 'Case decided''. A case may be said to be decided if the court adjudicates for the purpose of the suit, some right, or obligation of the parties in controversy; every order in the suit cannot be regarded as 'case decided', within the meaning of Section 115. By overruling an objection to the question put to a witness, or allowing the question, to be put 'no case is decided'.

In the case of Major S.S.Khanna v. Brigadier F.J.Dhillon, : [1964]4SCR409 , the Court observed that when by an interlocutory order, the trial Court held that the suit filed by the plaintiff for recovery of amounts advanced by the defendant, was not maintainable, it was manifestly a decision having a direct bearing on the rights of the plaintiffs to a decree for recovery of the loan alleged to have been advanced by him and if the expression 'Case' includes a part of the case, the order of the Subordinate Judge, must be regarded as a case which has been decided.

In the case of Ram Gulam Choudari v. Nabin Choudari, : AIR1972 Pat499 , Justice N.L.Untwalia (as he then was), following the judgment of the Supreme Court, in Baldev Das Shivlal and another v. Filmistan Distributors (India) Pvt. Ltd., : [1970]1SCR435 , has held that the question whether an order was 'case decided' depends upon whether or not, there was an adjudication for the purpose of suit or proceedings, some right or obligation of parties in controversy. The order can be revised only if there was such an adjudication and suffered from jurisdictional error.

In the case of Mahanth Som Prakash Das v. Udasin Panchavathi Akhara Bara, : AIR1983 Pat35 , the Court held that refusal of the court to entertain the documents not in possession of the petitioner affects the valuable right of the petitioner to file a suit and hence it amounts to 'case decided'. The court on perusal of Explanation to section 115 held that it is clear that a Civil Revision Petition could be maintainable against any order which determines the rights and obligations of the parties in controversy. In this decision, the learned Judge has made an important observation that though the meaning of the expression 'case decided' has been

widened by virtue of explanation to Sub- Section (2) of Section 115, the decision of the Supreme Court in the case of Baldev Das Shivilal and another v. Filmistan Distributors (India) Pvt. Ltd., : [1970]1SCR435 is still a good law.

9. The Allahabad High Court in the case of Manohar Lal v. Valarior (Cawnoore) Pvt Ltd., : AIR1980 All327 held that the impugned order refusing to recall a witness for further cross examination is not an order adjudicating upon any right or liability of the parties in controversy and accordingly does not amount to a 'case decided', within the meaning of Section 115. Therefore, the revision was held to be 'not maintainable'.

10. In C.R.P. No.3269 of 1998, S.S.Subramani, J., following the decision reported in Ravindran v. Roja, 1992(2) KLT 102, has held that the order refusing to send the document for expert opinion does not amount to a 'case decided' and revision against that order is not maintainable.

11. From the above observations made by the different courts, and from the cases referred to above, it is clear that the meaning of the term 'case decided' has been widened after the introduction of the amendment introducing the explanation of Sub- Section (2) of Section 115. But in spite of this extended meaning, the Courts have held that any and every order passed in the course of the suit does not amount to a 'case decided' and the order must relate to adjudication of some right or obligation of the parties in controversy. It is further apparent from the decisions that even if an Order amounts to a 'case decided' and there is a question of jurisdiction within the meaning of clause (a), (b) and (c) of Sub-Sec(1) of Section 115 still it must satisfy Clause (a) and Clause (b) of the proviso to section 115(1), that is the order if had been made in favour of the party applying for the revision would have finally disposed of the suit or other proceedings or the order if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made. It is pertinent to mention here that this proviso has been added by the amendment.

12. It is to be now, seen, how far these requirements are satisfied in the facts and circumstances of the case on hand. As stated earlier, the rights and obligations of the parties has already been settled by a compromise final decree in O.S.No.256

of 1973 and pursuant to the said decree, possession has already been taken on 21.10.1998 by Rangasami. Prior to recording of the same, Rangasami died and the respondent herein has filed application in E.A.No.19 of 2000 for impleadment so as to enable him to continue the proceedings. The reasons stated for impleading is that Rangasami Naicker executed a will in favour of the respondent herein and the proponent and the executing witness have already been examined and to prove the factum that the respondent has admitted Rangasami in the hospital who died there in the hospital, the respondent herein wanted to give evidence and for that purpose he sought the permission of the court. The court has also granted permission. In the said process, there is absolutely no adjudication of any right or obligation of the parties in controversy.

13. The power of the High Court under Section 115 is exercisable in respect of any case which has been decided. A case can be said to have been decided only when any right or obligation of the parties is adjudicated upon. By permitting a person to appear as his own witness at a later stage for reasons to be recorded, the Court does not decide any question relating to right or obligation of the parties in controversy. Such a permission does not decide any right of the parties. By evidence, the truth of a fact which is submitted to investigation is established or established or disproved. That is the precise reason that a rule of evidence is defined as a principle which expresses the mode or manner of proving the facts and circumstances upon which a party relies to establish the fact in dispute. Hence, by merely permitting a party to appear as a witness at a later stage, the Courts does not adjudicate upon any rights of the parties.

14. Further, certain more facts as culled out from the records need to be put on record. The petitioner herein enjoyed the fruits of the partition decree at his own instance. But he did not allow his brothers to enjoy the benefits which is manifest from the filling of the E.P. and the subsequent suit by his sons arraying the petitioner also as a party, for partition of very same property on the grounds of ancestorality. However, the exclusion of the property, in the said partition suit which has been disposed of by the father smacks genuineness. The subsequent conduct of the petitioner would also tell up him. The petitioner herein, filed a habeas corpus, petition in HCP.No. 2193 Of 1999 on 27.12.1999 before this Court,

impleading the Inspector of Police, Thiruppur Police Station and the respondent herein and the brother of respondent, one Somasundaram and two others, complaining of illegal custody of Rangasami. On notice, the Inspector of Police, reported that Rangasami dies in hospital and the respondent herein also produced Hospital Bill and Death certificate from the Corporation of Coimbatore and Cremation Certificate before Honourable Court, whereupon the Division Bench permitted the withdrawal of the HCP on 8.12.99. In spite of this fact, the petitioner herein has disputed the factum of death in the execution proceedings. Only in that circumstances, to fore stall any such attempt, the respondent was advised and forced to give evidence to prove the fact of Rangasamy's illness and his death, taking into consideration all the facts and the circumstances of the case, the lower court has given a finding as stated in paragraph 3 above. The reasons given by the lower Court, in my opinion, do not de serve to be interfered with.

15. In view of the foregoing discussions, I am of the view that the order under revision does not satisfy the condition laid down under section 115 of the Civil Procedure Code and as such, it is not available to be interfered with. In exercises of the revisional jurisdiction of this Court. Since this point has not been raised, adjudicated or decided upon either in the decisions referred to in the reference order or in the order of reference reported in S. Srinivasan v. Smt. Balambal and others, : 2000(1)CTC646 I ventured to decide the issue as to the maintainability. Since I have taken the decision that the order impugned is not a 'case decided', as laid down by the various pronouncements of the Courts including the Apex Court and as such the revision is not maintainable on the first point, any consideration and discussion on the second point would be of no consequence and accordingly I refrain to go into the said question.

16. In view of the above discussion, the civil revision petition deserves to be dismissed as not maintainable and as such dismissed. However in the circumstances of the case there is no order as to costs.