

Sigappi Vs. Kathayee

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Court : Chennai

Decided On : Sep-04-1934

Reported in : AIR1935Mad68; 155Ind.Cas.190

Appellant : Sigappi

Respondent : Kathayee

Judgement :

Madhavan Nair, J.

1. The defendant is the appellant. The second appeal arises out of a suit instituted by the plaintiff for a declaration of title to the suit properties, for a permanent injunction, and, if necessary, for recovery of possession of the same free from interference from the defendant. The plaintiff is the wife of the deceased son of the defendant. The defendant's son died in November 1926. According to the plaintiff's evidence, she collected the crops from the suit lands of the year of the death of her husband. The next year she cultivated the lands and the defendant, and her men destroyed the crops. Then the present suit was filed on 28th July 1928. On the merits, the defendant's contention was that the plaintiff cannot claim any right to the properties as her son was disqualified for various reasons from inheriting them. The plaintiff was given a decree by the first Court and this decree was confirmed in appeal. The defendant did not give her entire evidence before the trial Court. In this second appeal the question is whether the defendant should now be

allowed an opportunity to put before the Court all her evidence. The failure of the defendant to adduce her entire evidence arose as a result of a ruling given by the District Munsif as to the burden of proof with reference to two issues in the case. These issues are issues 4 and 7. Issue 4 is:

whether the plaintiff was in possession at the date of the suit, and if not, whether the suit for declaration and injunction is maintainable.

2. Issue 7 is an additional issue. It is

whether the plaintiff or her predecessors in title had possession within 12 years before suit.

3. When the suit was taken up the vakils on both sides were absent. The Munsif then put the plaintiff into the witness-box and elicited an answer to a question. By that time the plaintiff's vakil turned up and said that the burden of proof was not on the plaintiff and that the defendant should begin. The Munsif then put the defendant's agent into the box as a witness on the defendant's side and began to examine him himself. After some examination the case was adjourned. The defendant's vakil turned up later and continued the examination of the witness. Later on, the defendant put in an application that the burden of proving issues 4 and 7 lay on the plaintiff and that he (plaintiff) should be directed to begin. On this application the District Munsif passed the order:

On hearing both parties I already called upon the defendant to begin, since on the main issue the burden is upon her, etc.

4. The defendant's petition was dismissed. The examination of the defendant's witness 1 was continued and witness 2 on her side was also examined in part and some documents were filed. The suit was then adjourned. On the adjourned date defendant's witness 1 was re-called and examined, but the defendant's vakil declined to proceed with the further chief examination of defendant's witness 2. The plaintiff's vakil was then allowed to cross examine him and his evidence was closed. The defendant's vakil put in a memorandum that day declining to let in any further evidence as the burden of proof lay on the plaintiff. The evidence on the

plaintiff's side was then taken and the case was proceeded with. When the plaintiff's evidence was closed the defendant's vakil wanted permission to adduce evidence on the defendant's side. This permission was refused by the Munsif and thus the case was finally closed and a decree was given in favour of the plaintiff.

5. In the lower appellate Court it was argued, as was done before me, that the burden of proof with regard to issues 4 and 7 rightly lay on the plaintiff, that the learned Munsif was wrong in calling upon the defendant to begin, and as the procedure was thus irregular the defendant should be given a further chance to adduce all her evidence. The learned Subordinate Judge was distinctly of opinion that the burden lay on the plaintiff. But in his view the learned District Munsif's ruling that the defendant should begin first was right because on the 'presumptions' arising in the case the plaintiff had discharged the initial burden; and therefore when the case was begun the defendant had to prove her case by showing how the plaintiff's husband was disentitled to inherit the properties. There can be no doubt that the initial burden with respect to these issues (Issues 4 and 7) to prove that the plaintiff was in possession lay on the plaintiff. The learned Subordinate Judge thought that this burden was discharged because of the presumption that the defendant's possession of the properties was on behalf of her son, the husband of the plaintiff who was a minor, that after the death of the plaintiff's husband the plaintiff and defendant lived together for some time, that the properties must have been enjoyed by them both, and that, if there is a presumption in favour of the plaintiff that her husband was in possession till his death in November 1926, then it is not necessary for her to lead any evidence assuming that she was out of possession on the date of the suit as her husband's possession was well within the statutory period. (See the end of para. 8 of the judgment). The suit being thus in time, the main point for decision would be whether the defendant has shown that the plaintiff's husband was disqualified from inheriting the properties.

6. In this view the burden of proof will lie on the defendant and the defendant will have to adduce evidence first. This seems to be one way of looking at the question, but it is clear this was not the basis for the ruling given by the learned District Munsif. From his order it is clear that the process of reasoning adopted by

the learned Judge was not at all present to his mind. What he said was this, that he called upon the defendant to begin since on the main issues the burden is upon her that is to say, the main issue being whether the plaintiff's husband was disqualified from inheritance for the reasons mentioned in the defendant's written statement. Of this of course the burden is upon the defendant. The order of the District Munsif reads as if he decided without expressing any opinion regarding the burden of proof with respect to Issues 4 and 7, that the defendant should begin as on the main issue the burden was upon her. Though the learned Judge was of opinion that the District Munsif's ruling was right, he yet considered the question whether the failure of the defendant to adduce evidence should not be condoned as that failure must have been due to a bona fide mistake on the part of her vakil who must have thought, though wrongly, that the burden of proof lay on the plaintiff and that the plaintiff should first begin to adduce her evidence; and decline to condone the failure as the defendant had been given full opportunities to adduce evidence and had deliberately refused to adduce the same. The question is whether in these circumstances a fresh opportunity should be given to the defendant to adduce her evidence. I have given the matter my anxious consideration. As the grounds for the order of the District Munsif are not clear, and as undoubtedly, the learned Subordinate Judge has declared his order correct on a ground which I do not think was present to the mind of the learned District Munsif, one can well hold that the position did not appear to be absolutely clear to the mind of the defendant's advocate; and this probably is the explanation for his conduct in refusing to adduce evidence, though if this was the main reason one fails to see why he continued to adduce evidence for some time after the ruling and declined to give further evidence only afterwards. Even though it is assumed that the District Munsif did not give any definite ruling, or even if the ruling given is assumed to be wrong, still the defendant's pleader was not justified in refusing to adduce further evidence, after he had submitted to that ruling and proceeded with the examination of defendant's witnesses 1 and 2. In view of the circumstances detailed above I think it is necessary in the ends of justice that an opportunity should be given to the defendant to adduce her evidence. But having regard to her conduct this concession can be given to her only on condition that she pays all the costs of the plaintiff except the institution fee up to date irrespective of the result of

the suit and should in no way endeavour to obtain possession of the properties from the plaintiff during the pendency of the suit. Mr. Vinayaka Rao has candidly stated that he is willing to be put upon terms. I would therefore set aside the decree of the lower Court and remand the case for disposal to the lower Court according to law after allowing the defendant to adduce further evidence. The plaintiff will be allowed to adduce whatever evidence she thinks necessary to meet the further evidence adduced by the defendant. The costs incurred in the lower Court will be provided for in his decree by the learned Judge.

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