

In Re: Ayya Nadar

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Court : Chennai

Decided On : Dec-09-1952

Reported in : AIR1953Mad933; (1953)1MLJ462

Judge : Ramaswami, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11

Appeal No. : Civil Revn. Petn. No. 2228 of 1952

Appellant : In Re: Ayya Nadar

Advocate for Pet/Ap. : P.S. Chandrasekharan and ;P.S. Ramachandran, Advs.

Disposition : Petition dismissed

Judgement :

ORDER

1. This is a Civil Revision Petition which is sought to be filed against the finding given by the learned District Munsif, Koilpatti, on a preliminary issue regarding 'res Judicata' raised in O. S. No. 42 of 1952.

2. The facts necessary for understanding this finding are: The plaintiff Subbiah Nadar and the defendant Ayyah Nadar are brothers. This plaintiff had purchased from his mother Shenpa-gathammal the eastern portion of a land 2-98 acres in extent and for which the sale deed stood in the name of that Shenbagathammal.

The vendee was obstructed from taking possession of the property and therefore he filed O. S. No. 98 of 1949. In that suit the defendant-brother raised the plea that though the sale deed stood in the name of the mother, in reality the property had been purchased with the funds of the Joint family and that the sale deed had been taken 'benami' in the name of the mother and that the plaintiff was not entitled to the eastern half of the property claimed by him as vendee. This suit was dismissed and there was an appeal therefrom in A. S. 127 of 1950 on the file of the Sub-Court, Tuticorin, and therein the findings of the lower Court were confirmed and the appeal was dismissed.

3. The plaintiff has therefore filed this suit for partition and reducing into separate possession of his half share in the aforesaid entire property viz., the eastern and western portions.

4. The contention of the defendant among other, things was that the present suit was barred by the principle of 'res judicata' and that this plaintiff might and ought to have, put forward this claim in the previous suit.

5. The learned District Munsif rejected this contention on the ground that the plaintiff was not bound to put forward this claim in the prior suit because if he had done so, it would have resulted in putting forward incongruous pleas and that this is not contemplated by the line of cases on the subject.

6. There can be no doubt that the plea of 'might and ought' cannot be extended to the extent of compelling a litigant to set up incongruous pleas in order to exhaust all the possible permutations and combinations of attacks or defences which might be evolved. Just as the provisions relating to 'might and ought' have been engrafted in Section 11, C. P. C. in order to avoid multiplicity and protraction of proceedings by wilful keeping back grounds of attack or defence in order to furnish ammunition for fresh rounds of litigation, and to put an end to causes becoming infinite when the lives of men are finite, and to prevent litigants from becoming so many Sisyphuses the non-necessity to put forward incongruous pleas, even though by not putting them forward a litigant would not exhaust all his possible claims, is based upon the common sense principle that no man can be compelled to come to Court in order to advance pleas which will work out their mutual

destruction.

The absurdity of compelling a party to put forward such incongruous pleas is well brought out in two well known stories possibly apocryphal of pleadings in American Courts. The first was a suit filed for damages in regard to a domestic utensil namely a kettle which had been lent and not returned in the good condition it was when it was lent. The alternative defences set up by the defendant and put forward by his counsel to the Court were: 'May it please your Honour', said Counsel,

'In the first place we contend that the kettle in dispute was cracked when we borrowed it; secondly, that it was whole when we returned it; and thirdly, that we never had it.'

The second is a case where damages were claimed for arson. The alternative defences put forward in that case and pleaded by the defending counsel were :

'I shall first prove to the Jury (civil trials are by Jury) that the defendant is incapable of such an act; if that does not convince you I shall show that my client was insane when the act was committed; if that fails I shall prove an absolute alibi; and as a last resort, may it please the Court, I shall show that the building was over-insured and consequently there was no loss and that this alleged crime was only a neighbourly kindness to the owner of the building.'

7. In the instant case if this plaintiff had put forward both the claims it would certainly have been incongruous and would have brought about their mutual destruction without any effort on the part of the defendant. His case was that he had paid hard cash for the purchase of the property whose title and possession were with his mother and that that title and possession had passed to him under that sale deed. If he were to advance the plea that he should get a half share in the property in any event, would any Court believe the payment of consideration or the 'bona fides' of the sale or the title and possession set up in the mother supported by a sale deed in her name etc.? Only a suicidal client and a lunatic advocate would put forward such incongruous pleas in Court, the evidence in support of which will be such that it might be destructive of the other plea and unite

causes of action leading to inconsistency and confusion.

8. In fact though in the immortal language of Mr. Bumble, the law may be an ass, it is not so asinine as to impose such patent hardships on the prospective litigant. The question whether a matter might have been made a ground of attack or defence in the former suit, rarely presents any difficulty. Whether it ought to have been made a ground of attack or defence depends upon the facts of each case. If a matter could have been set up as a ground of attack or defence in the former suit, 'and' if its introduction into that suit was 'necessary' for a complete and final decision of the right claimed by the plaintiff therein, it will be deemed to be a matter which 'ought' to have been made a ground of attack or defence in that suit: -- 'Mootoo Vijaya v. Katama Natchiar', 11 Moo Ind App 50 (A); -- 'Doorga Persad Singh v. Doorga Kumvari', 4 Cal 190 (B), unless where the evidence in support of one ground is such as may be destructive of the other ground and in such a case two grounds need not be set up in the same suit.

The reason given is that the test of determining whether both the grounds ought to have been set up in the same suit is afforded by the provision of Order 2, Rule 1, C. P. C. and the provisions of that rule as to the framing of suits are only to be applied as far as practicable. It is clear therefore that it cannot be said of any matter that it 'ought' to have been set up as a ground in the former suit, if its introduction would have been 'incongruous' to the matter of that suit: -- 'Masilamania v. Thiruvengadam', 31 Mad 385 (C); --'Ramaswamy v. Vaithinatha', 26 Mad 760 (D); --'Rangaswamy v. Appalaswamy', AIR 1917 Mad 481 (E); -- 'Anant Subrao v. Mahableswar Bhat', AIR 1931 Bom 114 (F) ; -- 'Deputy Commr. of Kberri v. Khanjan Singh', 29 All 331 (O); -- 'Lala Soul Ram v. Kanhaiya Lal, 40 Ind App 74 (H); 'Dewan Chand v. Hari Chand, AIR 1914 Lah289 (D); -- 'Mt. Aishan v. Muhammad Din', AIR1917 Lah 19 (J); -- 'Kameswar Pershad v. Rajkumari Rattan Koer', 20 Cal 79 (K); -- U Sin v. Ma Ma Lay, AIR 1941 Rang 118 CD; -- 'Ningaya Bharmanna v. M. Gurappa : AIR1931 Bom187 ; -- 'Krishnaswarai v. Manikka Mudali : AIR1931 Mad268 ; -- 'Debendra Nath v. Nagendranath : AIR1933 Cal900

Thus, a person claiming property on the allegation that it is wakf property and that he is the manager thereof is not bound to claim the same property in the same suit alternatively in his own right in the event of its being held that the property was not 'wakf property. Having asserted that the property is 'wakf property, he could not have consistently claimed the same property as his personal property except possibly in an alternative form. He was however not under an obligation to adopt the latter course. The mere fact that he could have claimed the property in the alternative as his own property is no ground for saying that he ought to have done so. Again, Explan. IV to Section 11, C. P. C. does not apply unless the parties are litigating under the same title. Thus, if A sues B for a declaration that he was the owner of certain property, he is not bound to plead in the alternative that if he is not the owner he is a permanent tenant.

In the instant case the plaintiff having asserted in the previous suit that the property was the separate property of his mother and which she was competent to dispose of in any manner she liked, he could not have pleaded in the alternative that it was joint family property and that he is entitled by birth to take a half share therein along with his brother subject to the rights, if any, of the mother. Therefore, Explan. IV to Section 11, C. P. C. is not applicable to this case as has been found to be on the facts by the learned District Munsif,

9. I shall now briefly refer to three decisions cited by the learned advocate for the petitioner. In -- 'Muhammad Rowther v. Abdul Rahman Rowther', AIR 1923 Mad 257 , a person instituted a suit against a trespasser in possession, for partition and recovery of his share in certain lands on the footing that he was a co-owner under a joint purchase made by himself and his two deceased brothers. But his claim was dismissed on the ground that the purchase was not a joint one but the sole purchase of one of the deceased brothers. The former instituted a subsequent suit to recover his share as one of the heirs of the deceased purchaser. It was held that the suit was barred by the rule of 'res judicata' as the plaintiff ought to have joined his subsequent ground of title in the former suit under Section 11, Explan. IV, C. P. C. This decision proceeded on the footing that the joining together of the two claims one under the purchase and the other as a heir would not lead to any confusion or any embarrassment. That is not the case here.

The second decision is -- 'Goshawarali v. Adhik-Lal Sahu', : AIR1948 Pat302 , wherein the facts were: In 1928 M executed a mortgage in favour of T in respect of plot I. In 1929 he executed another mortgage in favour of S in respect of plots 1, 2 and 3. In 1931 M executed another usufructuary mortgage bond in favour of P in respect of plots 1, 2 and 3 of which P was put in possession. In February 1934 M executed a sale in favour of D in respect of plots 1 and 2. M executed in March 1934, another sale deed in favour of P in respect of plots 1, 2 and 3. P was dispossessed in 1937 by D on the strength of his purchase. P instituted a suit for possession on the strength of his purchase. The suit was dismissed on the ground that D was entitled to possession on account of his prior purchase. P instituted another suit for ejectment of D as trespasser. In this suit P based his claim on the usufructuary mortgage bond of 1931.

It was held (i) that the cause of action in this suit was the same as in previous suit; (ii) that P was litigating under the same title in both the suits and (iii) that therefore the suit was barred by constructive 'res Judicata' under Section 11, Explan. IV, C. P. C. It will be seen that this is not the case of a person litigating under different titles but a case of suing twice on identical cause of action.

The third decision is -- 'Venkataramayya v. Lalbibbi Saheba', AIR 1935 Mad 90 (R), where a former suit by the wife of a last male holder against some purchasers in a court sale by a mortgagee, alleging the suit properties had been gifted to her by her husband and that no title passed to the alienees under the court sale was dismissed and a later suit was filed by the daughters of the last male holder for partition of the suit properties, and the wife, the plaintiff in the former suit, claimed her right to a share in the properties and the question was, whether the matter, which not only might but also ought to have been made a ground of attack in the former suit by her, could not be availed of now by the rule of 'res judicata' it was held that the claim of a share by the wife was barred by 'res judicata'. The facts of the instant case are very different and I have already pointed out how the introduction of the present plea into the former suit was not necessary for a complete and final decision of the right claimed by the plaintiff in that suit and that in fact if it had been introduced, it would have been incongruous & a wholly supererogatory task taken upon himself by the plaintiff in order to destroy his own

case.

10. I cannot more fittingly close this matter than in the words of Lord Penzance;

'Procedure is the machinery of law after all --the channel and the terms whereby law is administered and Justice reached -- It strangely departs from its proper office if in place of facilitating it, it is permitted to obstruct and even to extinguish legal rights and is thus made to govern where it ought to subserve:' -- 'Kendall v. Hamilton', (1879) 4 Ac 504 (S).

11. In the result, this revision petition is dismissed.

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