

(Veda) Krishnaswami Mudaliar Vs. (Veda) Malai Mudaliar

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Court : Chennai

Decided On : Mar-01-1935

Reported in : AIR1935Mad649

Appellant : (Veda) Krishnaswami Mudaliar

Respondent : (Veda) Malai Mudaliar

Judgement :

Madhavan Nair, J.

1. Plaintiff is the appellant. The suit out of which this second appeal arises was instituted by the plaintiff to recover the amount which,, according to him, though the defendant shad agreed to pay at a partition between him and the defendant, the plaintiff had ultimately to pay. The defendant denied the partition alleged by the plaintiff and contended that the claim was barrod by res judicata by reason of the decision in O.S. No. 325 of 1926. Both the lower Courts accepted the contention of the defendant and dismissed the plaintiff's suit. In this second appeal the question for consideration is whether the plaintiff's suit is barred by reason of the decision in O.S. No. 825 of 1926. To appreciate the arguments it is necessary to state the facts relating to O.S. No. 325 of 1926. Both the decision thereon. The plaintiff and the defendant are brothers. The plaintiff was defendant 1, and the defendant was defendant 2 in that suit. There the mortgagee sought to recover the mortgage debt from the joint family and made defendants 1 and 2 parties to the suit. The

mortgage-deed was executed by defendant 1, i.e., the present plaintiff, as manager of the family. The plaintiff's case was that the two brothers were members of an undivided Hindu family and that the debt was binding on the joint family. Having stated the basis of his claim in this manner he added in the plaint at the plaint of para. 7:

Further, as it appears that the defendants affected partition subsequent to the suit mortgage, and some of the properties covered by the mortgage have fallen to defendant 2's share, defendant 2 has been impleaded herein.

2. Defendant 1 in that suit contended that there was a partition between himself and defendant 2 and the particular debt was allotted for payment to defendant 2's share and he was not there-sovereign liable. One of the issues in the case was whether the partition alleged was true or not. It was found that the partition was not proved. So far as the plaintiff in that suit was concerned he did not get any relief against both the defendants. The relief which he got was limited to defendant 1's share of the family properties the ground being that the debt for which the mortgage was executed was not binding on the joint family. His relief was therefore limited to defendant 2's share. Apparently after the decree defendant 1 had to pay the debt and having paid it he has instituted the present suit to recover the amount from defendant alleging that according to the partition already referred to the present defendant who was defendant 2 in the prior suit was the person liable to pay. The point for decision is whether the question of partition which was found not to have been proved in that case is res judicata in the present suit, From what has been stated above it is clear that the question of partition was raised specifically between the defendants in that case, i.e. the present plaintiff and defendant, who were defendants 1 and 2 in the prior suit. The question for decision is to what extent will a question which was decided between two defendants in a suit will be res judicata in a subsequent suit where the question arises between the same two defendants as in the present case. The law on the point is very clear and it has been settled in a series of decisions of which the latest is a decision of the Privy Council in *Munni Bibi v. Tirloki Nath* 1931 PC 114. In that decision their Lordships of the Privy Council state the law as follows:

A decision operates as res judicata between co-defendants provided (1) there was a conflict of interest between them, (2) it was necessary to decide that conflict in order to give the plaintiff the relief which he claimed and (3) the question between co defendants was finally decided.

3. It may be said having regard to the conclusions arrived at in the previous decision that the first and third points postulated by their Lordships would clearly apply to the case before us. The only question is whether a decision on the question of partition was necessary in order to give the plaintiff in that suit the relief which he claimed, i.e., whether the second point postulated by their Lordships would apply to the decision in O.S. No. 325 of 1926. It is clear to me reading the plaint in that case that the basis of the plaintiff's claim was the allegation that the defendants therein were members of an undivided family and that the debt was binding on the joint family, the mortgage having been executed by defendant 1 as manager. He did not base his claim on the ground that there was a debt, that between the defendants they had agreed that defendant 2 should pay the debt and therefore defendant 2 should be made to pay it. He could not have put forward this claim for the simple reason that he wanted to get relief against both the defendants. If this case was based exclusively on partition he could have got the relief only from defendant 2. However that may be it is clear as he himself says he made defendant 2 a party to the suit not because defendant 2 was divided from defendant 1 as a result of the partition, but as he alleges some of the family properties on account of the partition, are alleged to be in the possession of defendant 2 and therefore he was made a party.

4. It was solely for that reason and for no other reason that he was made a party by the plaintiff to that suit. Having regard to the cause of action alleged by him he could have succeeded in the suit without making defendant 2 a party. That is clear; but he did make defendant 2 a party for the reason that it may not be said that defendant 2 can escape on some other ground from his claim. It was only on account of extra caution that defendant 2 was made a party and not for getting relief on the claim which he alleged against the family as such. It appears therefore that the decision as to the question of partition was not necessary at all in order to give the plaintiff relief in the prior suit. That is the opinion of the District

Munsif also in the present case. But he thought that though the point was not necessary for adjudicating the claim of the plaintiff, if defendant 1 had succeeded in the plea, viz., that there was a partition, the plaintiff would have been given the relief he asked for in the suit as against defendant 2, and therefore his opinion was that on this finding as to partition if it was favourable to defendant 1 the plaintiff could have obtained relief. But the learned District Munsif forgets that even if the partition was proved as a fact it would have been hardly possible for the plaintiff to get a decree in that suit; he being a stranger to the contractual arrangement between the two defendants. In my opinion therefore the question as to whether there was a partition between the two defendants though it was specifically raised and decided as between the defendants in that case was not necessary for the decision of the claim with respect to the plaintiff in that suit, and therefore following the principle enunciated by their Lordships of the Privy Council the decision in the prior suit does not amount to res judicata in the present case. The question of partition therefore is left open for the parties to fight out in the present case. For the above reasons, I hold that the present suit is not barred by reason of the decision in O.S. No. 325 of 1926 and the lower Courts will have to decide the case on the merits.

5. I set aside the decisions of the Courts below and remand the case to the District Munsif of Chingleput for disposal according to law. The appellant will be entitled to his costs in this Court and also to a refund of Court fee paid on the memorandum of appeal.

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