

Velusamy Vs. Viswanathan (Died),

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Court : Chennai

Decided On : Jul-01-2002

Reported in : (2002)2MLJ833

Judge : Prabha Sridevan, J.

Appeal No. : A.S. No. 134 of 1987 and Cross Objections

Appellant : Velusamy

Respondent : Viswanathan (Died), ;thangavel (Died), ;n. Subramaniam, ;n. Meiyazhagan, ;lakshmi, ;srinivasan, ;nar

Advocate for Def. : P. Pandi, Adv. for RR1, 11 to 14 for minors RR5 to 10

Advocate for Pet/Ap. : S. Parthasarathy, Adv. for Sarvabhauman Associates

Disposition : Appeal allowed

Judgement :

Prabha Sridevan, J.

1. One Alagiriswami Naidu filed O.S.No.424 of 1974 for recovery of money against Thangavel, the second respondent herein now deceased. The first respondent represented by his mother Nallammal the 17th respondent filed an application under O.21, R.58, CPC in the execution proceedings of the decree in that suit. The

suit properties in that execution application and the suit properties in the present appeal are the same. The present appeal is the continuation of a later suit O.S.No.69 of 1983, which is a suit filed by the first respondent as a minor represented by his mother against his father 'T' for declaration of his and his brother's share and other reliefs. The aforesaid Alagiriswami and the appellant herein who purchased the suit property in the court auction sale conducted in pursuant to the earlier decree were also arrayed as defendants. In the application under O.21 R.58, CPC it was claimed that the first respondent had an interest in the suit properties. There was a partition deed in 1974, marked as Ex-A1 under which 'T', the father was given only a life estate in the properties and that therefore, the entire suit properties cannot be brought to sale to satisfy the decree debt. The order dismissing the application is marked as Ex-B4. No appeal was filed there against and the order has become final. The same partition deed was relied on in the present suit for claiming a share in the suit property. In the present suit it was claimed that on no account the suit properties can be brought to sale. The decree debt was for an immoral purpose since 'T' was leading a wayward life. The main defence in this suit is the bar of res judicata.

2. The Trial Court, however, found that the order Ex-B4 would apply to the one third share of the father and that the present suit is not barred by res judicata. The partition deed, Ex-A1 was accepted by the Trial Court as a valid partition and the suit was not decreed as prayed for, but there was a preliminary decree for two third share of the sons of 'T'. The appeal is filed by the auction purchaser. Cross objections have been filed by the plaintiff for not decreeing the suit as prayed for.

3. The questions that arise for consideration in this appeal are:

(a) Whether the suit is not barred by res judicata?

(b) Whether the suit even if maintainable, can be decreed, since the son's shares are liable for the debt of the father, on account of pious obligation? and

(c) Whether the evidence produced by the plaintiffs are sufficient to show that the debt was an immoral debt

4. Res judicata:

Ex-B6, dated 18-04-1978, is the order passed in the said application under O.21, R.58, CPC. In that petition, the case of the first respondent and his brother, Soundarrajan was that the suit properties were ancestral and there was an oral partition between the father and his brother 10 years ago and that they were all living separately and this oral partition was confirmed by a registered partition deed, Ex-B14 dated 22-08-1974 and the suit property was allotted exclusively to his father and therefore, 'T' and the sons, viz., the first respondent and the fifteenth respondent were entitled to it as a joint family properties. Because of the bad habits and immoral life of 'T', the family had entered into a family arrangement to secure the property. This is dated 29-03-1974(Ex-A1). Under Ex-A1, 'T' was given only a life estate in respect of the suit properties with no power of alienation. Therefore, Alagirisamy Naidu cannot proceed against these properties while executing the decree in O.S.No.424 of 1974. This petition was resisted by the said Alagirisamy Naidu on the ground that the suit property was allotted to the father in Ex-B14. It is specifically mentioned therein that the decree debt and the discharged 'T's share. The learned Judge considered the evidence adduced on the side of both the parties and came to the conclusion that Ex-A1 is a self-serving document. He did not believe the case of the petitioners that earlier there was a partition deed and dismissed the application.

(a) In the present case, the plaintiffs have referred to the immoral life of 'T' the reasons for executing Ex-A1, and also to the order, Ex-B6. However, it was stated that Ex-B6, was a summary order. According to the first respondent, Alagirisamy Naidu was fully aware that only his mother who was in possession and enjoyment of the suit property from the year 1974, after Ex-A1, and that she had been managing the properties as the documents would show and since, 'T' only had a life estate, the court auction sale will have no effect over the share of the plaintiffs.

(b) The learned counsel for the appellant would submit that since the questions that arose in the suit and the execution application are identical, the suit ought to have been dismissed as barred by res judicata and to support his case, he relied on the following decisions:

(1) Yakub Rowther v. Poongavanammal (1990 1 LW 444)(2)Kandadai Narasimhachariar v. Raghava Padayachi (1945 (32) Mad 333) (c) The learned counsel for the respondent would however submit that a perusal of Ex-B6 would clearly show that this question had been left open by the learned Judge and he had given leave to the petitioners therein to file a suit for recovery for the vested remainder as and when the occasion arises. The crucial recital in Ex-A1 is that,

'ek;kpy; 1 ,yf;fkpl;l j';fnty; bul;oahh; vt;tpj guhjPd';fSf;Fk; cl;gLj;jhky; mjd; tUkhdj;ij kl;Lk; mth; Ma[s; tiu mile;J bfhs;Sk; brhj;Jf;fs;/@/ There is no mention in this document of the debt and the manner in which it should be discharged. On the other hand, in Ex-B14, which is subsequent to Ex-A1, which is alleged to be the partition deed amongst 'T' and his brothers there is no mention of either the earlier oral arrangement or Ex-A1. It reads as if they were divided only on Ex-B14.

@ehk; vy;yhUk; cwpe;J mtpgf;j FLk;gj;ij nrh;e;j rnfjhuh;fs;. ,Jtiuapy; ehk; vy;nyhUk; VfFLk;gkhf ,Ue;J xw;Wikahf FLk;gk; elj;jp te;njhk;/@ And there is a specific mention of the debt incurred by 'T'. The recitals are: A Schedule fhuh;.

viz., 'T' bfhLf;fntz;oa fld; Fspj;jiy mHfphp eha[Ltpw;F@/ Therefore, in Ex-B14 the debt incurred by 'T', is carefully mentioned so that the shares of 'T's brother would not be affected by any claim of the decree holder or the auction purchaser.

(d) The Full bench decision in (cited supra) has dealt with the scope of a decision on claims by way of objections by third parties to execution of decrees. In the Editor's note to the said Full Bench decision reference is made to the changes effected by Act 104 of 1976, and it was held that if the legal position is clearly visualized the dispute of the claim to the debtor's entitlement urged by the claimant-third party when adjudged is and remains an adjudication of claim of title between the debtor personified in his creditor and the claimant. It was also held that the question whether the decision in a suit filed pursuant to O.21, R.63, CPC will operate as res judicata in a subsequent litigation will depend upon the scope of controversy in that suit and also whether the matter was directly and substantially in issue to the suit between the same parties and that it makes no difference, whether the adjudication is in the suit under O.21, R.63, CPC as it stood prior to the amendment or an adjudication under O.21, R.58, CPC as it stands at present.

The language of O.21, R.58, CPC makes the position clearer and when any claim is preferred or objection is made on the ground that any property attached in execution of a decree is not liable to such attachment, all questions relating to right, title or interest arising between the parties and relevant to the adjudication of the claim or objection shall be determined by the Court dealing with the claim and not by a separate suit. Further, where any claim or objection has been adjudicated upon under this rule, the order so made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree. Therefore, against the order passed in Ex-B6, the plaintiffs in the present suit had the remedy of filing an appeal. They did not do so.

(e) The Full Bench cited from 38 MLJ 397(Velu Padayachi alias Sadaya Padayachi v. Arumugam Pillai) was quoted where it was observed that the auction purchaser is entitled to take advantage of the order against the claimant not because the auction purchaser is the representative of the decree-holder, but, because the order which established the right of the decree holder to bring the property to sale against the claim of the claimant cannot be given effect to otherwise and was clearly intended by the Legislature to have the effect of precluding the claimant from putting forward his claim again in opposition to the auction purchaser at the sale held in pursuance of the order against the claimant. Therefore, the question clearly boils down to whether the present suit raises the same issues between the same parties litigating under the same title. A comparison of the present plaint and Ex-B6 shows that the matter was directly and substantially in issue in the earlier proceedings. There is some difficulty in construing the effect of the last sentence in the following paragraph in Ex-B6 :

'Ex-A1 document is a self-serving document. Even now the petitioners concede that the second respondent is entitled for life-estate. The petitioners would only claim the vested remainder. It was open to them to file the suit for recovery as and when they became entitled to the vested remainder'.

This is resolved by the decision of the Supreme Court in Most. Rev. P.M.A. Metropolitan Vs . Moran Mar Marthoma where there is a detailed discussion on the principle of res judicata and there is a reference to Mysore State Electricity Board

Vs . Bangalore Woolen, Cotton and Silks Mills Limited

'it is indeed true that what becomes res judicata is the 'matter' which is actually decided and not the reason which leads the Court to decide the matter. Therefore, what was decided in Ex-B6 is that the properties are liable to be brought to sale in Court auction and the claimants' objection was adjudicated against them.

(f)A very eloquent passage has been extracted from Ampthill Peerage case 1976 II AER 411 in the same Supreme Court decision.

'Nevertheless, the law recognizes that the process cannot go on indefinitely.... It is in the interest of society that there should be some end to litigation... Truth may thus be shut out but society considers that the truth may be bought at a too high a price that truth bought at such expense is the negation of justice. ...' 'Society says we have provided Courts in which your rival contentions have been heard. We have provided a code of law by which they have been adjudged. Since judges and juries are fallible human beings, we have provided Appellate Courts which do their own fallible best to correct error. But in the end you must accept what has been decided. Enough is Enough, and the law echoes:- res judicata the matter is adjudged.' So the Supreme Court observed that such is the principle of finality.

(g) In this case, it is clear that there has been a debt incurred by the father. The suit was filed for recovery of the said amount. This suit was allowed to be decreed ex parte. After the borrowal and before the suit was filed, Ex-A1 has been brought about. The Court which decided the claim petition came to the conclusion that it was a self-serving document. In any event, a desperate attempt is made by the family to save this property from being brought to sale and therefore, the plaintiffs project a case that their father was a womanizer, an alcoholic and a wastrel and that the mother alone had to manage the suit properties and that the debt was incurred for an immoral purpose and therefore, atleast their share should be saved from being brought to sale. The intention of the parties is very clear. But, however, the question whether this property can be brought to sale and whether the share of the plaintiffs is not liable for the decree-debt was directly and substantially in issue in the earlier proceedings. It has been decided and the decision has also been allowed to become final. The present suit seeks to revive the same issue in an

attempt to get a different decision. The Supreme Court has said that even if this is the truth it cannot be obtained at such a great expense and there should be finality. The present suit is therefore, definitely barred by res judicata.

5. Pious Obligation and Immoral Debt:

(a) As far as the doctrine of Pious Obligation is concerned, allegations have been made against the father's immoral activity and thereafter, it is stated as follows:

'The plaintiffs come to know that the second defendant has filed the suit in O.S.NO.424 of 1974 on the file of the District Munsif, Kulithalai against the first defendant claiming that he has advanced some amounts to the first defendant for his illegal and immoral ways of living.' (b) In the written statement, the defendants have denied that the debt was for an immoral purpose and had specifically stated that the debts incurred by the first defendant shall be repaid on the principles of pious obligation.

(c) The learned counsel for the appellant relied on the following two decisions:(1)Velivelli Sydulu Vs . Guntupalli Venkateshwarlu and(2)Kasirajan v. Ramasamy Nainar1992 I L.W. 89

(d) In the evidence of P.W.1 it is found as follows:

@fld; th';fp D1 vd;d bryt[bra;jhh; vd;gJ bjhpahJ/@ Though in the chief examination she has stated that,

@vd; fzth; fld; th';f mtrpak; ,y;iy/ mg;go fld; th';fpaJ bjhpahJ/ FLk;g ed;ikf;F th';ftpy;iy/@ (e) P.W.2, Marachi Reddiar who is said to have helped P.W.1, the mother of the plaintiffs to file the suit has no knowledge about the suit debt.

@o2lk; g[nuhnehl;oy; o1 fld; th';fg;gl;IJ vdf;F nehpy; bjhpahJ/ nkw;brhd;d flidg; gw;wp o1w;Fk; mth; rnfhjuDf;Fk; Vw;gl;l ghfg;gj;jpuj;jpy; Fwpg;gpl;IJ gw;wp vdf;Fj; bjhpahJ/@ (f) D3 also is of no help in this regard because he has deposed that,

@o1 dplk; vdf;F nehpilahd mDgtk; ,y;iy/ ahh; ahhplk; fld; th';Ffpwhh; vd;w tpgu';fs; vdf;Fj; bjhpahJ/@ In these circumstances, it is difficult to accept the plea that the debt was an immoral one.

(g) Ofcourse, the learned counsel for the respondent would strenuously urge that all the witnesses on the side of the plaintiff have given evidence of 'T's profligate nature and it was also on record that the mother alone was managing the lands which would show that the allegations regarding the conduct of the father was genuine. But in the Division Bench judgment of Andhra Pradesh referred to above it has been held that to escape the liability of pious obligation the son should make out that the borrowing was utilized for immoral purposes and that it is not sufficient to make a general charge of immorality against the father, and that even otherwise, the son cannot succeed if it is not proved that, but for the borrowings the life of vice could not have been indulged in by his father. 1992 I L.W. 89(cited supra) was an appeal that arose out of an application under O.21 R.58, CPC in somewhat similar circumstances. The learned Judge held that under the provisions of the Code as amended in 1976, the Court shall proceed to adjudicate all questions including questions relating to right, title or interest on the property attached arising between the parties to a proceeding or their representatives under the rule. It was open to the appellants to prove that the debt was not binding on them or that it was tainted with illegality or immorality.

6. Under Ex-A1, the recitals are as follows:

@A brl;a{y; brhj;Jf;fs; ek;kpy; 1 ,yf;fkpl;l j';fnty; bul;oahh; vt;tpj guhjPd';fSf;Fk; cl;gLj;jhky; mth; Ma[s; tiu mile;Jbfhs;Sk; brhj;Jf;fs;/@ No mention is made of the debt in this document. In 1992 I L.W. 89(cited supra), one Ramalinga Padayachi and his father constituting a Hindu Joint Family borrowed a certain sum. When the lender issued a notice Ramalinga Padayachi's sons represented by their mother filed a suit for partition. An ex parte decree was obtained against Ramalinga Padayachi, his father and his brother in the suit filed for recovery of money due under the promissory note.

7. The observations of the Supreme Court in Deshpande Vs . Kusum Kulkarni were referred to. Finally the facts of that case were crystallized and it was held that the decision of the Supreme Court applied on all fours. And further it was held as follows:

'In this case the debt is not a personal or an individual debt of the father or the appellants. It was a debt due by the entire family in partition of the entire properties without making provision for payment of the debt due by the family would not prevent the creditor from proceeding against the family property. Apart from that, the appellants are bound by the doctrine of pious obligation.'

The aforesaid comment would apply very well to the present case only with a slight distinction that too only with regard to the nature of debt. But the fact remains there is no evidence to show that it was a debt tainted with illegality or immorality.

8. In this context the observation of the Supreme Court in *Anthonisamy Vs . Chinnaswamy* might be relevant.

'.. The liability imposed on the son to pay the debt of his father is not a gratuitous obligation thrust on him by Hindu Law, but is a salutary counterbalance to the principle that the son from the moment of his birth acquires along with his father an interest in joint family property.'

This decision applies to this case on two counts. One is that in the present suit there is no proof that the debt is tainted with illegality or immorality and therefore, not binding on the son. Two, the pleas that the debt was an immoral one and that there was no pious obligation was a plea that they ought to have raised in the earlier proceedings but did not. Therefore, they cannot be permitted to raise it now.

9. In a recent decision reported in 2002 II All ER 353 the question arose as to whether a decision which has become final can be reopened and the extent to which a Court of Appeal had residual jurisdiction to do so. Lord Woolf, C.J., says in no uncertain terms.

'Furthermore parties who are involved in litigation are expected to put before the Court all the issues relevant to that litigation. If they do not, they will not normally be permitted to have a second bite at the cherry.'

10. In the result, the judgment and decree of the Trial Court is set aside and the appeal is allowed as prayed for. For the same reasons the cross objection is also dismissed.

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