

Chandrapal Sharma Vs. Sumathi Devi

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Court : Chennai

Decided On : Apr-03-2013

Judge : M.Jaichandren

Appellant : Chandrapal Sharma

Respondent : Sumathi Devi

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS Dated :

03. 04.2013 Coram The Honourable Mr.Justice M.JAICHANDREN and The Honourable Mr.Justice M.M.SUNDRESH Original Side Appeal No.20 of 2013 & M.P.No.1 o

1. Chandrapal Sharma 2.Mahendra Kumar Sharma ... Appellants -vs- Sumathi Devi (Deceased) 1.Suresh Kumar Sharma 2.Inderchand Sharma 3.Basananthi Bai 4.Guneswarlal Shirma 5.Nirmala Devi 6.Manju Devi 7.Santhosh Devi 8.Ratanlal Sharma 9.Pakash Chand Sharma ... Respondents Original Side Appeal filed under Order XXXVI Rule 1 of the Original Side Rules, 1956, read with Clause 15 of the Letter Patent against the order dated 22.06.2012 made in C.S.No.418 of 2007. For appellants : Mr.M.L.Ramesh For respondents : Mr.B.Balachandran for R1 & R2 Mr.M.Kumaraswami for R3 & R8 No appearance for R4 to 7, 8 & 9 JUDGMENT (The Judgment of the Court was delivered by M.M.SUNDRESH,J.) The unsuccessful defendants 3 and 4 in a suit in C.S.No.418 of 2007, which was filed for declaration of shares and consequential partition as well as incidental reliefs,

are the appellants herein. 2.The suit properties originally belonged to one Bansilal Sharma, Ramlal Sharma and Rathanalal Sharma. The suit properties have been purchased under two separate sale deeds marked as Exs.P1 and P2. Ramlal Sharma died on 22.07.1977 leaving behind the plaintiffs and the ninth defendant as his legal heirs. Ex.P5 is the Legal Heir Certificate. Bansilal Sharma died on 06.12.1995 leaving behind defendants 1 to 7 as his legal heirs. Ex.P4 is the Legal Heir Certificate.

3. The ninth defendant earlier filed a suit in C.S.No.1460 of 1993 seeking partition. The suit was decreed ex-parte on 20.01.2004. Pending suit, even prior to the decree passed, Bansilal Sharma died as early as on 06.12.1995. Thereafter, the suit was filed by the plaintiffs seeking partition of 1/3rd share in the 1/3rd share of the deceased Ramlal Sharma in the suit properties.

4. The second defendant and the third defendants have filed written statements. The second defendant supported the case of the plaintiffs and the fourth defendant that of the third defendant. These two defendants viz., defendants 3 and 4, are the appellants herein. The main plea taken in the written statement is regarding res judicata since a preliminary decree has already been granted by this Court at the instance of the ninth defendant. In other words, there is no serious dispute regarding the entitlement of the parties to their respective shares. Defendants 2 and 3 alone cross-examined P.W.1. Defendants 1 and 5 to 8 were set ex-parte. The learned single Judge has framed the following issues for proper adjudication of the suit.

1. Are not the plaintiffs entitled for a declaration that they are entitled to 1/3rd share in the 1/3rd share of their late father Ramlal Sharma in the suit schedule properties? 2. Are not the plaintiffs entitled to a decree for partition by metes and bounds in respect of the suit schedule properties? 3. Are not the plaintiffs entitled for a decree for permanent injunction against the defendants 1 to 8, from in any manner interfering with plaintiffs' peaceful possession of the suit schedule properties? 4.Are not the plaintiffs entitled for recovery of Rs.4,32,000/- from the defendants 1 to 8 towards mesne profits in respect of the suit schedule properties? 5.Are not the plaintiffs entitled for future mesne profits in respect of the suit

schedule properties? Additional Issues:

1. Whether the suit is barred by res judicata? 2. Whether the defendants 3 and 4 are liable to pay mesne profits? 5. Before the learned single Judge, the arguments were advanced on the plea of res judicata. The learned single Judge was also pleased to observe that there is no dispute with regard to the status and the allotment of shares. Further more, as the arguments were focussed only on the issue of res judicata, it can be safely concluded that the appellants accepted the rightful share of the parties. Therefore, the learned single Judge, on a consideration of the entire materials available on record, was pleased to decree the suit. In so far as the claim of mesne profits is concerned, the learned single Judge has rightly directed that an enquiry shall have to be conducted. Challenging the same, defendants 3 and 4 being the appellants, have filed the present Original Side Appeal.

6. The learned counsel appearing for the appellant would contend that respondents 1 and 2 being the plaintiffs, cannot maintain the present suit. The earlier suit having been decreed at the instance of the ninth defendant herein, the only course open to the plaintiffs is to file an application for final decree in the said suit. As the issue involved between the parties has already been decided, the present suit is barred by res judicata. The contentions of the appellants were also sought to be adopted by respondents 3 and 8, even though they have been set ex-parte by the learned single Judge and no appeal has been filed. Accordingly it was pleaded that the appeal will have to be allowed.

7. Per contra, the learned counsel appearing for respondents 1 and 2/plaintiffs would contend that a preliminary decree granted by the same Court cannot be termed as finally determining the rights of the parties. Some of the defendants viz., defendants 1 to 7, were not parties to the earlier suit. The earlier suit was filed by the ninth defendant herein. The plaintiffs have not indulged in re-litigation. On the contrary, they want to assert their concluded right. Further more, what they seek is a higher share than that was granted by the learned single Judge in the earlier proceedings. The status of the parties continued to be the same. Therefore, when there is no division of joint family properties, the cause of action would survive.

The earlier decree passed was a nullity as it was passed without bringing the legal representatives of the deceased Bansilal Sharma, who died as early as on 06.12.1995. The ex-parte decree was passed only on 30.01.2004 including the deceased person. The decree passed earlier by this Court is a nullity and inexecutable. In any case, as there is no dispute between the parties regarding the entitlement and consequential division of shares, the appeal will have to be dismissed. In support of his contention, the learned counsel has made reliance upon the following judgments. (1) SANTAN NARAIN TEWARI V. SARAN NARAIN TEWARI AND OTHERS (AIR 195.Patna 331(VOL.46 C. 89); (2) PHOOLCHAND AND ANOTHER V. GOPAL LAL (CDJ 196.SC

301) and (3) GANDURI KOTESHWARAMMA AND ANOTHER V. CHAKIRI YANADI AND ANOTHER (2012) 1 Chennai Law Times 284).

8. Even though several issues have been framed, the learned single Judge has rightly taken into consideration of additional issue No.1 alone. Further more, in view of the statement made by the learned counsel appearing for the appellant that the argument is made only on the issue of res judicata, we also refrain from going into the other issues as unnecessary.

9. Admittedly, the earlier suit was filed by the ninth defendant in the present suit. That suit was filed in C.S.No.1460 of 1993 for the relief of declaration of shares and consequential partition. The suit was decreed ex-parte on 30.01.2004. It is not as if, the plaintiffs are trying to plead anything contra to the decree granted earlier by this Court. The contentions raised by the plaintiffs in the earlier suit and the present suit are one and the same. Therefore, we do not find any re-litigation. In other words, the plaintiffs in the present suit do not seek to raise any issue contrary to the issues decided in the earlier suit. Further more, some of the defendants were not parties in the earlier suit.

10. Admittedly, there was no division among the parties. Further, the plaintiffs have specifically pleaded in their plaint that the earlier decree could not be executed as some of the defendants in the present suit are not parties and one of the defendants viz., Bansilal Sharma died on 06.12.1995 i.e., even prior to the decree and the said fact is not in dispute. The ex-parte decree was passed in

C.S.No.1460 of 1993 on 30.01.2004 without impleading his legal heirs. Both the earlier suit and the present suit have been filed only before this Court. Therefore, we do not find any substance in the submissions made by the learned counsel for the appellants. Further more, the plaintiffs are seeking higher share than that was granted earlier. Considering the said issue, the learned single Judge of Andhra Pradesh High Court in ABDUL KAREEM SAB V. GOWLIVADA S. SILAR SAHEB AND ANOTHER (AIR 195.AP 4.(V 4.C 1.Mar.) (1)) has held as follows: When a preliminary decree declaring a right to partition or the shares of the parties, has not been given effect to by the parties proceeding to partition in accordance with it and the property continues to be jointly held by the co-sharers, their right to partition continues. So long as they continue to be interested in the joint property as co-sharers, it is competent for them to bring a suit for declaration of their right and for partition in case their right to partition is denied or challenged. Such a suit is not barred by res judicata.

11. A Division Bench of Patna High Court in SANTAN NARAIN TEWARI V. SARAN NARAIN TEWARI AND OTHERS (AIR 195.Patna 331 (VOL.46 C.

89) was pleased to hold in the following manner. A co-sharer has got a right to seek fresh partition if for some reason the previous decree for partition becomes unenforceable so that there has not been actually breaking up of the title and possession of the co-sharer by actual delivery to each of them of the specific portion of the joint property allotted to him by that decree. This principle follows from the fundamental concept of joint ownership and possession giving each joint owner a right to transfer from this joint ownership and possession into several and independent ownership and possession, but this transformation cannot in the eye of law be held to have been brought about unless and until the entire process of transformation starting from the ascertainment of the share of each joint owner, and ending in the actual delivery to him of the property given to him forming his share of the joint property, has been gone through; no long as this does not take place, the title and possession of all the co-sharers continues to be joint. It is only when the last stage has been completed that each owner ceases to be a co-sharer with the other. The matter, of course, might be different if in a particular case the facts proved show that the person seeking fresh partition is guilty of any conduct

amounting to fraud on his co-sharers or on the court, preventing directly or indirectly thereby the completion of the previous partition suit by actual delivery of the properties allotted to each co-share by the previous decree. Where the parties treated the previous decree to be infructuous and continued to remain in possession as co-sharers of the properties as before, a fresh suit for partition is not barred.

12. After going through the ratio laid down in the above said pronouncements, we are in respectable agreement with the same. A co-owner has every right to get his share, when previous decree has become unenforceable. Further more, when there is no actual division of status leading to delivery of each share to a co-owner, then a subsequent suit is maintainable as the cause of action still continues. Therefore, we do not find any scope for application of Section 11 of the Code of Civil Procedure in such a situation.

13. Accordingly, we do not find any reason to interfere with the judgment and decree of the learned single Judge and the Original Side Appeal is dismissed. Consequently, no order as to costs. Consequently, connected miscellaneous petition is also dismissed. (M.J.,J) (M.M.S.,J.) 03.04.2013 Index:Yes Internet:Yes
raa M.JAICHANDREN, J.

and M.M.SUNDRESH, J.

raa O.S.A.No.20 o

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