Tej Mai Sowcar Vs. Jagapilla Papayamma and ors.

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Court : Chennai

Decided On : Nov-28-1911

Reported in : 13Ind.Cas.788; (1912)22MLJ225

Appellant : Tej Mai Sowcar

Respondent : Jagapilla Papayamma and ors.

Judgement :

1. In this case the 1st and 2nd defendant each obtained a decree for money against the third defendant, and certain property was attached as belonging to the judgment-debtor in execution of each of the decrees. When the attachment was made at the instance of the 1st defendant, plaintiffs Nos. 1 to 3 and the 4th defendant, who are sisters, put in a claim petition urging that the property attached belonged originally to their mother, the 3rd defendant's wife; that they had succeeded as heirs, and that, therefore, 1st defendant had no right to attach it as belonging to the 3rd defendant. No claim petition was put in when the second defendant made the attachment. This suit is instituted by the plaintiffs, three out of four sisters, for a declaration ' that the attachments made by 1st and 2nd defendants are not valid' on the ground that the property does not belong to the 3rd defendant;

2. An issue was raised as to whether the suit was not bad for misjoinder of causes of action on the ground that there was really no cause of action against the 2nd defendant as no claim petition had been put in against his attachments and that at any rate the plaintiffs had not the same cause of action against the first and second defendants, The District Munsif upheld the objection of misjoinder and decided on the merits also against the plaintiffs, holding that the property belonged to the 3rd defendant and not to his wife.

3. On the appeal preferred by the plaintiffs the Subordinate Judge held that there was no misjoinder of causes of action and, disagreeing with the Munsif on the merits, held that the property belonged to the mother of the plaintiffs and the 4th defendant and passed to them by inheritance, and he passed a decree as prayed for in the plaint. Mr. Ramesam in second appeal argues that the Subordinate Judge was wrong in holding that there was no misjoinder. We have not heard his arguments on this question fully as we have come to the conclusion that even if there was misjoinder we should not interfere with the judgment of the lower appellate, court on that ground. Section 99 of the Civil Procedure Code (Act V of 1908) enacts that no decree shall be reversed or substantially varied * * on account of any misjoinder of parties or causes of action. The learned vakil for the appellant contends that this section is not applicable to this case as the suit was instituted while the repealed Procedure Code (Act XIV of 1882) was in force and the corresponding section in that Code, namely, Section 578, did not make any provision similar to that in Section 99 of the new Code in cases of

misjoinder of causes of an action. But we are of opinion that the section is one regulating the procedure of the appellate court, and that, therefore, it is applicable to all appeals heard after the Act came into force. The section was held to apply in a similar case-Aiyavu Mooppan v. Vellaya Nadan I.L.R. (1910) M. 55. Mr. Ramesam relied on Venkata Naranmha Appa Row v. Lakskmi Venkayamma Row (1909) 7 M.L.T. 296 where he contends that. Order XLI, Rule 33, dealing with the powers of an appellate court in pronouncing judgment, was held not to apply to appeals presented before the new Act came into operation. That was an appeal under Section 15 of the Letters Patent against the judgment of this court, the two Judges who originally heard the appeal differing in opinion. It is not clear whether the learned Judges may not have meant that the procedure in Letters Patent appeals is not governed by Order XLI, Rule 33. However that may be, in several subsequent cases it was held that Order XLI, Rule 33, would be applicable to all cases where an appeal is heard after Act V of 1909 came into force--in Krisfinier v. Sarvothama Royar (1910) M.W.N. 640., in Nagulla Kottayya v. Nagulla Mallayya (1909) 7 M.L.T. 296 (Abdur Rahim and Krishnasawmi Iyer JJ.) and in Chandramalhi Ammal v. Narayanasawmy Iyer I.L.R. (1909) M. 241. It may be noted that Wallis J. was one of the learned Judges who decided Venkata Narasimha Appa Row v. Lakshmi Venkayamma Row (1909) 7 M.L.T. 296. Section 99 of the new Code was held applicable in cases of misjoinder though the suit or appeal might be instituted before Act V of 1908. In Achuthan Unni v. Vasunni (1909) 20 M.L.J. 344 it was suggested that Section 99 of the new Code would not apply where the first court dismisses the suit on the ground of misjoinder, but the appellate court, overruling the decision, holds in appeal that there is no misjoinder and pronounces a decision on the merits of the case. But in a case already referred to--Aiyavu Moofian v. Vettayya Nadan I.L.R. (1910) Mad 55. Section 99 of the new Code was applied to such a case. Besides, when the appellate court, overruling the plea of misjoinder, passes a decree on the merits of the case we think it would be right to say that the court of second appeal should not reverse that decision on the ground of misjoinder of causes of action. The appellate court has to try the suit and has got the same function and the same powers as the court of first instance, subject to any limitations expressly imposed by the legislature. The principle has been held to be applicable to all cases where the appellate court has plenary jurisdiction and not a mere limited jurisdiction as in the case of such appeals. Section 107 of the Civil Procedure Code (Act V of 1908) recognises it, and we believe it has always been recognised both in England and in this country in determining the powers of a court of appeal. We are, therefore, of opinion that we should not interfere with the judgment of the Subordinate Judge on the ground of misjoinder.

4. Mr. Ramesam, in the course of his argument, has raised another point, namely, that as the plaintiffs are at present entitled only to a three-quarter share in the property and as the 4th defendant is entitled to the other one-quarter share and the suit has been instituted by the plaintiffs only, the lower appellate court should not have declared that the attachment by defendants Nos. 1 and 2 of the property in question was altogether invalid. We are of opinion that he is right in contending that no relief ought to have been granted to the plaintiffs except as to their rights. The order on the claim petition became conclusive against the 4th defendant on the expiration of one year from the date that it was passed. We therefore modify the decree of the lower appellate court by directing that the declaration as against the appellant, the 2nd defendant, shall be that the attachment of the property is invalid as against the rights of the plaintiffs in the suit. As the last point-was not raised in the grounds of second appeal, we think that the appellant should pay the whole of the respondent's costs in this court.