

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:23.07.2015

CORAM

THE HONOURABLE MS. JUSTICE R. MALA

S.A.No.855 of 1999
and C.M.P.No.8765 of 1999

Judgment reserved on 20.07.2015	Judgment pronounced on 23.07.2015
------------------------------------	--------------------------------------

T.V.Nadanasabapathy ... Appellant/Plaintiff

Vs

T.V.Veerappan ... Respondent/Defendant

Prayer: Second appeal filed under Section 100 of CPC against the judgment and decree dated 23.12.1998 in A.S.No.119 of 1997 on the file of the Principal Sub-Court, Mayiladuthurai, in reversing the judgment and decree dated 24.07.1996 made in O.S.No.749 of 1992 on the file of the Additional District Munsif Court, Mayiladuthurai.

For Appellant : Mr.A.Muthukumar

For Respondent : Mr.S.Sounthar

JUDGMENT

The second appeal arises out of the judgment and decree dated 23.12.1998 in A.S.No.119 of 1997 on the file of the Principal Sub-Court, Mayiladuthurai, in reversing the judgment and decree dated 24.07.1996 made in O.S.No.749 of 1992 on the file of the Additional District Munsif Court, Mayiladuthurai.

2.The averments made in the plaint are as follows:-

(i)The suit property originally belonged to one Vaithiyalinga Mudaliar. His sons are the plaintiff and defendant. He executed a Will on 11.03.1963 bequeathing his properties in favour of his heirs.

As per the Will, 'D' schedule property was allotted to the plaintiff (i.e.) western half of the suit house in 'A' schedule property. Likewise, 'F' schedule property was allotted to the defendant and he is entitled to get the eastern half of the suit house in 'A' schedule property. Neither the defendant nor the plaintiff had given any separate portion in respect of the suit 'B' schedule property.

(ii) The defendant had filed a suit in O.S.No.457 of 1989 for recovery of possession in respect of his half share in the 'A' schedule property and that suit was decreed on 30.04.1991. Without filing a partition suit in respect of the property allotted for the common enjoyment, the defendant is not entitled to get recovery of the portion in the backyard, based on the decree. The decree passed in the above suit is beyond the rights given to the parties in the Will. The plaintiff under the impression that the defendant filed that suit only in respect of building portion, so he has not raised this plea in the above said suit. Issues were not framed with regard to this subject. Hence, the present suit is not barred by the principles of resjudicata.

(iii) Taking advantage of the decree in his favour, the defendant is attempting to put up a pucca wall in the backyard, so the plaintiff will not have ingress and egress to his backyard portion through the common lane situate on the eastern side of the suit house. Hence, the plaintiff constrained to file the suit to set aside the decree and judgment dated 30.04.1991 in O.S.No.457 of 1989 and to restrain the defendant from altering the suit property by putting up any new constructions or demolishing the existing structure until the matter has been finally disposed of in respect of the subject matter of early suit. Therefore, he prayed for decree.

3. The gist and essence of the written statement filed by the defendant are as follows:

(i) The plaintiff has purposely suppressed his consent and admission made before the Advocate Commissioner in whose presence delivery was effected in pursuance of the decree made in O.S.No.457 of 1989 on 20.05.1992. So the plaintiff has not come to the Court with clean hands. In the absence of any plea of fraud, coercion and establishment of the same, a valid decree cannot be asked to be set aside simply because the plaintiff was under the impression that suit was filed only in respect of building portion. The decree is made only in respect of the property given in the Will and due delivery is made to this defendant. There is no need to file a suit for partition as no portion is given to be enjoyed in common except the lane in the Will. Therefore, he prayed for dismissal of the suit.

4. The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side counsel, has framed necessary issues and on perusing the oral and

documentary evidence viz., P.W.1 and Exs.A1 to A4, Exs.B1 to B5, decreed the suit. Aggrieved against the judgment and decree passed by the trial court, the defendant preferred an appeal in A.S.No.119 of 1997 on the file of the Principal Sub-Court, Mayiladuthurai.

5.The learned First Appellate Court has considered the arguments advanced on either side, framed necessary point for consideration, reversed the Judgment and Decree passed by the Trial Court. Against the Decree and Judgment passed by the first Appellate Court, the present second appeal has been preferred by the plaintiff/appellant.

6.At the time of admission, the following substantial questions of law have been framed:

"1.Whether the judgment and decree in O.S.No.457 of 1989 between the same parties would operate against the plaintiff in the present suit on the principles of resjudicata?"

7.Challenging the judgment and decree passed by the first appellate Court, learned counsel for the plaintiff/appellant submits that the trial Court has correctly decreed the suit, whereas the first appellate Court has held that the suit is barred by resjudicata. But the suit in O.S.No.457 of 1989 is not act as resjudicata for the present suit. Hence, he prayed for allowing the second appeal.

8.Resisting the same, learned counsel for the respondent/defendant submits that the present suit is filed for setting aside the decree and judgment dated 30.04.1991 passed in O.S.No.457 of 1989 and also for injunction restraining the defendant from altering the suit property by putting up any new constructions or demolishing the existing structure. He further submits that the appellant and respondent are own brothers and their father Vaithiyalinga Mudaliar executed a Will under Ex.A1. In pursuance of Ex.A1/Will, the defendant filed the suit in O.S.No.457 of 1989 for recovery of possession of 'B' schedule property in O.S.No.457 of 1989 stating that as per Ex.A1, the appellant/plaintiff was allotted to western half share and the respondent/defendant was allotted to eastern half share. That suit was decreed in favour of the respondent/defendant and the judgment and decree were marked as Exs.A2 and A3. In pursuance of the decree, execution petition was filed, in which, the objection made by the appellant/plaintiff was overruled. Thereafter, E.P. proceeding has been filed and delivery has been handed over to the respondent/defendant. Against the judgment and decree passed in O.S.No.457 of 1989, the appellant/plaintiff has not preferred any appeal. But the appellant/plaintiff without raising any plea of fraud cannot file the suit for setting aside the decree and judgment passed in O.S.No.457 of 1989 and also for injunction. If really the appellant/plaintiff was aggrieved against the judgment and decree passed in O.S.No.457 of 1989, he may very well prefer an appeal. So the first appellate Court

has rightly considered the above aspect and held that the present suit is hit by resjudicata. Therefore, he prayed for dismissal of the second appeal.

9.Considered the rival submissions made on both sides and perused the materials available on record.

10.The appellant herein as a plaintiff filed the present suit for setting aside the decree and judgment dated 30.04.1991 in O.S.No.457 of 1989 on the file of the District Munsif Court, Mayiladuthurai and also restraining the defendant from altering the suit property by putting up any new constructions or demolishing the existing structure until the matter has been finally disposed of in respect of the subject mater of early suit. The trial Court decreed the suit, against which the respondent/defendant has preferred an appeal and the same was allowed by the first appellate Court, against which, the present second appeal has been preferred by the appellant/plaintiff.

11.On perusal of para-4 and 5 of the plaint, it reveals that the plaintiff has not assigned any valid reasons for setting aside the decree and judgment passed in O.S.No.457 of 1989. In para-5, he has stated that the suit is not hit by resjudicata, but he has not stated that the defendant obtained decree by committing fraud or misrepresentation.

12.In written statement, the respondent/defendant stated that the present suit is hit by resjudicata. Admittedly, the judgment and decree passed in O.S.No.457 of 1989 were marked as Exs.A2 and A3. In pursuance of Ex.A2, E.P. proceeding was initiated and to prove the same, Ex.B1 was marked, delivery receipt was given, in which, the defendants 1 to 3 in O.S.No.457 of 1989 are signatories. On that basis, the respondent/defendant has taken possession.

13.It is pertinent to note that the appellant/plaintiff has taken effective steps to contest the suit in O.S.No.457 of 1989. In the said suit, Advocate Commissioner was appointed and he inspected the suit property and filed his report under Ex.B2 in pursuance of the order passed in Ex.B5. In the presence of the Advocate Commissioner only, possession has been handed over to the respondent/defendant on 20.05.1992 and the same was evidenced by Ex.B2. The present suit was filed by the appellant/plaintiff on 11.12.1992 that too after decree has been executed and the respondent/defendant was put in possession. After execution of decree, the appellant/plaintiff has come forward with the present suit for setting aside the decree without assigning any valid reasons as to why the decree has to be set aside. Unless he pleaded that the defendant has obtained decree by committing fraud upon the Court, he is not entitled to get the decree to be set aside. But the appellant/plaintiff has not assigned any reasons for setting aside the decree in O.S.No.457 of 1989. Under such circumstances, I am of the view, the suit itself is not maintainable.

14.It is pertinent to note that in pursuance of Ex.A1/Will, the respondent/defendant has filed the previous suit for recovery of possession. In O.S.No.457 of 1989, one of the issue was whether the respondent is entitled to the property and the same was decided, even though the respondent therein has raised a plea of adverse possession, it has been negatived by the Court. In such circumstances, the first appellate Court has correctly held that the present suit is hit by constructive resjudicata. Now the appellant/plaintiff cannot be turned down and sought for decree to set aside the decree and judgment passed in O.S.No.457 of 1989. If really the appellant/plaintiff was aggrieved against the decree and judgment passed in O.S.No.457 of 1989, he may very well prefer an appeal. Furthermore, in the previous suit, the Will has been marked and on that basis only, decree was granted. Point No.1 is answered against the appellant/plaintiff.

15.Considering the aforesaid circumstances, I am of the considered opinion, the first appellate Court has considered all the aspects in proper perspective and held that the present suit is hit by constructive resjudicata and dismissed the suit. So the decree and judgment passed by the first appellate Court are sustainable. I do not find any merits in this appeal and this appeal deserves to be dismissed and it is hereby dismissed.

16.In fine,

- The Second Appeal is dismissed.
- The decree and judgment passed by the first appellate Court are hereby confirmed.
- No costs.
- Consequently, connected Miscellaneous Petition is closed.

Sd/-

Asst.Registrar (CS III)

/true copy/

सत्यमेव जयते

Sub Asst. Registrar

kj

To

- 1.The Principal Sub-Judge, Mayiladuthurai.
 - 2.The Additional District Munsif Judge, Mayiladuthurai.
 - 3.The Record Keeper, V.R.Section, High Court, Chennai.
- +1 cc to Mr.A.Muthukumar, Advocate, sr.37443/15

S.A.No.855 of 1999
and C.M.P.No.8765 of 1999

cnr co
kra 08/10