

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.09.2015

CORAM :

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.221 of 2009

O.S.Suriyavelu Mudaliar

... Appellant/Plaintiff

-Vs-

J.Palanivelu Mudaliar

... Respondent/Defendant

Prayer:- This Second Appeal has been filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 19.12.2007 made in A.S.No.398 of 2003 on the file of the Additional District Judge, Fast Track Court IV, Chennai, confirming the judgment and decree made in O.S.No.5122 of 1994 on the file of the XIV Assistant Judge, City Civil Court, Madras, dated 14.01.2003.

For Appellant : Mr.K.Bijai Sundar

For Respondent : Mr.S.R.Raghunathan

J U D G M E N T

A preliminary objection of res judicata was raised contending that the decree passed by the XIV Assistant Judge, City Civil Court, Chennai in a suit in O.S.No.6259 of 1994, had become final.

2. The sole but elegant issue canvassed before this Court is whether the appellant is entitled to a decree of permanent injunction, restraining the respondent from in any manner interfering with the rights of the plaintiff over the portion allotted to him in the settlement deed dated 06.02.1975, or from using the entrance to the property from Kallukaran Street side.

3. The facts leading to the preliminary objection are as follows:-

O.S.No.5122 of 1994 was filed by one Suryavelu Mudaliar, who is the appellant herein, against J.Palanivelu Mudaliar, for the relief of permanent injunction restraining him from in any manner interfering with the rights of the plaintiff over the portion allotted to him in the settlement deed dated 06.02.1975. Another suit in O.S.No.6259 of 1994 was filed by the respondent herein against plaintiff, for the reliefs of mandatory injunction to remove the construction of first floor over the common passage and for permanent injunction, restraining the defendant from obstructing the passage of 5' 3" from Kallukaran Street.

4. With the consent of both the parties, suits were tried in common and the common judgment was rendered by the Assistant Judge, City Civil Court on 14.01.2003.

5. After elaborated trial, the suit in O.S.No.5122 of 1994 was dismissed and the suit in O.S.No.6259 of 1994 filed by the respondent herein was decreed in part only with respect to prayer for injunction alone. In other words, the respondent herein was permitted to use the 5' 3" lane to reach the street.

6. The plaintiff in O.S.No.5122 of 1994, who is the appellant herein, aggrieved by the decree of dismissal, preferred an appeal in A.S.No.398 of 2003 on the file of Additional District Judge, Fast Track Court No.IV, Chennai.

The lower appellate Court also dismissed the appeal, confirming the judgment and decree of the trial Court in O.S.No.5122 of 1994. Now, the Second Appeal has been preferred against the dismissal of A.S.No.398 of 2003 dated 19.12.2007.

7. The appellant who was the defendant in O.S.No.6259 of 1994 was not aggrieved by the decree, granted in favour of the respondent herein, only with respect to injunction and therefore not preferred any appeal. In fact, the lower appellate Court ought to have framed an issue of res judicata as the appellant herein had allowed the finding in O.S.No.6259 of 1994 to become final and did not mind about the respondent, having an injunction for their usage of pathway in the other suit.

8. Per contra, the learned counsel for the appellant, placing the technical objections, contended that Order 41 Rule 33 gives ample powers to the appellate Court, even if the appeal is only against a part of the decree and may be

exercised in all or any of the respondents or parties. The learned counsel appearing for the appellant, contended that question of res judicata will not arise as the judgment of the trial Court was simultaneous. Besides, both the decrees are on the same facts and based on the same judgment, the matter was decided concerning the entire suit. Hence, the question of principles of res judicata is inapplicable to the present facts. The submission of the learned counsel for the appellant though look attractive at the first blush, yet a closure scrutiny reflects the cracks within.

9. The learned counsel appearing for the respondent, raising the preliminary objection, placed his reliance on the judgment of the Kerala High Court reported in AIR 1990 KERALA 144 Madhavi Amma Bhavani Amma and others Vs Velu Pillai and others and Others, wherein, it has been held as follows:.

8. The decision in O.P.No.33 of 1974 conclusively shows that the plaintiff is the legal heir of Thankappan Pillai. In a case where two proceedings were jointly tried and decisions were reached in both the proceedings and when appeal has been filed against only one of the proceedings the decision in other proceedings will operate as res judicata in the proceedings taken on appeal. In Janardhan Pillai v. Kochunarayani Amma Pillai vs.? Amma, 1976 Ker LT 279 a Full Bench of this Court held that in cases where two or more suits between the same parties relating substantially as to the same matter are decided and only one of them is challenged by way of appeal it cannot be said that the decisions are simultaneous and hence there can be no bar of res judicata. In other words, if the party takes up in appeal only one of the decisions the other decision becomes final. When the present second appeal is taken up for hearing the indisputable position is that the decision in O.P.No.33 of 1974 has become final as it has not been challenged and so that decision would operate as res judicata. As the question whether the plea of res judicata is available has to be decided with reference to the time.

10. The learned counsel for the appellant based his claim on the discretionary power of the appellate Court under Order 41 Rule 33 CPC. Though for the exercise under order 41 Rule 33, no rigid rule can be laid down, it would depend on the

facts. In appropriate cases, it is open to the Court to exercise the said power and pass a decree in favour of the party, who had not preferred any appeal. Whether the powers under Order 41 Rule 33 should be exercised in the present case, is the question that has to be decided in this appeal.

11. The learned counsel for the appellant also placed his reliance on an unreported judgment dated 20.07.2009, wherein, the Division Bench of this Court had held that, if the appellant challenged the decree passed only in one of two suits tried together merely because he has not filed an appeal, against the other, the appeal filed will not be hit by principles of res judicata. While allowing the Letters Patent Appeal, the Division Bench had held that Order 41 Rule 33 CPC intended to remove uncertainty with regard to principles of res judicata and in order to empower the appellate Court to do complete justice between the parties notwithstanding technicalities.

12. The contention of the learned counsel for the appellant is that there cannot be any question of res judicata when two suits having common issues, were tried by consent of the parties or by order of the Court together and both the suits were disposed of by a common judgment. The question would arise as to whether there have been two distinct and independent trials. According to the learned counsel, since there is only a single judgment, the question of former or latter suit for applying the principles of res judicata, may not arise. The said contention may not be acceptable. If 'A' filed a suit against 'B' and 'C', which was decreed, and B and C filed separate appeals, which was allowed by a common judgment and two separate decrees were drawn by the Court, the question of application of principles of res judicata may not apply. Because, when there is only one suit, the question of res judicata does not arise at all. When there is one trial, one finding, one judgment, there need not be two appeals, even though two decrees were drawn up. However, in the case on hand, two suits were tried in common of which was no appeal against one suit, which was allowed to become final and hence, the same issue cannot be allowed to be reopened in the Second Appeal filed against the decree passed in an appeal arising out of another suit.

13. The above said principle has been laid in Lonankutty -vs- Thomman, reported in AIR 1976 SC 1645 and the same was reiterated again in Narayana Prabhu Venkateswara Prabhu v. Narayana Prabhu Krishna Prabhu (Dead) by L.R.s, AIR, 1977 SC 1268, wherein, it has been held that the expression "former

suit", according to explanation I of Section 11 CPC makes it clear that, if a decision is given before the institution of the proceeding which is sought to be barred by res judicata and that decision is allowed to become final or becomes final by operation of law, a bar of res judicata would emerge. Therefore, the effect of non-filing of appeal against the judgment and decree is that it becomes final. This finality can be taken away only in accordance with law. Same consequences follow when a judgment and decree in a connected suit are not appealed.

14. The above said principle cannot be confined only to two suits filed independently but also can be applied in a case of common judgment, where two suits were tried together and a common judgment is delivered and separate decrees are drawn up and when one of the adjudication would be allowed to become final, that adjudication assumes finality on and from the date of adjudication. In the course of an appeal against the other judgment and decree, the judgment which had become final, can be pleaded as res judicata on the ground that the said controversy has already decided finally. Hence, the contention of the learned counsel for the appellant cannot be accepted.

15. On the other hand, the learned counsel for the respondent placed his reliance on the decision of the Bench of the Hon'ble Apex Court, reported in (2015) 3 SCC 624 Sri Gangai Vinayagar Temple Vs. Meenkashi Amman and others, wherein it has been held as follows:-

25. On the issue of applicability of res judicata in cases where two or more suits have been disposed of by one common judgment but separate decrees, and where the decree in one suit has been appealed against but not against the others, various High Courts have given divergent and conflicting opinions and decisions. The High Court of Madras and the erstwhile High Courts of Lahore, Nagpur and Oudh have held that there could be no res judicata in such cases whereas the High Courts of Allahabad, Calcutta, Patna, Orissa and the erstwhile High Court of Rangoon have taken contrary views. It should also be noted that there are instances of conflicting judgments within the same High Court as well. The decision of Tec Chand, J. in Full Bench

Judgment of the Lahore High Court in Lachhmi vs. Bhulli and Full Bench Judgment of the Madras High Court in Panchanda Velan vs. Vaithinatha Sastrial and of the Oudh High Court in B. Shanker Sahai v. B. Bhagwat Sahai appear to be the leading decisions against the applicability of res judicata. Without advertng to the details of those cases, it is sufficient to note that the hesitancy or reluctance to the applicability of the rigorous of res judicata flowed from the notion that Section 11 of the Code refers only to "suits" and as such does not include "appeals" within its ambit; that since the decisions arrived in the connected suits were articulated simultaneously, there could be no "former suit" as stipulated by the said section; that substance, issues and finding being common or substantially similar in the connected suits tried together, non-filing of an appeal against one or more of those suits ought not to preclude the consideration of other appeals on merits; and that the principle of res judicata would be applicable to the judgment, which is common, and not to the decrees drawn on the basis of that common judgment.

26. On the other hand, the verdict of Full Bench of the Allahabad High Court in Zaharia vs. Debia and decisions of the Calcutta High Court in Isup Ali vs. Gour Chandra Deb and of the Patna High Court in Mrs. Getrude Oastes vs. Mrs. Millicent D'Silva are of the contrary persuasion. These decisions largely proceeded on the predication that the phraseology "suit" is not limited to the Court of First Instance or Trial Court but encompasses within its domain proceedings before the Appellate Courts; that non-applicability of res judicata may lead to inconsistent decrees and conflicting decrees, not only due to multiplicity of decrees but also due to multiplicity of the parties, and thereby creating confusion as to which decree has to be given effect to in execution; that a

decree is valid unless it is a nullity and the same cannot be overruled or interfered with in appellate proceedings initiated against another decree; that the issue of res judicata has to be decided with reference to the decrees, which are appealable under Section 96 of the CPC and not with reference to the judgment (which has been defined differently), but with respect to decrees in the CPC; that non-confirmation of a decree in appellate proceedings has no consequence as far as it reaching finality upon elapsing of the limitation period is concerned in view of the Explanation II of Section 11, that provides that the competence of a Court shall be determined irrespective of any provisions as to right of appeal from the decision of such Court; and that Section 11 of the CPC is not exhaustive of the doctrine of res judicata, which springs up from the general principles of law and public policy.

27. Procedural norms, technicalities and processual law evolve after years of empirical experience, and to ignore them or give them short shrift inevitably defeats justice. Where a common judgment has been delivered in cases in which consolidation orders have specifically been passed, we think it irresistible that the filing of a single appeal leads to the entire dispute becoming sub judice once again. Consolidation orders are passed by virtue of the bestowal of inherent powers on the Courts by Section 151 of the CPC, as clarified by this Court in Chitivalasa Jute Mills vs. Jaypee Rewa Cement (2004) 3 SCC 85. In the instance of suits in which common Issues have been framed and a common Trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments. While so opining we do not intend to whittle down the principle that appeals are not expected to be filed against every inconvenient or disagreeable or unpropitious or unfavourable

finding or observation contained in a judgment, but that this can be done by way of cross-objections if the occasion arises. The decree not assailed thereupon metamorphoses into the character of a "former suit". If this is not to be so viewed, it would be possible to set at naught a decree passed in Suit A by only challenging the decree in Suit B. Law considers it an anathema to allow a party to achieve a result indirectly when it has deliberately or negligently failed to directly initiate proceedings towards this purpose. Laws of procedure have picturesquely been referred to as handmaidens to justice, but this does not mean that they can be wantonly ignored because, if so done, a miscarriage of justice inevitably and inexorably ensues. Statutory law and processal law are two sides of the judicial drachma, each being the obverse of the other. In the case in hand, had the Tenant diligently filed an appeal against the decree at least in respect of O.S. 5/78, the legal conundrum that has manifested itself and exhausted so much judicial time, would not have arisen at all.

16. Following the principles of law enunciated in the above decision of the Hon'ble Supreme Court, I am of the opinion that the present appeal could not be entertained, as in both the suits, the question involved is the same, viz., whether the plaintiff is entitled for the relief of permanent injunction as prayed for. Common evidence was let in and it was held that the rectification deed was not sought to be declared as null and void and the same was executed in an equitable act by donar for the purpose of the benevolent enjoyment of the parties of their own respective portions. The relief of mandatory injunction for removal of the construction of first floor over the common passage was not granted by the Courts and only the relief of injunction was granted in O.S.No.6259 of 1994. The appellant had appealed against the decree in O.S.No.5122 of 1994 alone and not against the decree in O.S.No.6259 of 1994, wherein, the defendant/respondent herein was granted a decree in his favour for permanent injunction against the appellant herein from obstructing the passage of 5' 3" from Kallukaran Street. Once

that judgment is not challenged, the findings rendered therein have become final. Though the judgment is common, it has to be treated as separate in each case. Hence, the principles of res judicata would operate and apply to present case.

17. In the result, the preliminary objection raised by the respondent is upheld and hence, the Second Appeal is liable to be dismissed. Once, it is held that the Second Appeal is barred by principles of res judicata, the other issues raised before this Court, has to be answered against the appellant. Accordingly, the Second Appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1. The Additional District Judge,
Fast Track Court IV, Chennai.
2. The XIV Assistant Judge,
City Civil Court, Chennai

+lcc to Mr.K.Bijai Sundar, Advocate, S.R.No.51846
+lcc to Mr.S.R.Rajagopal, Advocate, S.R.No.51823

S.A.No.221 of 2009

UG(CO)
CA(28/10/2015)

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