

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.11.2016

PRONOUNCED ON : 07.11.2016

CORAM :

THE HONOURABLE Dr. JUSTICE G. JAYACHANDRAN

SA.No.223 of 2008
and MP.No.1 of 2008

1.P.Kaliammal
2.V.Eswari
3.P.Kumar

... Appellants/Respondents/Plaintiffs

Vs.

1.V.Rathinammal
2.S.Vaithyanathan

... Respondents/Appellants/Defendants

Second Appeal is filed under Section 100 of C.P.C. against the judgment and decree dated 18.09.2006 made in AS.No.151 of 2005 on the file of the Principal Subordinate Judge, Salem reversing the judgment dated 13.12.2004 made in OS.No.156 of 2001 on the file of the II Additional District Munsif, Salem.

For Appellants : Mr.A.Bharath
for Mr.Kandavadivel Doraisami

For 2nd Respondent: Mr.J.Vinodh - No appearance.

JUDGMENT

Short but very interesting point involved in the present second appeal is whether an exparte decree passed after completion of pleading would constitute resjudicata and whether such a decree can be challenged in an separate suit on the ground of fraud and misrepresentation.

2.The brief facts involved in this case is as follows :-

The admitted facts in this case is that while Perumal has purchased property covered in S.No.154/1 at Sivadapuram Village, Salem Taluk in the year 1969 vide Ex.A1, the respondents herein had purchased the property falling under S.No.154/2 in the year 1980, for the property in dispute earlier OS.No.233 of 1992 was filed by Rathinammal and exparte decree in her favour was passed.

3.The plaintiffs who are wife, daughter and son of one Perumal, have filed the suit which is the subject matter of the present appeal claiming that the exparte decree passed in OS.No.233 of 1992 is vitiated by fraud, suppression of facts and misrepresentation. Admittedly, the earlier suit in OS.No.233 of 1992 filed by the first respondent herein against one Perumal who is the husband and father of the present appellants, was contested by Perumal by filing written statement and later he did not participated in the trial and remained exparte. Hence, the exparte decree was passed against him on 24.07.1997, culminating him in filing of Execution Petition in REP.No.18 of 1999 by the respondents herein. The execution petition was obstructed and pending execution petition, the said Perumal died intestate on 22.06.2000. The appellants herein were brought on record in the execution petition. Pending, execution petition, the suit in OS.No.156 of 2001 was filed by the appellants who are the legal heirs of late Perumal to declare the earlier decree passed in OS.No.233 of 1992 as void and to declare the appellants as absolute owner of the suit property and for permanent injunction.

4.In the earlier suit in OS.No.233 of 1992, the specific case of the respondents herein was that Perumal had encroached about 415sq.ft of land falling under S.No.154/2 which has been resurveyed as S.No.154/2A1 and had put up construction over the encroached land. In the said suit, the Perumal has filed written statement which is marked as Ex.P10 in latter Suit (OS.No.156 of 2001). The specific case of Perumal was that he purchased the property in the year 1969 and had put up construction in the year 1974 itself, in the portion of the land, which is in his enjoyment ever since 1969. The respondents who have purchased the land after 11years, trying to encroach upon his land and has filed OS.No.233 of 1992 seeking declaration and possession of the red color marked property, over which the respondents herein have no right. Even if they have title they have lost the right over the property due to open and continuous enjoyment of the said property by him, since 1969.

5.After pleading so, the Perumal remained exparte and exparte decree was passed on 24.07.1997, till his death on 22.06.2000, he has not taken any steps to set aside the exparte decree or to contest the REP.No.18 of 1999. The legal representatives of Perumal who are the appellants herein after being impleaded as judgment debtors in REP.No.18 of 1999, have chosen to file fresh suit seeking declaration of earlier decree passed in OS.No.233 of 1992 as a fraudulent decree obtained by way of misrepresentation.

6.The appellants herein have based there suit for two reliefs; firstly, they want to declare a decree passed against them as void and enforceable; secondly, they want a decree in their favour declaring them as the owner of the suit property, as if they are perfected the title over the property by adverse possession.

7.Order 6 Rule 4 CPC specifically mandates the plaintiff who pleads misrepresentation, fraud, breach of trust, wilful default or undue influence, those particulars must be necessarily exemplified with dates.

8.This Court tried to find out whether the plea of fraud and misrepresentation has been properly exemplified with particulars. To the shock of this Court, the present plaint is nothing but the replica of the written statement filed by the Perumal in the earlier suit in OS.No.233 of 1992. When the case of the respondent regarding right over the suit property has been contested by Perumal from whom the present appellants claiming right, can a decree passed by a competent Court be declared as void in a separate suit on a vague and bald allegation of misrepresentation and fraud is the moot question.

9.The trial Court has gone into the merits of the pleadings, which ought to have been canvassed and proved by the appellants in the earlier suit. Having failed to do so, with a bald allegation of misrepresentation, the appellant has laid the subsequent suit and surprisingly succeeded before the trial Court. The first appellate Court has rightly gone into the core of the issue and has held that even an exparte decree would constitute resjudicata. If at all the appellants were aggrieved by the decree passed in the previous suit, the course open to them is to get the exparte decree set aside and contest the matter on merits. A fresh suit declaring the previous suit passed by an competent Civil Court as void and enforceable is mere abuse of process of law.

10.Though, the trial Court has miserably failed to appreciate the law and facts of the case, the first appellate Court has rightly pointed out that having failed to effectively contest the previous suit in OS.No.233 of 1992, the legal representatives of Perumal have no right to file subsequent suit for declaring that the decree in OS.No.233 of 1992 as void and enforceable.

11.The conditions to constitute resjudicata is (i)there must be two suits; (ii)Court that decided former suit must be competent to try subsequent suit; (iii)matter directly and substantially in issue must be same, either actually or

constructively in both suits; (iv) matter directly and substantially in issue in subsequent suit must have been heard and finally decided in former suit; (v) parties to both suits or parties under whom they or any of them claim must be same in both suits; (vi) parties in both suits must have litigated under same title.

12. As pointed out earlier, the present plaint in OS.No.156 of 2001 is similar to the written statement filed in OS.No.233 of 1992. The parties are one and the same and the dispute of property is also one and the same, the previous suit has reached its finality. Admittedly, the appellant herein has never opted to take steps to set aside the decree passed in the previous suit. The present attempt to file suit to declare the earlier decree has void on the ground of fraud and misrepresentation has not been pleaded with particulars and not been proved that there was fraud committed upon the Perumal and decree was obtained behind the back.

13. At this juncture, it is relevant to refer the judgment reported in AIR 1998 MAD 218 - R.Govindasamy (died) and others V. Kasthuri Ammal and others, which has considered the facts similar to this case, in paragraphs 8 and 12 it is held as follows :-

"8. Newton V. Official Trustee, AIR 1954 Cal 506.

In the said case, exparte decree was passed after filing the written statements and taking part in the proceedings for a considerable time, the appellants defaulted in appearance during the last stages. After distinguishing the Privy Council case New Brunswick Railway Co. V. British and French Trust Corporation (1939) AC1, the Calcutta High Court Bench took the view that even if a decree is an exparte, it will operate as resjudicata in respect of all grounds of defence against the actual claim in the suit as also all matters inconsistent with such claim which might and ought to have been raised.

12. In Vishnu Sugar Mills Ltd., V. I.S.P. Trading Co., AIR 1984 Cal 246 also a Bench of the Calcutta High Court has categorically held that an exparte decree do constitute resjudicata. They have expressed the said principle in the following terms (at p.248 AIR)

"The basic principle underlying S.11 is that once the parties have undergone adjudication of an issue in a suit, that would be final as between the parties irrespective of whether that suit was filed earlier at point of time or later and no Court can try that issue any further in another suit even if that suit had been instituted at an earlier point of time.

It is the finality of the decision which creates the bar and such finality is not dependent upon the fact as to whether the suit in which the issue had been decided had been filed before or after the suit in which the same issue has arisen. (Isup Ali V. Gour Chandra, (1923) 37 Cal LJ 184) : AIR 1923 Cal 496. Similarly the learned Judge was equally in the error if he thought that the decree in Money Suit No.126 of 1972 would not constitute resjudicata only because it was an exparte decree where no issues were framed. It is settled principle now that even exparte decrees do constitutes resjudicata if the issue involved is one which constitutes the basis or foundation of the decree".

14. Under such circumstances, this Court is of the opinion that the first appellate Court has rightly reversed the judgment and decree of the trial Court and the substantial question of law whether the decree in OS.No.233 of 1992 operates as resjudicata is answered in affirmity.

15. The facts of the case in hand is not merely exparte decree without contesting, but exparte decree has been passed after completion of pleadings by both sides and execution proceeding was also filed. Aggrieved parties were given opportunity to contest it on merits by exercising their rights conferred under Section 47 CPC. Whileso, instead of exercising that option, the present suit has been filed without any pleading to substantiate, that the previous decree was obtained by fraud or misrepresentation. Under the grab of misrepresentation and fraud, the previous suit which has reached its finality cannot be reagitated. If such practice is entertained, section 11 of CPC which has a strong basis of public policy will become redundant.

16. For the aforesaid reasons, the second appeal stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS II)

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Sub Assistant Registrar

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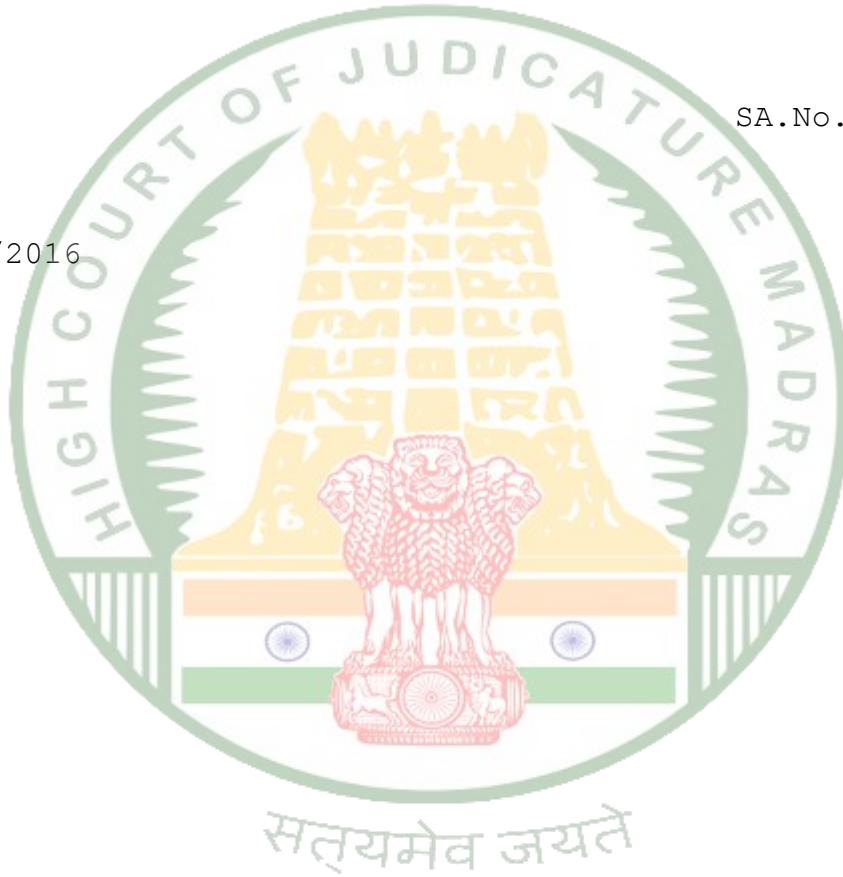
To

1. The Principal Subordinate Judge, Salem.
2. The II Additional District Munsif, Salem.

+lcc to M/S.Muthumani Doraisami, Advocate Sr.63581

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