

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.04.2016

C O R A M

THE HON 'BLE Dr. JUSTICE S.VIMALA

Civil Revision Petition (NPD) No.416 of 2016
and C.M.P.No.2215 of 2016

G.D.Pushpavathy

... Petitioner / D-1

Vs.

1. Madhavi
2. Elangovan
3. Damodharan
4. Kothai
5. D.Mythili

... Respondents /
... Plaintiffs & D-2 & D-3

Prayer :- Civil Revision Petition (NPD) filed under Section 115 of the Code of Civil Procedure to set-aside the fair and decreetal order, passed in I.A.SR No.1 of 2016 in O.S.No.3050 of 1993, dated 19.01.2016 on the file of the VII Assistant City Civil Court, Chennai.

For Petitioner : Mr. M.Kumar
For respondents : Mr. G.Suryanarayanan, for R-1 to -3
Mr. K.S.Lakshmi Kumaran, for R-4
Mr. M.Balasubramanian

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ORDER

Fraud and justice never dwell together (fraus et jus nunquam cohabitant); or fraud and deceit ought to benefit none (fraus et dolus nemini patrocinari debent) – invoking these maxims, the petitioner

seeks reopening of the preliminary decree passed about two decades back.

2. The dispute is between the legal heirs of Andalammal, namely, Madhavi (P-1), Elangovan (P-2) and Damodharan (P-3) and legal heirs of Durairajan, namely, Pushapavathi (wife) (D-1), Kothainayagi (D-2), Mythili (D-3), Durairajan and Andalammal being the son and daughter of their parents, Govinda Naicker and Nagammal. Govinda Naicker was the son of Ponnappa Naicker and Ponnappa Naicker was the son of Narayana Naicker, from whom the title originates.

3. This is the second round of litigation initiated by Mythili, D-3 in O.S.No.3053 of 1993 and also the plaintiff in O.S.No.5067 of 2014. Mythili filed the suit in O.S.No.5067 of 2014, seeking for a declaration that the judgment and decree passed in O.S.No.3050 of 1993 before VII Assistant City Civil Court, dated 16.07.2002, is null and void and not binding on her.

4. The genealogy / family tree of the family members of both the parties are essential in order to briefly describe the facts of the

case:-

FAMILY TREE

PONNAPPA NAICKER

GOVINDA NAICKER

NAGAMMAL
(WIFE)
(DIED IN 1981)

18.08.1950 – Mortgage Executed by
Durai Raja Naicker and Nagammal
(Mother and Son)

Durairajan
(Son)
(Died in 1984)

Andal Ammal
(daughter)
(Died in 1962)

Pushapa Kothai Mythili
vathy Nayaki (D-3)
(wife) (D-2)
(Defendants in O.S.No.3050/93)

Madhavi Elangovan Damodaran
(Plaintiffs in O.S.No.3050/93)
claimed ½ share in suit prop.

5. The partition suit in O.S.No.3050 of 1993 was filed by the legal heirs of Andalammal, in which, all the three plaintiffs together claimed half share over the suit property. The decree was granted accordingly. The appeal filed by the defendants, (A.S.No.59 of 2003) was allowed and thereby the suit got dismissed. The Second Appeal No.925 of 2005 was preferred by the plaintiffs and it was allowed, thereby, the decree of the trial court, decreeing the suit, got confirmed. The SLP preferred by the defendants before the Hon 'ble

Supreme Court in SLP (C) No.8685 of 2010 was dismissed. Thus, the first round of litigation attained finality (in favour of the plaintiff).

6. Thereafter, D.Mythili, the Revision Petitioner herein, filed an application in I.A.No.9305 of 2013 in O.S.No.3050 of 1993 to condone the delay of 4,661 days in filing the application to set-aside the preliminary decree. That application was dismissed on 12.03.2014. Against this order, a Civil Revision Petition was filed in CRP No.2048 of 2014. That was dismissed with the observation that allowing this kind of litigation would amount to encouraging mockery of justice delivery system.

7. Thereafter, the suit in O.S.No.5067 of 2014 has been filed alleging fraud on the part of the plaintiffs in O.S.No.3050 of 1993.

8. The first defendant, G.D.Pushpavathy, (mother of Mythili (D-3)) filed an application in I.A.SR No.1 of 2016 in O.S.No.3050 of 1993, seeking to recall the preliminary decree, dated 16.07.2002, passed by the Court in O.S.No.3050 of 1993, on the ground that it was obtained by playing fraud on the Court. This petition was dismissed by the order, dated 19.01.2016. Challenging the same, this Civil Revision

Petition has been filed.

9. It is the case of the Revision Petitioner that respondents 1 to 3 (who are the plaintiffs in the previous suit) are guilty of fraud and suppression of material facts, in not disclosing a mortgage deed of the year 1950 executed by Nagammal and Durairajan and that, had it been disclosed, the plaintiffs would not have been able to get a decree for partition. In other words, the contention is that, fraud and justice do not dwell together and but for the fraud committed, the plaintiffs would not have been in a position to obtain a preliminary decree, which is tainted with illegality and that it deserves to be set-aside.

10. The main contention of the learned counsel for the respondents is that, the Revision Petitioner herein has already released her entire right, title and share in the suit property in favour of her two daughters, even in the year 1988 and as such, having no right, title and interest, the petitioner has no locus standi to file this petition.

10.1. It is also contended that the daughter, Mythili, who obtained property, has challenged the decree, as fraud, in O.S.No.5067 of 2014 and when she has produced the so-called

suppressed document from her custody, it is not open to the Revision Petitioner herein to maintain any case, with regard to this property.

11. The reason as to why the Revision Petitioner has filed the petition seems to be that, already Mythili filed an application to set-aside the exparte preliminary decree, wherein this Court, in CRP No.2058 of 2014 has given a serious observation regarding the conduct of the daughter, Mythili, and the relevant observation reads as under:-

“... It is a calculated method on the part of the petitioner to keep the matter long lasting without reaching any finality and to deny justice to the respondents 1 to 3 / plaintiffs who approached the Court with a bonafide belief that they would get justice. This case is an abuse and misuse and process of law and this kind of litigation should not be entertained and if it is entertained, the justice delivery system would be made mockery. Therefore, this Civil Revision Petition fails and as a determinant measure, heavy cost is to be slapped on the petitioner....”

12. Therefore, no scope is given / no space is left for Mythili to agitate the matter. Hence, the mother has filed the petition, even though she has no subsisting / existing right over the suit property.

13. The learned counsel for the respondents relied upon the

decision of the Hon 'ble Supreme Court in the case reported in Civil Appeal Nos.6656-6657 of 2010, dated 16.08.2010 (**Meghmala & Ors v. G.Narasimha Reddy & Ors**), in which, it has been held that Judicial pronouncements unlike sand dunes, are known for their stability / finality and therefore, after two decades, the preliminary decree passed should not be set-aside.

14. The learned counsel for the Revision Petitioner contended that: (a) the second round of litigation is necessitated on account of the subsequent cause of action, i.e., based on Mortgage Deed, dated 18.08.1950, which was suppressed in O.S.No.3050 of 1993; (b) the document, dated 18.08.1950, would show that the property exclusively belonged to G.D.Durairajan, who was the petitioner's husband and the execution of the mortgage deed, jointly with Nagammal, was at the instance of the creditor and that will not confer any title upon Nagammal, when she has no pre-existing right; (c) the decree obtained by fraud can be annulled at any stage is the settled legal position; (d) when the subsequent suit is filed based on the subsequent cause of action, the earlier decree in O.S.No.3050 of 1993 will not operate as resjudicata.

14.1. In support of the contentions raised, the following

decisions are relied upon:-

(i) **2007-4-L.W.139 (A.V.Papayya Sastry & ors v.**

Government of A.P. & Others):-

"23. **In Duchess of Kingstone, Smith's Leading Cases, 13th Edn., p.644**, explaining the nature of fraud, de Grey, C.J. stated that though a judgment would be res judicata and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was 'mistaken', it might be shown that it was 'misled'. There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment.....

.....

37. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as nullity,

whether by the court of first instance or by the final court. And it has to be treated as non est by every Court, superior or inferior.”

(ii) 2015 (6) CTC 555 (Vaish Agarwal Panchayat v.

Inder Kumar and Others):-

“ 17. ...There is an assertion that in the earlier suit a decree came to be passed because of fraud and collusion. In such a fact situation, in our considered opinion, the High Court has fallen into error by expressing the view that the plea of resjudicata was obvious from the plaint. In fact, a finding has been recorded by the High Court accepting the plea taken in the written statement. In our view, in the obtaining factual matrix there should have been a trial with regard to all the issues framed.”

15. These decisions will not help the case of the Revision Petitioner, as there is nothing to indicate that the plaintiffs in the earlier suit willfully committed fraud by suppressing the document, as the original document itself has been produced from the custody of the daughter of the Revision Petitioner.

16. Even if the mortgage deed had been produced in O.S.No.3050 of 1993, it is not sure whether the preliminary decree would not have been passed in favour of the plaintiffs in the suit in

O.S.No.3050 of 1993.

17. It is appropriate to quote the decision reported in **MANU/KE/0343/1997 (Raghurama Rao and Others v. Pathimabi and others)** wherein it has been observed as under:-

"5. Jenkins C.J. in **Nanda Kumar v. Ram Jiban (2) I.L.R Cal 999** observed:

The jurisdiction to impugn a previous decree for fraud is beyond question... but it is a jurisdiction to be exercised with care and reserve, for it would be highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further, litigation.

Justice Madhavan Nair in the decision in **Subramoniam v. Nagarammd 1962 K.L.T. 1019** after referring to the various decisions on the subject exhaustively, held that the contention that a party had secured the decree by letting in false or perjured evidence, even if true, would not amount to fraud of the kind that would nullify the decree in the suit. The falsity or truth of the claim has been or must be deemed to have been adjudicated by the Court when it decreed the claim. A Division Bench of the Andhra Pradesh High Court in **L.V.Apte v. R.G.N. Price MANU/AP/0145/1962 : A.I.R. 1962 A.P. 274** after referring to series of decisions of the Madras High Court, held:

A decree of a Court cannot be set aside on the

ground of fraud on the allegations that it was obtained by perjured evidence or that the claim was false. It must be proved that the Plaintiff was prevented by some trick or contrivance of the Defendant from appearing and placing his case before the Court. Mere suppression of certain facts, does not amount to a fraud that would entitle a party to avoid the decree."

18. From the decision, cited supra, it is clear that the non-production of the document in O.S.No.3050 of 1993 cannot be a ground for branding the judgment as a fraudulent one and it cannot be a ground to set-aside the preliminary decree.

19. What cannot be achieved by Mythili by filing an application to set-aside the exparte preliminary decree is now sought to be achieved through her mother, the Revision Petitioner herein, by filing this petition. This Revision Petition has no merits. Therefore, this Civil Revision Petition is dismissed. However, there will be no order as to costs. Consequently, the connected CMP is closed.

27.04.2016

Index : Yes / No
Web : Yes / No
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S.VIMALA, J.,

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To

1. VII Assistant City Civil Court, Chennai
2. The Section Officer, V.R.Section, Madras High Court,
Chennai - 104

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