

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 17.10.2016

PRONOUNCED ON: 02.11.2016

CORAM

THE HON'BLE MR.SANJAY KISHAN KAUL, THE CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE R.MAHADEVAN

O.S.A.Nos.333 to 336 of 2009

1.M/s.Sagar Constructions,
rep.by its Proprietor K.M.Vidyasagar,
91, 92, Jawaharlal Nehru Salai,
Ashok Nagar, Chennai-600 083.

2.K.M.Mathivathanan ... Appellants in all the
appeals

-vs-

1.S.B.Sivakamiammal (deceased)
2.S.Gunasekari
3.B.Umapathy
4.S.B.Suryakumar
5.S.B.Yuvarajan
(Respondents 2 to 5 brought on record
as LR's of the deceased sole respondent
vide order of this Court dated 06.09.2016
made in M.P.Nos.1 to 3 of 2014)... Respondents in all the
appeals

O.S.A.No.333 of 2009 filed under Order 36 Rule 1 of
O.S.Rules r/w Clause 15 of the Letters Patent, against the order
passed by this Court in Application No.1293 of 2008 in
E.P.No.132 of 2003 dated 18.09.2009.

O.S.A.No.334 of 2009 filed under Order 36 Rule 1 of
O.S.Rules r/w Clause 15 of the Letters Patent, against the order
passed by this Court in Application No.1294 of 2008 in
E.P.No.132 of 2003 dated 18.09.2009.

O.S.A.No.335 of 2009 filed under Order 36 Rule 1 of
O.S.Rules r/w Clause 15 of the Letters Patent, against the order
passed by this Court in Application No.1295 of 2008 in

E.P.No.134 of 2003 dated 18.09.2009.

O.S.A.No.336 of 2009 filed under Order 36 Rule 1 of O.S.Rules r/w Clause 15 of the Letters Patent, against the order passed by this Court in Application No.1296 of 2008 in E.P.No.134 of 2003 dated 18.09.2009.

Prayer in Application No.1293 and 1295/2008:

Applications filed under order 14 Rule 12 of OS Rules praying that this Hon'ble Court be pleased to set aside the order dated 11.01.2008 made in EP.No.132/2003 and EP.No.134/2003.

Prayer in Application No.1294 and 1296/2008

Application filed under order 14 Rule 12 of OS Rules praying that this Hon'ble Court be pleased to stay all further proceedings in EP.No.132 and 134/2003 pursuant to the order of learned master dated 11.01.2008.

For Appellants :: Mr.K.Harishankar

For Respondents :: Mr.M.Chidambaram for R2
Mr.R.Tholgappian for R3
Mr.T.Sreetharan for R4 and R5

JUDGMENT

R.MAHADEVAN, J.

These appeals are filed against the order dated 18.09.2009 passed by this Court in A.Nos.1293 and 1294 of 2008 in E.P.No.132 of 2003 and A.Nos.1295 and 1296 of 2008 in E.P.No.134 of 2003.

2.The facts arising out of this appeals are as under:-

(i)Originally, two execution proceedings in E.P.Nos.132 and 134 of 2003 were ordered by the learned Master on 11.01.2008 directing the first respondent therein (first appellant herein) to pay a sum of Rs.30,36,923/- individually, and the first and second respondents therein (the first and second appellants herein) to pay a sum of Rs.5,10,750/- jointly or severally on or before 11.02.2008, failing which an order of attachment in respect of the properties of judgment debtors / respondents mentioned in the Execution Petition Nos.132 and 134 of 2003 would be passed automatically.

(ii)The judgment debtors/appellants herein have filed applications in A.Nos.1293 to 1296 of 2008 before this Court to set aside the orders passed by the learned Master in the

execution petitions, stating that the decree passed in C.S.No.895 of 2003 is a compromise decree and it embodies the terms of understanding arrived between the parties to regulate their affairs amicably. It also grants rights to both parties and imposes obligation upon both parties and unless a party fulfils the obligation cast upon him, that party cannot seek to enforce any obligation owed to him. The compromise decree casts an obligation upon the judgment debtors / plaintiffs to supply a flat to the defendants at a particular place. It also gives the plaintiffs the option to supply a flat at any other place, subject to the defendants identifying the same and indicating their intention to the plaintiffs. The defendants never identified any alternate site or alternate flat so as to enable the plaintiffs to convey the same to the defendants. The plaintiffs are ready to convey only an appropriate flat to the defendants upon the defendants' suitably identifying the same. The defendants were also liable to issue No Objection Certificate to enable the plaintiffs to obtain electricity connection for the flats in the suit property. But the defendants deliberately refused to give NOC and on account of the same, the plaintiffs were put to irreparable loss. Since the defendants were guilty of breach of promise, which they had agreed to perform under the compromise decree, they cannot enforce reciprocal promise. The compromise decree comprises of several cross obligations. The execution petitioners, having failed to perform their obligations, cannot compel the plaintiffs to perform their obligations. It was further contended that only one of the defendants came forward to file the execution petitions without the written authority of the other and hence, it is barred under Order 39 Rule 18 of the Original Side Rules.

(iii) When the applications came up before this Court on 18.09.2009, this Court, referred to the judgment and decree dated 30.04.2001 in C.S.No.895 of 2000 and Tr.A.Nos.1706 to 1709 of 2001, which was passed based on a memo of compromise signed between the parties. Subsequent to the passing of the decree, insolvency notices were issued in I.N.Nos.187 and 184 of 2004 and thereafter, Application Nos.234 and 235 of 2005 were filed to set aside the insolvency notices and those applications were allowed. Against the said order, appeals in OSA Nos.202 and 203 of 2006 were filed and a Division Bench of this Court, held that for the issuance of notice under Section 9(2) of the Presidency Towns Insolvency Act, 1909, there must be a decree or an order for payment of money. In the present case, since the Court was unable to notice any decree or order for payment of money, the order to set aside the insolvency notices were confirmed in the OSAs. But, since the terms of compromise was not adhered, execution proceedings were initiated, in which the learned

Master, passed an order of attachment on 11.01.2008 as stated supra, but the application for arrest was rejected.

(iv) The learned counsel for the applicants / judgment debtors / appellants herein contended before this Court that if there is no decree as contemplated by the Division Bench as set out above, the question of filing Execution Petition does not arise.

(v) A counter was also filed stating that the judgment debtor is a proprietorship concern and one K.M.Vidyasagar is its proprietor; that the second applicant / judgment debtor is the father of the said K.M.Vidyasagar. The first applicant remained ex-parte throughout the proceedings. The terms of the compromise decree under execution is comprised of independent obligations to be fulfilled within the time stipulated therein and failing fulfilment, monetary compensation is alternatively provided. Under the terms of the decree, there is no reciprocal or interlink obligation created and the applicants are left to work out their remedies by way of independent execution proceedings.

(vi) The learned single Judge, on considering the submissions made on either side and the submission that the observations of the Division Bench of this Court in the OSA against the insolvency notices cannot have any bearing in deciding the validity of the order passed in the EP proceedings, and for that matter, also relying on the decision of the Hon'ble Supreme Court in M.P.Gopalakrishnan Nair and another vs. State of Kerala and others, reported in 2005 (3) CTC 428, held that the order of the Master did not suffer from any illegality or infirmity and that since the request for arrest of the judgment debtors was negated by the Master and only attachment order was passed, this Court is not inclined to interfere in the matter.

(vii) Challenging the said order passed, the present appeals have been filed.

3. The learned counsel for the appellants has submitted that the learned single Judge had failed to note that the decree dated 30.04.2001 made in C.S.No.895 of 2000 is a composite decree which imposed mutual obligations on both parties such that performance by one is conditional upon performance of the other. He further stated that even though the findings of the learned single Judge that the proceedings under the Insolvency Act are distinct from the proceedings under CPC, are correct, it is not correct on the part of learned single Judge in failing to note that the findings of the Division Bench in the OSAs as to the nature and character of the decree passed in C.S.No.895 of 2000 is a judgment pronounced inter parties and therefore

binding upon the respondents. He finally submitted that even as per the finding of the Division Bench of this Court in O.S.A.Nos.202 and 203 of 2005 the decree grants rights to both the parties and imposes obligation upon both parties, the learned single Judge has erred in not considering the said proposition properly. Stating so, he submitted that these appeals have to be allowed.

4.The learned counsel appearing for the third respondent has submitted that it is trite proposition that consent decree is a contract with the imprimatur of the court superadded. It is something more than a mere contract and has both the elements of command and a contract. It is also well settled that a consent decree is executable as much as a decree passed on adjudication, the, executability of which cannot be questioned except on grounds of mutual discharge, satisfaction or discharge, nullity or otherwise barred under any law. He further submitted that the parties have resorted to the mode of compromise with the view to amicably settle their disputes on mutually accepted beneficial terms and also obtained the seal of approval from the Court for enforcing the same as a decree. Once it has become the mandate of the court, it is not open to both parties to raise objections or pleas or scuttle the execution on any specious legal grounds raised against the executable character of the decree which if permitted would render the passing of the decree a nugatory exercise by the court. All efforts must be made by the executing court to see that the fruits of the decree are realized by the party entitled to them. He contended that Insolvency proceedings and execution proceedings could proceed simultaneously, subject to restrictions and limitations as contained in the provisions of the Insolvency laws. In the present case the insolvency proceedings came to an end at the threshold of maintainability. He further stated that the principles of res judicata are applicable to insolvency as well as execution proceedings depending upon the facts and circumstances arising for decision. He also stated that in the Insolvency proceedings, the appellants herein as applicants in Application Nos.234 and 235 of 2005 submitted that sub-section (2) of Section 9 of the Act is applicable only in a case of money decree simplicitor and when the decree is composite in nature and the conditions for payment is subject to the compliance of certain other conditions, payment of money would arise only when there is compliance of other conditions stipulated in the memorandum of compromise. It was further contended that the memorandum of compromise should be read as a whole and not in isolation and, if so read, the remedy is elsewhere and not the insolvency notice petitions invoking subsection (2) of Section 9 of the Act. On the basis of the said submissions, the learned Judge proceeded to consider the issue

touching upon the maintainability of the insolvency notices issued under sub section (2) of Section 9 of the Presidency Towns Insolvency Act 1909 and accordingly held that the only point to be considered is as to whether the decree passed on the basis of the memorandum of compromise is a decree for payment of money simpliciter or a composite decree.

5. The learned counsel for the third respondent further submitted that learned judge did not enter into the disputed questions relating to the actual performance or non performance of the obligations imposed on the parties as found in the compromise decree, and to the consequential legal rights of the parties to enforce their claims, or merits of the claim, because the decision on the question of maintainability was found suffice to dispose of the applications filed to set aside the insolvency notices. Accordingly, the learned Judge after analyzing the various clauses appearing in the compromise decree as a whole, concluded that the compromise decree was a composite one. He further submitted that the learned single Judge as well as the Division Bench of this Court was not even remotely called upon to adjudicate upon disputes arising between the parties concerning the manner and conduct of performance or non performance by either party of their respective obligations under the compromise decree as a matter of fact. It is further stated that a distinction must be drawn between saying that the compromise decree imposed mutual and reciprocal obligations on the parties and hence not a decree for payment of money, and that one party has in reality failed to perform his or her part of the obligations and therefore, the other party need not perform his or her part of the obligations under the compromise decree. The present appeals are concerned only with the second aspect of the disputes relating to the practical implementation of the terms in compromise decree as put in execution. Therefore, he submitted that what was projected on the part of the applicants as a contention was by way of a general proposition on the scheme of the compromise decree considered as a whole, that the conditions for payment is subject to the compliance of certain other conditions, payment of money would arise only when there is compliance of other conditions stipulated in the memorandum of compromise without the decree holder performing the obligations. He submitted that in the insolvency proceedings, there were no assertion or denial on facts by way of pleadings regarding the rights of the decree holder to seek enforcement of each of the clauses put in execution, thereby giving rise to any issues of fact for adjudication as was obtaining in the execution proceedings. Thereafter, on appeals preferred by the first respondent herein, the Division Bench focussed its consideration to the various clauses embodying the obligations cast upon the parties to the

compromise decree in entirety in order to ascertain the real nature and character of the compromise decree in the context of sub-section (2) of Section 9 of the Presidency Towns Insolvency Act, 1909. In other words, the focal point in consideration was the jurisdictional fact as to whether the compromise decree if read as a whole could be construed as a decree of order for payment of money and consequently the question of maintainability of the Insolvency notices under the said provision. Thus, the learned counsel for the third respondent submitted that the issue of jurisdiction of the insolvency court to entertain and try the action in insolvency founded upon a compromise decree in question and the maintainability of the same as such at the threshold was directly and substantially under consideration.

6. Stating so, the learned counsel for the third respondent prayed that these appeals have to be dismissed.

7. The learned counsel for the respondents 2, 4 and 5 adopted the arguments made by the learned counsel for the third respondent.

8. We have heard the arguments advanced by the learned counsel on either side and perused the materials available on record.

9. The following two questions arise for consideration in the present appeals:-

(a) Whether in the facts and circumstances, the earlier judgment of the Division Bench in O.S.A Nos. 202 and 203 of 2005 arising in Insolvency proceedings is binding on the parties in the execution proceedings on principles of res judicata?

(b) Whether the order passed in the execution proceeding as confirmed by the learned single Judge in the appeals, is sustainable under law?

10. A composite decree, in the strict sense, not coming within the ambit and meaning of the phraseology "decree or order for payment of money" as contained in sub-section (2) of Section 9 of the Presidency Towns Insolvency Act is one thing, and enforceability of the terms under a composite decree in execution, if enforceable under law, is another aspect which may require different considerations on facts and law applicable thereto. In AIR 1999 SC 1823 in Pawan Kumar Gupta v. Rochiram Nagdeo, with regard to the application of the principles of res judicata, the Hon'ble Supreme Court held as follows:-

"The rule of res judicata incorporated in Section 11 of the Code of Civil Procedure (CPC) prohibits the

court from trying an issue which has been directly and substantially in issue in a former suit between the same parties," and has been heard and finally decided by that court. It is the decision on an issue, and not a mere finding on any incidental question to reach such decision, which operates as res judicata.....

....

Thus the second legal position is this: If dismissal of the prior suit was on a ground affecting the maintainability of the suit any finding in the judgment adverse to the defendant would not operate as res judicata in a subsequent suit. But if dismissal of the suit was on account of extinguishment of the cause of action or any other similar cause a decision made in the suit on a vital issue involved therein would operate as res judicata in a subsequent suit between the same parties. It is for the defendant in such a suit to choose whether the judgment should be appealed against or not. If he does not choose to file appeal he cannot thereby avert the bar of res judicata in the subsequent suit."

11. In the decision of the Hon'ble Supreme Court reported in 1970 (1) SCC 613 (Mathura Prasad Bajoo Jaiswal and others v. Dossibai N.B. Jeejeebhoy), a bench of three judges of the Hon'ble Supreme Court in an illustrative exposition of various facets of doctrine of res judicata enunciated the law as under:

"5. But the doctrine of res judicata belongs to the domain of procedure: it cannot be exalted to the status of a legislative direction between the parties so as to determine the question relating to the interpretation of enactment affecting the jurisdiction of a Court finally between them, even though no question of fact or mixed question of law and fact and relating to the right in dispute between the parties has been determined thereby. A decision of a competent Court on a matter in issue may be res judicata in another proceeding between the same parties: the "matter in issue" may be an issue of fact, an issue of law or one of mixed law and fact. An issue of fact or an issue of mixed law and fact decided by a competent Court is finally determined between the parties and cannot be re-opened between them in another proceeding. The previous decision on a matter in issue alone is res judicata: the reasons for the decision are not res judicata. A matter in issue between the parties is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and

application of the relevant law thereto. A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue. When it is said that a previous decision is resjudicata, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties. A previous decision of a competent Court on facts which are the foundation of the right and the relevant law applicable to the determination of the transaction which is the source of the right is res judicata. A previous decision on a matter in issue is a composite decision: the decision on law cannot be dissociated from the decision on facts on which the right is founded. A decision on an issue of law will be as res judicata in a subsequent proceeding between the same parties, if the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declares valid a transaction which is prohibited by law.

6. The authorities on the question whether a decision on a question of law operates as res judicata disclose widely differing views. In some cases it was decided that a decision on a question of law can never be res judicata in a subsequent proceeding between the same parties: Parthasardhi Ayyangar V. Chinnakrishna Ayyanagar (ILR 5 Mad 304); Chamanlal V. Bapubhai (ILR 22 Bom 669); and Kanta Devi V. Kalawati (AIR (1946) Lah 419). On the other hand Aikman, J., in Chandi Prasad V. Maharaja Mahendra Singh (ILR 23 All 5) held that a decision on a question of law is always res judicata. But as observed by Rankin C.J., in Tarini Charan Bhattacharjee V. Kedar Nath Halidar (ILR 56 Cal 723):

"Questions of law are of all kinds and cannot be dealt with as though they were all the same. Questions of procedure, questions affecting jurisdiction, questions of limitation, may all be questions of law. In such questions the rights of parties are not the only matter for consideration".

... ..

9. A question of jurisdiction of the Court, or of procedure or a pure question of law unrelated to the right of the parties to a previous suit, is not res judicata in the subsequent suit. Rankin, C.J.,

observed in Tarini Charan Battacharjee's case (supra):

"The object of the doctrine of res judicata is not to fasten upon parties special principles of law as applicable to them inter se, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory by precluding the parties from reopening or recontesting that which has been finally decided".

... ..

11. It is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent Court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law, i.e., the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11, Code of Civil Procedure means the right litigated between the parties, i.e. the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land."

12. By applying the above principles to the facts of the present case, it is clear that the issue decided between the parties in the earlier insolvency proceedings, related to the jurisdiction of the insolvency Court to embark upon the proceeding, to try or decide the same under the law of insolvency, which obviously depended on consideration as to whether the compromise decree in question was a decree of the nature contemplated within the meaning of sub section (2) of Section 9 of the Act, as a jurisdictional fact unrelated to the rights of the parties arising with respect to the actual

performance or non performance of the obligations under the various terms of the compromise decree subjected to execution.

13. Further, the issue of enforceability of the particular terms of the compromise decree forming subject matter of execution as projected by the appellants did not enter into specific consideration in the judgment of the learned single Judge while setting aside the insolvency notices, as well as in the judgment of the Division Bench in O.S.A. Nos.202 and 203 of 2005 while confirming the same, inasmuch as no occasion had arisen for such consideration, having regard to the position that the court had held the decree as not being one for payment of money as such within the meaning and ambit of Insolvency law. Hence, there is no legal embargo in maintaining the execution proceedings. To decide the said legal issue, the Division Bench as a matter of course had to incidentally consider the tenor and effect of the various clauses found in the entire compromise decree for the limited purpose of ascertaining the nature and character of the compromise decree. The judgments of the Insolvency court were primarily concerned with the effect of the compromise decree taken as a whole and the intrinsic nature and character of the same so as to find out whether the said decree could be labelled as a decree for payment of money having the attributes of a simple money decree, for assuming jurisdiction to hear and try the insolvency proceeding. Both the judgments of the Insolvency Court did not adjudicate upon disputes or allegations relating to actual fulfillment or non fulfillment of the obligations by the parties to decree, the rights of the parties to enforce the obligations and the merits of the probable claims arising as between them, under the compromise decree. Thus, the finding of the Division Bench in the last portion of Para 8 of the judgment relied upon by the appellants to the effect that "under these circumstances the contention put forth by the learned counsel for the appellant that the decree gives rise to a money claim against the respondents for non fulfillment of the obligations and hence the decree was executable as one for decree for payment of money, though attractive, cannot be countenanced under law" needs to be read and understood in the context in which the same was considered and not divorced from the statutory context under consideration.

14. In the present case the obligations required to be performed by the appellants under the clauses put in execution are not preconditioned or interlinked by any prior obligation to be performed on the part of the decree holder. Neither is it the specific case of the appellants. On the other hand, performance of the obligations under certain clauses cast upon the decree holder are independent, distinct and severable without interlinking of obligations.

15.The parties had claimed their interest in the lands in suit from a common ancestor. They entered into a compromise. A decree was passed thereupon. A decree, as is well known, remains valid unless set aside. The respondents never challenged the validity or otherwise of the said consent decree. It was acted upon. They had disposed of a property pursuant thereto and, thus, took advantage of a part thereof. It was, therefore, impermissible for them to resile therefrom.

16.In view of the above stated circumstances, these appeals are liable to be dismissed and accordingly the same are dismissed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To
The Sub Assistant Registrar
Original Side, High Court, Madras

+4cc to Mr.K. Hari Shankar, Advocate, S.R.No.62004
+1cc to Mr.M. Chidambaram, Advocate, S.R.No.61986
+4 cc to Mr. R. Tholgappian, Advocate Sr.No.62209,62206,62210 & 62211

ARII(CO)
md (15/11/2016)

O.S.A.Nos.333 to 336 of 2009

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