

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.11.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

S.A.No.352 of 2005
and
C.M.P.No.5642 of 2005

Mr.Chinnaswamy ..Appellant/2nd Defendant

Vs.

1.Mr.Nagalingam
2.Mr.Marimuthu

..Respondents/Plaintiff/1st Defendant

Prayer:Second Appeal filed under section 100 of the Code of Civil Procedure against the judgment and decree in A.S.No.29 of 2002 on the file of Additional District Judge, Fast Track Court.IV, Poonamallee dated 30.06.2004 in reversing the well considered the judgment and decree in O.S.No.348 of 1997 on the file of District Munsif cum Judicial Magistrate, Ambattur dated 16.03.2000.

For Appellant : M/s.V.Srimathi
For Respondents : R1 - Died
No appearance

JUDGMENT

The Second Appeal on hand is filed against the judgment and decree passed in A.S.No.29 of 2002 on the file of learned Additional District Judge, Fast Track Court.IV, Poonamallee, reversing the judgment and decree passed in O.S.No.348 of 1997 on the file of District Munsif-cum-Judicial Magistrate, Ambattur.

2.One Sri.Chithirai, father of the plaintiff had two wives namely Gengammal and Varadhammal. The plaintiff is the only son through the 2nd wife, namely Varadhammal. The defendants are the sons through the 1st wife, namely Gengammal. 2 Acres and 47 Cents in Vellanoor Village belonged to Chithirai, out of which, he sold 'A' Schedule to Varadhammal on 14.09.1967. The remaining 1 Acre and 80 Cents were equally divided amongst plaintiff and two defendants and each shared 60 Cents equally. The plaintiff is the only legal heir to the said Varadhammal and therefore, the plaintiff claims that he is in absolute possession and enjoyment of the 'A' Schedule property, measuring 20 Cents of

'B' Schedule property. Based on the ground that the plaintiff is in possession and enjoyment of the suit schedule property, the suit was filed for permanent injunction. The defendant rebutted the contentions raised by the plaintiff in the plaint. Though the relationship between the plaintiff and the defendants were admitted, the defendants had not admitted the possession and enjoyment of the suit schedule property of the plaintiff. Oral partition of 0.60 Cents to each son is admitted by the parties, the defendants had purchased 0.40 Cents, out of 0.60 Cents share of the plaintiff and therefore, it was claimed that the defendant is entitled for 1 Acre and 08 Cents inclusive of the other lands purchased by him. It was stated that the defendant had been cultivating the suit lands and the plaintiff was not in possession of the suit schedule property.

3.It is further contended by the defendant that he had already filed the Civil Suit in O.S.No.409 of 1991 and an ex-parte decree was granted in his favour. The plaintiff in O.S.No.348 of 1997 filed an application to set aside the ex-parte decree in Interlocutory Application in I.A.No.1326 of 1997 and the same was also dismissed and accordingly, the ex-parte decree passed in O.S.No.409 of 1991 became final.

4.Relying on the said decree passed in O.S.No.409 of 1991, the defendant pleaded that the present suit filed by the plaintiff in O.S.No.348 of 1997 is liable to be dismissed. The Trial Court formulated the issues in respect of the entitlement of the plaintiff to get permanent injunction as prayed for in the suit. The Trial Court came to the conclusion that the decree passed in O.S.No.409 of 1991 operates against the plaintiff. Even, the Interlocutory Application filed in I.A.No.1326 of 1997, to set aside the ex-parte decree was dismissed by the Trial Court. Thus, the judgment and decree passed in O.S.No.409 of 1991 became final.

5.Placing reliance on the decree passed earlier in favour of the defendant, the Trial Court dismissed the suit. This apart, the Trial Court was of an opinion that when a decree was already passed in favour of the defendant, which was operating against the plaintiff, another suit for permanent injunction cannot be entertained in respect of the very same property, which is the subject matter of the suit, both in O.S.No.348 of 1997 and in O.S.No.409 of 1991.

6.The plaintiff preferred an appeal in A.S.No.29 of 2002 before the learned Additional District Judge(Fast Track Court.IV, Poonamallee). The First Appellate Court reversed the judgment on the ground that the decree passed in O.S.No.409 of 1991(Ex.B6) is an ex-parte decree and Ex.B7, an order passed in Interlocutory Application filed to set aside the ex-parte decree

was also due to default. Thus, both Ex.B6 and Ex.B7 are ex-parte orders and therefore, the theory of res judicata is not applicable.

7.Challenging the said judgment and decree passed by the First Appellate Court, the present Second Appeal has been filed by the defendant in the original suit.

8.The question of law raised by the appellants and this Court also admitted the Second Appeal on the following substantial questions of law:-

1. Whether the finding of the lower Appellate Court that the ex-parte decree in O.S.No.409 of 1991 on the file of District Munsif, Poonamallee is not binding upon the plaintiff is correct?
2. Whether the lower appellate Court ought not to have known the ex-parte decree is as good as a contested one and would operate as res judicata?
3. Whether the lower Appellate Court is justified in appointing an Advocate Commissioner at the Appellate stage contrary to the principles set out by the judgment of the Madras High Court in 1969 Mad. Page 144?
4. Whether the lower Appellate Court is justified in granting a decree on the basis of the Commissioner's report?
5. Whether the lower Appellate Court is right in holding that the plaintiff had proved the case for grant of permanent injunction when no document of possession had been filed?

9.The questions of law raised are in relation to the principles of res judicata to be applied in the facts and circumstances of the present appeal on hand.

10.The learned counsel for the appellant contended that the findings of the First Appellate Court is perverse on the ground that the ex-parte decree granted in favour of the defendant, cannot be brushed aside on the ground that it is an ex-parte decree.

11.Admittedly, the plaintiff in O.S.No.348 of 1997, who was the defendant in O.S.No.409 of 1991 filed an Interlocutory Application to set aside the ex-parte decree. Even that Interlocutory Application was dismissed for default. Thus, the ex-parte decree was not at the instance of the defendant in O.S.No.348 of 1997. The plaintiff in O.S.No.348 of 1997 was very much aware of the ex-parte decree and he filed Interlocutory Application No.1326 of 1997 to set aside the ex-parte decree and that was also dismissed for default. Thus, the findings of the First Appellate Court that the principles of res judicata need not be applied in the present case is patently erroneous.

12. Let us now look into Section 11 of the Code of Civil Procedure, which enumerates res judicata. "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

13. Admittedly, the plaintiff in O.S.No.348 of 1997 was the defendant in O.S.No.409 of 1991. The defendant in O.S.No.348 of 1997 was the plaintiff in O.S.No.409 of 1991. The suit in O.S.No.409 of 1991 was also filed for permanent injunction against the defendant, who is the appellant in O.S.No.348 of 1997. Thus, the subject matter of both the suits in O.S.No.348 of 1997 and in O.S.No.409 of 1991 are one and the same. This apart, the plaintiff in O.S.No.348 of 1997, Mr.C.Nagalingam was the 1st defendant in O.S.No.409 of 1991. Therefore, the parties to the suit in O.S.No.348 of 1997 are the parties in O.S.No.409 of 1991. In view of the fact that the parties are one and the same and the subject matter of the suit is also the same and further, the ex-parte decree became final, this Court is of an opinion that the very finding of the First Appellate Court that the principles of res judicata cannot be applied is erroneous and cannot be sustained at all. The very concept of the principles of res judicata is that the issues adjudicated in one suit cannot be the subject matter of the another suit between the same parties.

14. Admittedly, the parties in O.S.No.409 of 1991 are the parties in O.S.No.348 of 1997. This apart, the subject matter is also one and the same. Thus, the findings given by the First Appellate Court in this regard by stating that Ex.B6 and Ex.B7 and the ex-parte orders and therefore, the theory of res judicata is not applicable cannot be accepted and it is perverse.

15. On a perusal of the decree passed in O.S.No.409 of 1991, Ex.B6, it is found that the plaintiff Mr.Chinnaswamy, who is the defendant in O.S.No.348 of 1997. The defendant O.S.No.409 of 1991 is Mr.C.Nagalingam, who is the plaintiff in O.S.No.348 of 1997. This apart, the schedule of the properties both in O.S.No.409 of 1991 and in O.S.No.348 of 1997 reveals that it relates to Survey No.468 of 2001 of Vellanoor Village within the Sub Registration District of Poonamallee. When the parties to the suit in O.S.No.348 of 1997 and the parties in O.S.No.409 of 1991 and the suit schedule properties are also one and the same, this Court is of an opinion that the findings of the First Appellate Court with reference to the principles of res judicata is certainly perverse and cannot be accepted. Section 11 of the Civil Procedure Code categorically enumerates that if

the former suit is between the same parties and in respect of the same relief, then the subsequent suit is to be dismissed on the ground of principles of res judicata.

16. In the present case, the Trial Court has rightly dismissed the suit by applying the principles of res judicata and the First Appellate Court reversed the decree only on the ground that the ex-parte decree granted between the parties cannot be a ground to apply the principles of res judicata. It appears that such a proposition adopted by the First Appellate Court is contrary to the established principles in respect of the applications of the principles of res judicata. Thus, the Second Appeal deserves to be considered. Accordingly, the judgment and decree dated 30.06.2004 passed in A.S.No.29 of 2002 on the file of the Additional District Judge(Fast Track Court.IV, Poonamallee) is set aside and the judgment and decree dated 16.03.2000 passed in O.S.No.348 of 1997 on the file of the District Munsif-cum-Judicial Magistrate, Ambattur stands confirmed.

17. Thus, the Second Appeal stands allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Additional District Judge,
Fast Track Court.IV, Poonamallee.
2. The District Munsif-cum-Judicial Magistrate,
Ambattur.

Copy To:-

The Section Officer
VR Section, High Court
Madras.

+1cc to Mr.V.Raghavachari, Advocate, S.R.No. 77596

SA.No.352 of 2005

RJ(CO)
GN(17/12/2018)