

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.07.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.921 of 2015
and M.P No.1 of 2015

Marriyappa Nadar

... Appellant/Plaintiff

Vs.

1.Girija

2.Venkatesh

... Respondents/Defendants

PRAYER : Second Appeal filed under Section 100 of C.P.C against the judgment and decree in A.S.No.8/2013 dated 20.03.2014 on the file of the II Additional District Court, Tindivanam, reversing the judgment and decree in O.S.No.37/2004 dated 29.09.2011 on the file of the Additional Sub Court, Tindivanam.

For Appellant : Mr.N.Suresh

For Respondents : Mr.K.Venkateswaran

JUDGMENT

This Second Appeal has been filed against the judgment and decree in A.S.No.8/2013 dated 20.03.2014 on the file of the II Additional District Court, Tindivanam, reversing the judgment and decree in O.S.No.37/2004 dated 29.09.2011 on the file of the Additional Sub Court, Tindivanam.

2. The appellant is the plaintiff and the respondents are the defendants in O.S.No.37 of 2004 on the file of the Additional Sub Court, Tindivanam. The appellant partly succeeded in the suit and filed A.S.No.8 of 2013 challenging the portion of the decree rejecting his claim. The First Appellate Court dismissed the First Appeal as well as dismissed the suit in entirety. Against the said judgment dated 20.03.2014, the present Second Appeal is filed by the appellant/plaintiff.

3. The case of the appellant is that the first respondent is the mother of the second respondent. First respondent's

grandfather Neelakanda Mudaliar was the owner of the suit property and other properties. First respondent's father Appadurai Mudaliar and his brother Singaravel Mudaliar are the sons of Neelakanda Mudaliar. They partitioned the joint family property by unregistered family arrangement dated 29.10.1959. The suit property was allotted to the father of the first respondent Appadurai Mudaliar. The father of the first respondent bequeathed the suit property by a registered will dated 02.08.1969 in favour of the first respondent. The first respondent by sale deed dated 12.12.1994 sold the property to the appellant for Rs.25,000/- and agreed to clear encumbrance, if any found in title. The appellant borrowed monies from his friends for interest to purchase the suit property. The value of the suit property has increased in manifolds. When the appellant started construction of the house in the suit property, Sivagnanasambanda Mudaliar, son of Singaravel Mudaliar filed suit in O.S.No.949 of 1994 before Principal District Court, Tindivanam against the appellant claiming that the suit property belongs to him as the same was allotted to his father Singaravel Mudaliar in partition. He filed suit for declaration, injunction and obtained interim injunction. When the appellant contacted the first respondent, she promised the appellant that the property was allotted to her father and she has document to that effect and she will ask her paternal uncle Sivagnanasambanda Mudaliar to withdraw the suit and she will compensate the loss suffered by the appellant. She requested the appellant to contest the suit. The first respondent, in contrary, colluding with Sivagnanasambanda Mudaliar and the second respondent, gave evidence in O.S.No.949 of 1994 to the effect that they do not know about the property being allotted to the first respondent's father and they do not know the sale effected in favour of Ramalingam. Based on such evidence, the said suit in O.S.No.949 of 1994 was decreed. The appellant has filed appeal against the said judgment and decree. The appellant filed the present suit in O.S.No.37 of 2004 claiming Rs.2,00,000/- being the loss suffered by him.

3(a) According to the appellant, he wanted to construct the house and reside there. The appellant was forced to reside in a rental house and has paid Rs.1,00,000/- as rent. Further, he spent Rs.50,000/- to conduct the case in O.S.No.949 of 1994 and expenses incurred by him. He also stated that he suffered mental agony and he is entitled for compensation of Rs.30,000/-. Further, the appellant was forced to file suit against one Ramalingam and Gowri Shankar and he incurred expenses of Rs.20,000/-. In the said circumstances, he filed the suit for the relief stated above.

3(b) The respondents filed written statement and contended that the second respondent is unnecessary party, he has signed

only as a witness in the sale deed. The appellant is not entitled to suit claim of Rs.2,00,000/- from the respondents. The appellant has only forced to execute the sale deed. The respondents are residing in Chengalpet and they did not know the properties owned by the first respondent's father. The first respondent is willing to refund a sum of Rs.25,000/- paid by the appellant being the sale consideration and prayed for dismissal of the suit.

4. Based on the above pleadings, the Trial Court framed necessary issues. Before the learned Trial Judge, appellant examined himself as PW1 and marked eighteen documents as Exs.A1 to A18. The first respondent examined herself as DW1, but did not mark any document.

5. The learned Trial Judge, considering the pleadings, oral and documentary evidence, arguments of the counsel for parties and judgments relied on by the learned counsel for the appellant, partly decreed the suit for a sum of Rs.75,000/- and dismissed the suit for the balance amount.

6. Against the said judgment and decree dated 29.09.2011 made in O.S.No.374 of 2004, the appellant filed A.S.No.8 of 2013 before II Additional District Court, Tindivanam. The learned First Appellate Judge framed necessary points for consideration. The learned First Appellate Judge, considering the materials on record, judgment of the Trial Court as well as the arguments of the learned counsel for the appellant and respondents, dismissed the appeal. While dismissing the appeal, the learned First Appellate Judge also set aside the decree of the Trial Court granting a sum of Rs.75,000/- as compensation and dismissed the suit in entirety.

7. Against the said judgment and decree dated 20.03.2014 made in A.S.No.8 of 2013, the appellant has filed the present Second Appeal.

8. At the time of admission, the following substantial question of law is framed -

" Whether the lower Appellate Court is justified in law in setting aside the judgment and decree of the trial Court even in respect of granting the decree for money in favour of the appellant when there was no appeal filed challenging such decree?

9. The learned counsel for the appellant contended that the appellant has proved by letting in evidence as PW1 and by marking the documents the loss suffered by him and he is entitled to entire amounts of Rs.2,00,000/- as claimed in the suit. The respondents have not let in any contra evidence. Further, as per Ex.A1, family partition kurchit, the first respondent's father was allotted 2 cents which is the suit property. Contrary to the said document, the first respondent has deliberately given evidence in O.S.No.949 of 1994 that she does not know the property owned by her father. The respondents have not filed any appeal against the judgment and decree of the Trial Court granting compensation of Rs.75,000/-. They have also not filed any Cross Objection in the First Appeal filed by the appellant. In such circumstances, the learned First Appellate Judge, contrary to Order XLI Rule 22 CPC had dismissed the suit itself setting aside the judgment of Trial Court granting compensation of Rs.75,000/- to the appellant.

9(a) In support of his contention, the learned counsel for the appellant, relied on the following judgment of the Hon'ble Apex Court reported in AIR 2003 SC 1989 (Banarsi and others v. Ram Phal);

"13.We are, therefore, of the opinion that in the absence of cross appeal preferred or cross objection taken by the plaintiff-respondent the First Appellate Court did not have jurisdiction to modify the decree in the manner in which it has done. Within the scope of appeals preferred by the appellants the First Appellate Court could have either allowed the appeals and dismissed the suit filed by the respondent in its entirety or could have deleted the latter part of the decree which granted the decree for specific performance conditional upon failure of the defendant to deposit the money in terms of the decree or could have maintained the decree as it was passed by dismissing the appeals. What the First Appellate Court has done is not only to set aside the decree to the extent to which it was in favour of the appellants but also granted an absolute and out and out decree for specific performance of agreement to sell which is to the prejudice of the appellants and to the advantage of the respondent who has neither filed an appeal nor taken any cross objection.

In the case before us, the Trial Court found the plaintiff (in his suit) not entitled to decree for specific performance and found him entitled only for money decree. In addition, a conditional decree was also passed directing execution of sale deed if only the defendant defaulted any paying or depositing the money within two months. Thus to the extent of specific performance, it was not a decree outright; it was a conditional decree. Rather, the latter part of the decree was a direction in terrorem so as to secure compliance by the appellant of the money part of the decree in the scheduled time frame. In the event of the appellant having made the payment within a period of two months, the respondent would not be, and would never have been, entitled to the relief of specific performance. The latter decree is not inseparably connected with the former decree. The two reliefs are surely separable from each other and one can exist without the other. Nothing prevented the respondent from filing his own appeal or taking cross-objection against that part of the decree which refused straightaway a decree for specific performance in his favour based on the finding of comparative hardship recorded earlier in the judgment. The dismissal of appeals filed by the appellant was not resulting in any inconsistent, iniquitous, contradictory or unworkable decree coming into existence so as to warrant exercise of power under Rule 33 of Order 41. It was not a case of interference with decree having been so interfered with as to call for adjustment of equities between respondents inter se. By his failure to prefer an appeal or to take cross-objection the respondent has allowed the part of the Trial Court's decree to achieve a finality which was adverse to him.

22. For the foregoing reasons we are of the opinion that the first Appellate Court ought not to have, while dismissing the appeals filed by the defendant-appellants before it, modified the decree in favour of the respondent before it in the absence of cross-appeal or cross-objection. The interference by the first Appellate Court has reduced the appellants to a situation worse than in what they would have been if they had not appealed. The High Court ought to have noticed this position of law and should have interfered to

correct the error of law committed by the first Appellate Court."

10. Per contra, the learned counsel for the respondents contended that the appellant failed to prove that he suffered any loss and that the respondents are liable to pay compensation of Rs.2,00,000/-. It is only the appellant who insisted that the suit property belonged to the first respondent and insisted the sale of the suit property by the first respondent to him. In such circumstances, even if the appellant has suffered any loss, the respondents are not liable to pay any amounts as compensation. Even if the respondents have not filed any appeal or cross objection, the Appellate Court has ample power to set aside the judgment and decree erroneously granted by the Trial Court. The learned First Appellate Judge only corrected the error committed by the Trial Court and there is no necessity to interfere with the said finding and prayed for dismissal of the Second Appeal.

10(a) In support of his contention, the learned counsel for the respondents, relied on the following judgment reported in (1998) 7 SCC 327 (K.Muthuswami Gounder v. N.Palaniappa Gounder);

"12.Order XLI Rule 33 enables the appellate court to pass any decree or order which ought to have been made and to make such further order or decree as the case may be in favour of all or any of the parties even though (i) the appeal is as to part only of the decree; and (ii) such party or parties may not have filed any appeal. The necessary condition for exercising the power under the Rule is that the parties to the proceeding are before the court and the question raised properly arises out of the judgment of the lower court and in that event the appellate court could consider any objection to any part of the order or decree of the court and set it right. We are fortified in this view by the decision of this Court in AIR 1988 S.C. 54. No hard and fast rule can be laid down as to the circumstances under which the power can be exercised under Order XLI Rule 33 C.P.C. and each case must depend upon its own facts. The rule enables the appellate court to pass any order/decreed which ought to have been passed. The general principle is that a decree is binding on the parties to it until it is set aside in appropriate proceedings, ordinarily the appellate court must not vary or reverse a decree/order in favour of a party who has not preferred any appeal

and this rule holds good notwithstanding Order XLI Rule 33 C.P.C.. However, in exceptional cases the rule enables the appellate court to pass such decree or order as ought to have been passed even if such decree would be in favour of parties who have not filed any appeal. The power though discretionary should not be declined to be exercised merely on the ground that the party has not filed any appeals....."

11. Heard the learned counsel for the appellant as well as respondents and perused the materials available on record.

12. Considering the materials on record, the following additional substantial question of law is framed.

"whether the courts below have failed to consider the oral and documentary evidence let in by the appellant in proper perspective and whether the compensation awarded by the Trial Court is proper and adequate?"

Substantial question of law No.1 :

13. The appellant had filed the suit claiming compensation for Rs.2,00,000/- against the respondent for the loss suffered by him. The first respondent, in collusion with her paternal uncle has given evidence in O.S.No.949 of 1994 filed by her paternal uncle against the appellant after selling the property to him. In the said suit, the Trial Court granted a decree for a sum of Rs.75,000/-. The appellant filed A.S.No.8 of 2013 challenging the portion of decree rejecting part of the claim of the appellant. The respondents have not filed any appeal challenging the compensation granted to the appellant. They did not file any cross objection in the appeal filed by the appellant. In such circumstances, the learned First Appellate Judge erred in law in not only dismissing the appeal filed by the appellant, but also set aside the decree granted by the Trial Court. There is no special circumstances warranting the First Appellate Court to exercise the discretionary power under Order 41 Rule 22 of CPC.

14. The learned counsel for the appellant relied on Order 41 Rule 22 CPC which reads as follows -
Order 41 Rule 22 of CPC

"22.Upon hearing respondent may object to decree as if he had preferred separate appeal._(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree (but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he

has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow".

Explanation: A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.

(2) Form of objection and provisions applicable thereto. Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

...
(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule."

As per this provision, the respondent in the appeal is entitled to sustain a decree in challenging the finding rendered against him. But the respondent cannot seek the relief which was rejected by the lower court without filing an appeal or cross objection. This issue was considered by the Hon'ble Apex Court in the judgment reported in 2007 (1) SCC 75. As per the provision of Order 41 Rule 22 CPC and the judgment of the Hon'ble Apex Court referred to supra, the contention of the learned counsel for the appellant has considerable force. The portion of the judgment made by the learned First Appellate Judge in A.S.No.8/2013 dated 20.03.2014 setting aside the judgment of the Trial Court is liable to be set aside and it is hereby set aside.

Additional substantial question of law No.2 :

15.The appellant has claimed a sum of Rs.2,00,000/- as compensation from the respondents. According to the appellant, he spent a sum of Rs.1,00,000/- towards rent which he had incurred due to the conduct of the first respondent. The appellant has produced document to show that he was residing in a rented house. Admittedly, the appellant contested the suit in O.S.No.949 of 1994 filed by the paternal uncle of first

respondent as his title in respect of the property purchased from the first respondent was in dispute. From the materials on record, it is seen that the first respondent agreed to clear all the encumbrance if any found in title of the suit property. In view of such undertaking, the first respondent is liable to pay compensation to the appellant and amounts spent by him to contest the suit in O.S.No.949 of 1994.

16. In addition to that, one Ramalingam and another had encroached the suit property. The first respondent or her paternal uncle have not taken any steps to evict the said persons. The appellant only filed the suit for ejectment. The first respondent has not disputed that appellant had filed suit in this regard. Further, after purchase of the property, the appellant was not able to enjoy the property in view of the suits filed by the paternal uncle of the first respondent and encroachment made by Ramalingam and another. In view of the same, the appellant is entitled to compensation for mental agony. The Trial Court has considered this fact, but granted decree only for a sum of Rs.75,000/- considering the averments in the plaint, evidence both oral and documentary, that as per Ex.A1, 2 cents in Survey No.493 was allotted to her father and in spite of same, she gave evidence that she does not know the properties owned by her father. In view of such stand taken by the first respondent and admission of the first respondent as DW1 on the date of her evidence, the value of the property would be Rs.1,50,000/- to Rs.2,00,000/-, the appellant is entitled to interest @ 6% per annum from the date of judgment of the Trial Court, i.e. 29.09.2011 till repayment.

17. In the result, this Second Appeal is allowed setting aside the judgment and decree of the First Appellate Court dated 20.03.2014 made in A.S.No.8/2013 dismissing the suit in entirety. There will be a decree in favour of the appellant for a sum of Rs.1,50,000/- together with interest @ 6% per annum from 29.09.2011 till payment in full by the respondents. No costs. Consequently, connected Miscellaneous Petition is closed.

WEB COPY

Sd/-
Assistant Registrar (CO)

//True Copy//

Sub Assistant Registrar

rgr

To

- 1.The II Additional District Judge, Tindivanam
- 2.The Additional Subordinate Judge, Tindivanam.

Copy To

- 1.The Section Officer, V.R. Section,
High Court, Madras.

+1cc to Mr.N.Suresh Advocate, S.R.No. 47473

+1cc to Mr.A.Palaniyappan, Advocate, S.R.No. 47258

S.A.No.921 of 2015

VGI (CO)
GN(05/10/2018)



WEB COPY