

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on: 17.07.2019
Judgment Pronounced on : 12.09.2019

CORAM:

THE HONOURABLE MR. JUSTICE RMT.TEEKAA RAMAN

S.A.Nos.1120 and 1121 of 1999

T.N.Palanisamy ... Appellant/Plaintiff in S.A.No.1120/1999
... Appellant/2nd Defendant in S.A.No.1121/1999
....Versus....

P.Thangavel ...Respondent/Defendant in S.A.No.1120 of 1999

1.Minor Praba
Rep by Next Friend Mother Dhanalakshmi
2.Dhanalakshmi ..Respondents 1 & 2/Plaintiffs
3.Thangavel Nadar ...3rd Respondent/1st Defendant
in S.A.No.1121 of 1999

PRAYER in S.A.No.1120 of 1999:This Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 23.03.1999 made in A.S.No.181 of 1998 on the file of the Principal District Court, Erode modifying the judgment and decree in O.S.No.169 of 1994 dated 03.07.1998 on the file of the Principal Subordinate Court, Erode.

PRAYER in S.A.No.1121 of 1999:This Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 23.03.1999 made in A.S.No.216 of 1998 on the file of the Principal District Court, Erode modifying the judgment and decree in O.S.No.190 of 1996 dated 03.07.1998 on the file of the Principal Subordinate Court, Erode.

For Appellants:: Mr.A.K.Kumarasamy, Senior Counsel
for Mr.S.Kaithamalai Kumaran

For Respondents:: Mr.T.Murugamanickam,
Senior Counsel

J U D G M E N T

The appellant in S.A.No.1120 of 1999 (plaintiff in O.S.No.169 of 1994) filed the suit before the Sub-Court, Erode seeking the specific performance of the suit sale agreement dated 14.06.1989. While, the second respondent-Dhanalakshmi in

the Second Appeal No.1121 of 1999 filed a suit in O.S.No.190 of 1996 on the file of the Sub-Court, Erode, seeking partition of the suit schedule property and half a share in the property and on the ground that the suit property is an ancestral property and hence, she is entitled for half share in the suit property and the alleged agreement executed by the father P.Thangavel, is not binding upon her. The daughter of the first respondent in the S.A.No.1120 of 1999, who is the second respondent in S.A.No.1121 of 1999, Prabha also filed another O.S.No.99 of 1997 on the file of the District Munsif Court, Erode along with her mother, seeking for declaration that the agreement of sale executed by the father is not binding upon them to the extent of 2/3rd share, declaration of their title that the suit agreement is not binding upon them and injunction restraining them from enforcing the agreement against them.

2. On memo filed by the counsel for the respective parties, all the three suits O.S.No.169/94, O.S.No.190/96 and O.S.No.99/97 were clubbed together, common evidence has been let in and common judgment was pronounced, whereby the trial Court has decreed the suit for specific performance filed by the appellant herein in O.S.No.169 of 1994. However, dismissed the suit in O.S.No.190 of 1996 for the relief of partition and also dismissed O.S.No.99 of 1997 for the declaration that the agreement is not binding upon the parties to the extent of 2/3rd share.

3. Aggrieved against the common judgment rendered as above, the first defendant namely, Thangavel filed A.S.No.181 of 1998 against the judgment and decree granted in O.S.No.169 of 1994 whereas, the daughter who sought the relief of partition has filed A.S.No.216 of 1998 against the decree in O.S.No.190 of 1996 rejecting relief of partition. No appeal has been filed against the judgment and decree in O.S.No.99 of 1997.

4. On consideration of both oral and documentary evidence and re-appreciation of records, the Lower Appellate Court [Principal District Judge], Erode, by a common judgment dated 23.03.1999, has held that the specific performance decree granted by the trial Court had an erroneous consideration. In the absence of non-impleading of the one of the share owner, namely minor Praba, either in the agreement or in the suit and also on re-appreciation of the clause contained in the suit schedule agreement has held that in view of the multiple points of contradiction indicating the fact that the suit sale agreement was entered and executed only as a security for the loan transaction advanced by the plaintiff to the defendant and the sale agreement is never intended to be sale agreement. Only by way of security for the loan transaction, the same was executed and, accordingly, rejected the main prayer in the suit

and awarded the alternative relief of refund of the advance amount paid and also held that in view of the amendment to Section 29(A) of the Hindu Succession Act effected by the Tamil Nadu, the plaintiff minor Praba in O.S.No.190 of 1996 is entitled to 1/2 share in the suit property and accordingly, allowed both the appeal suits.

5. Aggrieved against the common judgment and decree granted in A.S.No.181 of 1998 and A.S.No.216 of 1998, the defeated unsuccessful plaintiff has filed S.A.No.1120 of 1999 with regard to the disallowed portion of the main prayer and filed the Second Appeal 1121 of 1999 against judgment in A.S.No.216 of 1998 for the grant of relief of partition of the half share in the suit property.

6. The above two Second Appeals were admitted on 15.07.1999 on the following substantial questions of law:-

i) Whether the judgment of the lower appellate court in non-suiting the plaintiff in his suit for specific performance, solely on the ground of laches, when the plaintiff has otherwise established his case can be sustainable in law?

ii) Whether the findings of the lower appellate court that since the alternative relief is sought for, it should be presumed that the appellant has given up the primary relief of specific performance, is correct?

7. Mr.A.K.Kumarasamy, learned Senior Counsel appearing for the appellant has filed a memo for the formation of additional substantial questions of law:-

i) Are not the findings rendered in O.S.No.99 of 1997 between the same parties operate as res judicata for the suits O.S.No.169 of 1994 and O.S.No.190 of 1996 against which the above appeals are filed?

ii) since the findings rendered in O.S.No.99 of 1997 become final as there is no further appeal against the same, the said findings cannot be allowed to be challenged in connected appeal

8. The learned Senior Counsel appearing for the appellant in both the Second Appeals contended that by a common judgment, the relief of specific performance was granted in O.S.No.169 of 1994

and the relief of partition as claimed by the minor Prabha-daughter of the first defendant Thangavel was rejected in O.S.No.190 of 1996 and also the relief of declaration asked by her along with her mother for a declaration that the agreement of sale entered between Palanisamy and Thangavel was not binding upon them to the extent of 2/3 share was also rejected by the trial Court. However, the defeated defendant has preferred A.S.No.181 of 1998 against O.S.No.169 of 1994 and A.S.No.216 of 1998 against O.S.No.190 of 1996. He submitted that no appeal has been filed against the judgment and decree in O.S.No.99 of 1997 wherein, the relief of declaration that Ex.A1 sale deed was not binding upon them to the extent of 2/3rd share has been rejected and hence, non-filing of appeal against the judgment and decree in O.S.No.99 of 1997 will operate as res judicata. In support of his contentions, he relied upon the decisions reported in i) 2010 (3) CTC 799 [1.K.Viswanathan 2.Karuppanna Chettiar Vs.1.R.Appavoo Chettiar and others], ii) 1997 (III) CTC 384 [A.S.A.Arumugam and another Vs.Ramalinga Nadar and another] and iii) AIR 1976 SUPREME COURT 1645 [Lonankutty Vs.Thomman and another].

9. Mr.T.Murugamanickam, learned Senior Counsel for the respondents would submit that since the issues framed therein are not inter-connected with O.S.No.169 of 1994 and pleading and the prayer in the above suits are different and distinct and evidence let in by the parties namely D.W.1 and D.W.2 are clear and not interrelated, the non-filing of appeal against the judgment in O.S.No.99 of 1997 will not operate as res judicata in respect of the claim in O.S.No.169 of 1994 before the Lower Appellate Court and further contended that in respect of O.S.No.190 of 1996 and O.S.No.99 of 1997, in the first suit, the daughter alone is a party, while, in the suit O.S.No.99 of 1997, both the daughter-Prabha and the wife of Thangavel are the plaintiffs and hence, they are parties to the lis and pleadings are different and prayer is different and the evidence adduced is different in nature in respect of the respective pleadings. So one shall not operate as a res judicata against the others.

10. Heard both sides and perused the records.

11. On perusal of pleadings in O.S.No.169 of 1994, the same was filed before the Sub-Court, Erode by the appellant in S.A.No.1120 of 1999 seeking the relief of specific performance of Ex.A1 suit sale agreement and the said suit was filed alleging that:

(i) on 14.06.1989, the defendant entered into an agreement of sale to sell the suit properties to the plaintiff for a total consideration of Rs.1,09,000/- out of which, the defendant had received on the said day a sum of Rs.82,000/- towards advance

and earnest deposit and executed a registered sale agreement Document No.1759 of 1989, S.R.O., Erode.

(ii) Under the terms of the said registered sale agreement, on the same day i.e., 14.06.1989, the plaintiff was put in possession in part performance of the sale. Ever since then, the plaintiff has been and is in continuous possession and enjoyment of the suit properties with the plaintiff having his L.T.C. Office therein. The then tenant inducted by the defendant was directed to pay rentals to the plaintiff by the defendant by his letter dated 14.06.1989.

(iii) On non-receipt of any reply from the defendant for his letter dated 5.11.1990, plaintiff again sent a registered letter on 28.1.1991 requesting the defendant to execute sale-deed. To the utter shock and dismay of the plaintiff, the defendant had caused a reply notice dated 15.02.1991 trotting out falsehood in abundance.

(iv) Plaintiff had issued a detailed and fitting reply on 20.02.1991 with no response from the defendant and therefore, the plaintiff caused a lawyer's notice dated 4.6.1991 under their Ref.No.58/1991 to which also there was no reply.

12. It is to be stated that by a memo, all the three suits have been clubbed together and common evidence was let in. The Agreement holder was examined as P.W.1., while Thangavel was examined as D.W.1. Mother of the minor Praba was examined as D.W.2 and private witness were also examined. The fact that neither the minor Prabha-daughter of the said Thangavel nor his wife were parties to Ex.A1 suit sale agreement and they are not parties to the suit in O.S.No.169 of 1994 assumes significance.

13. In view of the question of law urged by the respective Senior Advocates, it remains to be stated that while minor-Praba and mother were not a party, either to Ex.A1 or to the suit proceedings. So also, the mother of Prabha, namely Dhanalakshmi is not a party to O.S.No.190 of 1996 in her individual capacity. The fact that she mainly acted as a natural guardian for the minor plaintiff also assumes significance.

14. It is seen from the decision in K.Viswanathan case supra that speaking for the Division Bench, His Lordship, Hon'ble Mr.Justice V.Ramasubramanian, as He then was, has culled out the entire proposition of law in connection with res judicata under Section 11 of C.P.C and also carved out the procedure for application of the said provision of law, as interpreted by the Hon'ble Supreme Court in various decisions referred therein.

15. In the said judgment his Lordship has made a comparative table all the cases and prayers made and issues framed therein and accordingly, held that when the parties to the proceedings and reliefs sought for and the issues that arise for consideration were inextricably intertwined doctrine of res judicata shall operate.

16. Keeping in mind, the guidelines issued by the Division Bench on determination of the operation of the doctrine of res judicata let us analyse the facts of the respective cases.

Suit No.	Relief prayed for	Issues framed
O.S.No.164 of 1994	For a specific performance of the suit sale agreement Ex.A1	1.Whether the suit sale agreement is true? 2.Whether the plaintiff is entitled for the relief of specific performance? 3.Whether the plaintiff is entitled for the alternative relief of refund of the amount? 4. To what other relief?
O.S.No.190 of 1996	For a partition of 1/2 share and for separate possession	1.Whether the 1st defendant and the plaintiff minor Prabha are living separately for 4 to 5 years is true? 2.Whether it is true that the agreement executed by the 1st defendant on 14.06.1989 is not binding upon the plaintiff has alleged by the plaintiff? 3.Whether the plaintiff is entitled to 1/2 share? 4.Whether the plaintiff is entitled to the relief as sought for? 5.To what other relief, they are entitled to?

Suit No.	Relief prayed for	Issues framed
O.S.No.99 of 1997	For a declaration that the agreement dated 14.06.1989 is not binding upon the plaintiff and for injunction from enforcing the agreement against the plaintiff	1.Whether the plaintiffs are entitled for relief for declaration? 2. Whether the plaintiffs are entitled for the relief of permanent injunction? 3.To what other relief?

17. At this juncture, it remains to be stated that Praba and Dhanalakshmi are not parties to the suit in O.S.No.169 of 1994. On a comparative study of the pleadings in O.S.No.190 of 1996 and O.S.No.99 of 1997, it is seen that the issues framed therein touch upon the rights of the parties as to whether minor Praba is entitled to 1/2 share in the suit property (O.S.No.190 of 1996) and whether minor Prabha and her mother Dhanalakshmi (O.S.No.99 of 1997) are entitled for 2/3 share in the property and consequently, whether they are entitled to declaration of title that the suit sale agreement executed by the Palanisamy in favour of Thangavel is not binding upon them and to that extent, they are inter-connected and inter-related. It remains to be stated that the evidence of Thangavel, pleadings and evidence of Thangavel as D.W.1 in O.S.No.169 of 1994 appears to be different and distinct, while the pleadings and the evidence let in by the plaintiffs in O.S.Nos.190 of 1996 and 99 of 1997, Dhanalakshmi, who was examined as D.W.2, is different and distinct.

18. On applying the ratio laid down by the Division Bench in K.Viswanathan's case supra, this Court finds that both on pleadings, evidence, relief sought for and the issues, O.S.No.190 of 1996 and O.S.No.99 of 1997 are inter-related and inter-connected and hence, non-filing of appeal against the judgment and decree granted in O.S.No.99 of 1997 will operate as a bar in Appeal in A.S.No.216 of 1998 filed by the Praba and Dhanalakshmi in A.S.No.216 of 1998. While, seeking the relief of partition of 1/2 share. At this juncture, this Court hastens to add that though this Court has a reservation as to the finding rendered by the learned Sub-Judge in O.S.No.190 of 1996 and O.S.No.99 of 1997 for rejecting the relief of minor Praba and Dhanalakshmi on the ground that minor Prabha is also liable for anterior debts incurred by the father and though it is a joint family property, she cannot seek for partition and appears to be alien to the concept of joint family property and further alien to the provisions of the amended Hindu Succession Act.

19. Coming to the point of Principle of res-judicata, in view of the decision of the Hon'ble Supreme Court, as explained by the Division Bench judgment, on the question of law of res judicata alone, the judgment and decree passed in O.S.No.99 of 1997 is confirmed by vacating the judgment and decree granted in A.S.No.216 of 1998, though the learned Principal District Judge/ the Lower Appellate Court has rightly appreciated evidence and relief this case, however, on the principles of non-filing of appeal against the judgment in O.S.No.190 of 1996. Accordingly, this Court holds that S.A.No.1121 of 1999 filed by Palanisamy- the second defendant in the respective suit is allowed.

20. On the technical plea of res-judicata, the judgment and decree of the trial Court in those suits O.S.No.190 of 1996 and 99 of 1997 is confirmed. Without expressing anything on the finding given by the trial Court, though the finding is opposite to Hindu Succession Law as amended. In this view of the matter S.A.No.1121 of 1999 is allowed.

21. In this connection as to the application of the principle of res judicata to the judgment and decree granted in O.S.No.169 of 1994 has modified in A.S.No.181 of 1998 by the Lower Appellate Court (Principal District Judge, Erode) whereby, the relief of specific performance granted by the trial Court has been modified as that of the refund of the amount paid under the agreement by granting of alternative relief instead of the main relief, this Court observes that the minor Praba and the Dhanalakshmi are not a party to the Ex.A1-sale agreement nor parties to O.S.No.169 of 1994. Furthermore, the pleadings and the evidence of D.W.2 Dhanalakshmi who is a plaintiff in the above said two suits is different and distinct and issues involved therein are also different and distinct. Accordingly, non-filing of appeal against judgment in O.S.No.99 of 1997 before the Lower Appellate Court by the minor-Prabha and her mother Dhanalakshmi will not operate as res-judicata. In the absence of they being the party in the suit and the issues raised thereunder are not interconnected with the issues raised in O.S.No.169 of 1994 and the relief sought for.

22. Now, let us consider whether the judgment rendered by the Lower Appellate Court in A.S.No.181 of 1998 is sustainable in law and accordingly, this Court holds that the additional substantial question of law -1 in favour of the appellant in S.A.No.1121 of 1999 alone and not in S.A.No.1120 of 1999 as to the substantial question of law initially framed at the time of the admission S.A.No.1120 of 1999.

23. It is seen that the substantial questions of law (ii) and (iii) do not reflect the facts and circumstances of the

case. Since, the Lower Appellate Court has considered the material on evidence, while, rejecting the primary relief of specific performance on the ground that the agreement of sale was never intended to be an agreement of sale and it is executed only as a security for the loan transaction and in view of the clause contained therein namely that as a part performance of Ex.A1 suit sale agreement, the tenancy right has been made over to the agreement holder/plaintiff-appellant and he was directed to collect rent in view of the interest for the payment made under Ex.A1 and for a very meagre amount, a long period of two years has been given as a time for execution of the sale deed. Besides, under Ex.B1 issued by the plaintiff at the earliest point of time wherein the plaintiff has asked for the principal amount along with interest due thereon, but, not a specific performance of the agreement which remains undisputed in the cross-examination of D.W.1 assumes significance.

24. Further, the Lower Appellate Court has held that the suit has also been filed after 5 years, though period of time for execution of sale deed is fixed at 2 years. There is inordinate delay in filing the suit for specific performance of the suit sale agreement of 4 years. After 4 years, now, it is to be stated that the suit sale agreement was entered on 14.06.1989 and the time fixed for execution has expired on 14.06.1991 and the suit was filed two years 8 months 18 days, thereafter.

25. Taking into consideration that 3 years period is fixed for specific performance under the Limitation Act, the Lower Appellate Court has rejected held that amongst other things, that the plaintiff has not proved that he is ready and willing to perform his part of contract the primary relief of specific performance and granted the alternative relief of refund of the amount paid under the agreement and hence, the second substantial question of law does not arise for consideration on the above factual matrix and the Lower Appellate Court has rightly held that the minor Prabha was not made as a party to the agreement and hence, the third substantial question of law does not arise for consideration.

26. Substantial Question of Law -i:-

The appellant/plaintiff has come forward with suit for specific relief of Ex.A1 suit sale agreement and as extracted above, the sale consideration was fixed at Rs.1,09,000 and an amount and Rs.82,000/- was paid at the time of entering into the agreement and after reading the clauses in Ex.A1, coupled with the admission of P.W.1, the Lower Appellate Court has come to the conclusion that since the suit property was devolved upon the first defendant by virtue of the partition deed dated 5.7.1971 and further recitals that as the defendant to pay to tune of Rs.37,500/- and has to pay return back the advance

amount under agreement of sale with one Komalavalli and after the partition deed before entering into Ex.A1 sale agreement, the defendant has begotten the minor Prabha and hence, on the date of coming into force of Section 29(A) of the Hindu Succession Act by the Tamil Nadu Amendment, she is entitled for 1/2 share in the suit property and the sale agreement is subsequent thereof and accordingly, held that the minor being is not a party to Ex.A1 sale agreement wherein nothing was addressed regarding the presence of the minor daughter however the defendant himself is described as a full owner of the property viz., sole and absolute owner of the property and the sale consideration was fixed at Rs.1,09,000/- and advance amount of Rs.82,000/- was made and balance of Rs.27,000/- alone has to be paid for which, the period of execution of sale deed was fixed at 2 years and terms of Ex.A1 coupled with the admission of P.W.1 in the cross-examination that in order to cancel the earlier agreement of sale with Komalavalli under Ex.A4-suit sale agreement. Ex.A1 came into force and coupled with a fact that in view of the interest paid on the advance amount (viz) under agreement towards interest and advance amount Rs.82,000/- tenant of the building was instructed to pay the monthly rent to the agreement holder-plaintiff and he was permitted to collect the rent from him assumes significance as to colour of the alleged sale agreement.

27. The above fact coupled with a fact that Ex.B1 issued by the plaintiff wherein he had made an demand of repayment of principal along with interest defaulted by the defendant for which, a reply was given by the defendant. The legal notice demanding execution of a sale agreement has been issued only, after the expiry of the two years period goes against the plaintiff/appellant for the primary relief specific performance.

28. Besides, suit has been filed after two years, 8 months and 18 days from the expiry date fixed under the agreement. In other words, suit has been filed after 4 years of the entering into Ex.A1 agreement and in the absence of any bonafide evidence or positive evidence to show the plaintiff was ready and willing to perform his part of the contract, the Lower Appellate Court has rightly come to the conclusion that Ex.A1 is never intended to be an agreement of sale and it is only executed as surety for the loan transaction and such a finding has been arrived by the Lower Appellate Court, does not call for any interference at the appellate stage.

29. Based upon the proper interpretation in clause (i) of Ex.A1, coupled with the admission of P.W.1 in the cross-examination, the rejection of the primary relief of specific performance and granting of alternative relief of refund of the advance amount paid under Ex.A1 is well considered and well merited and does not warrant any interference by this Court and

hence, the substantial questions of law (ii) and (iii) were answered in negation against the appellant. While, the additional substantial question of law (i) is held in favour of the appellant only in respect of S.A.No.1121 of 1999 and in S.A.No.1120 of 1999, the same is held against the appellant.

30. In fine,

i) S.A.No.1120 of 1999 is dismissed and S.A.No.1121 of 1999 is allowed. No costs.

ii) The finding of the Lower Appellate Court that Ex.A1 agreement is only executed as a surety for the loan transaction between the parties and it was never intended to be the sale agreement and it is executed as the security for the amount advanced under the document namely Rs.82,000/- and the plaintiff has not demonstrated that he ready and willing to perform his part of the contract in the manner known to law is upheld.

iii) The suit having been filed after two years 8 months and 18 days of the time expiry and 4 years. Suit is filed after 4 years from the date of the agreement and hence, the rejection of the primary relief of specific performance by the Lower Appellate Court is hereby confirmed and the grant of the alternative relief of refund of amount paid under Ex.A1 is hereby confirmed.

iv) Consequently, the judgment and decree granted in A.S.No.181 of 1998 modifying the judgment and decree granted in O.S.No.169 of 1994 is hereby confirmed. Consequently, the judgment and decree in A.S.No.216/98 are set aside and the judgment and decree in O.S.No.190 of 1996 is restored.

-s/d-

Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

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To

1. The Principal District Judge, Erode
2. The Principal Subordinate Judge, Erode.
3. The V.R. Section, High Court, Madras.

+2 CCS to Mr.S.Kaithamalai Kumaran, Advocate sr 78754 & 78755

S.A.Nos.1120 and 1121 of 1999

NRJK (CO)

SP(10/03/2020)