

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.03.2019

PRONOUNCED ON : 23.05.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM
S.A.No.2004 of 2000
and
CMP.No.19734 of 2000
and M.P.No.191 of 2010

1. Arumugham
2.Sahadevan

... Appellants/plaintiffs

Vs.

1. Ramalingam(Deceased)
2. Smt. Kulandaiammal (deceased)
3. Ramamoorthy
4.Poomalai
5. Annamalai
6.Dharman
7. Govindammal
8. Venkatraman
(RR3 to R8 brought on record as LR's of the
deceased R1 vide order of court dated
30.10.2013 made in CMP.No.693/2013)

..Respondents/Defendants

PRAYER : Second Appeal filed under Section 100 of C.P.C.,
against the judgment and decree 07.08.2000 passed by the I
Additional District Judge cum Chief Judicial Magistrate, Salem
made in A.S.No.14 of 2000 reversing the judgment and decree of
II Additional District Munsif, Salem, dated 30.09.1999 made in
O.S.No.134 of 1994.

For Appellants : Mr.M.Vaidyanathan

For Respondents : M/s.R. Sivaraman (for R4 to R8)
set exparte(for R3)

JUDGMENT

This second appeal has been filed by the plaintiffs 2 and 3
against the judgment and decree passed by the Additional
District Judge-cum-Chief Judicial Magistrate, Salem in A.S.No.14
of 2000 dated 07.08.2000 reversing the judgment and decree
passed by the II Additional District Munsif, Salem in O.S.No.134

of 1994 dated 30.09.1999.

2. One Pachaiappan had filed a suit in O.S.No.134 of 1994 on the file of the II Additional District Munsif, Salem, to set aside the decree passed in O.S.No.826 of 1985 on the file of the District Munsif, Salem and to restrain the defendants and their men from in any manner interfering with his peaceful possession and enjoyment of the suit property by means of a permanent injunction. During pendency of the said suit, the said Pachaiappan died and hence his sons have been impleaded as plaintiffs 2 and 3. Subsequently, the plaint has been amended and a prayer has been included to declare the title of the plaintiffs to the suit property. The learned II Additional District Munsif by the judgment dated 30.09.1999 had decreed the suit as prayed for with costs. Aggrieved by the same, the defendants had filed an appeal in A.S.No.14 of 2000 on the file of the I Additional District Judge-cum-Chief Judicial Magistrate, Salem. The learned I Additional District Judge-cum-Chief Judicial Magistrate, Salem by the judgment dated 07.08.2000 had allowed the said appeal with costs and set aside the judgment and decree passed by the trial court and dismissed the suit. Feeling aggrieved, the plaintiffs 2 and 3 have filed the present second appeal.

3. For the sake of convenience, the parties are referred to as described before the trial court.

4. The averments made in the plaint are in brief as follows:

The plaintiffs are the absolute owners of the suit property. The first plaintiff's grandfather Arumuga Gounder gave his properties to his sons viz., Natesa Gounder, Muthuvel Gounder, Vadivel Gounder, Rathinavel Gounder and Kolandai Gounder by means of a registered settlement deed dated 01.11.1947. In the said document, he instructed his sons that all of them should get equal shares in the properties. Accordingly, after his death, his sons divided the properties orally and they took separate possession of their respective shares and separate patta also has been given in respect of their shares. In the said oral partition, the first plaintiff's father Vadivel Gounder got properties in S.No.83/13 part, 83/7, 82/4 and 85/7 in Jagir Reddypatty village, Salem Taluk. The said Vadivel Gounder and other sharers were having houses in S.No.83/13 and the said survey number has been sub-divided according to oral partition and construction of the houses. In this S.No.83/13, the portion allotted to the Vadivel Gounder in the oral partition has been sub-divided as S.No.83/13 B. There are two houses in S.No.83/13 B. In an oral arrangement, the first plaintiff took one house which is situated on the west and the other house which is situated on the east was given to the first

plaintiff's brother Palaniswamy. The house given to the first plaintiff in the said S.No.83/13 B is the suit property.

b) the first defendant is the husband of the second defendant. The first defendant's father Natesa Gounder and the first plaintiff's father Vadivel Gounder are brothers. In the oral partition between them and their brothers, the said Natesa Gounder got another house in S.No.83/13. The second defendant had purchased the house on the east of the suit property from the first plaintiff's brother Palaniswamy under a sale deed dated 14.10.1981. Of late, the defendants developed enmity towards the first plaintiff and his father Vadivel Gounder and brother Palaniswamy. They filed many false cases against the first plaintiff, his brother and all the family members. In all the criminal cases, the first plaintiff and his family members were acquitted. The civil suits also dismissed as false. While so, the first defendant in the course of his cross-examination in O.S.No.1240 of 1984 on the file of the District Munsif, Salem on 03.03.1989, proclaimed that he had obtained a decree for permanent injunction against the first plaintiff in respect of the suit property in O.S.No.826 of 1985 on the file of the District Munsif, Salem. On verification, the first plaintiff came to know that the first defendant had obtained an exparte decree against the first plaintiff on 31.07.1985 by fraud and misrepresentation and also by abuse of process of law. The first plaintiff did not receive any summons in the said suit. But the first defendant had managed to return the summons with an endorsement that the summons were refused and when there were so many proceedings pending between the parties, there is no reason for the first plaintiff to leave the matter exparte. The first plaintiff immediately filed an application in I.A.No.448 of 1989 on 09.03.1989 to set aside the exparte decree passed in the suit in O.S.826 of 1985. The said petition was posted to 26.03.1992 for enquiry. But on that date, the first plaintiff could not attend the court and hence the said petition was dismissed for default. Subsequently, the first plaintiff filed a petition to restore the I.A.No.448 of 1989, but the said petition was rejected on 06.08.1992.

c) The description of the property given in the suit in O.S.No.826 of 1985 is absolutely wrong and no such property is in existence within the alleged boundaries as mentioned in the suit in O.S.No.826 of 1985. The first defendant had wilfully given a wrong description. Even though the said decree does not relate to the suit property herein, the first defendant proclaims that the decree is only in respect of this suit property. By misinterpreting the decree, the first defendant is attempting to evict the first plaintiff forcibly from the suit property. The description of property given in the sale deed executed by the first plaintiff's brother Palaniswamy in favour

of the second defendant will clearly establish that the suit property belongs to the first plaintiff only. Under the said circumstances, the first plaintiff was advised to file a suit to set aside the exparte decree in O.S.No.826 of 1985 on the file of the District Munsif, Salem, on the ground of fraud and misrepresentation and by abuse of process of law. The second defendant who is none other than the wife of the second defendant is having property on the 'East-West' of the property. Taking advantage of the situation, she is also trying to encroach of the suit property on the instigation of the first defendant. Hence, the first plaintiff was constrained to file a suit for setting aside the judgment and decree passed in O.S.No.826 of 1985 on the file of the District Munsif, Salem and also for permanent injunction to restrain the defendants from interfering with his peaceful possession and enjoyment of the suit property. During pendency of the suit, the original plaintiff, Pachaiappan died and hence his sons have been impleaded as plaintiffs 2 and 3. Further, the plaint has been amended to include the prayer for declaration of title of the plaintiffs over the suit property.

5. The averments made in the written statement filed by the first defendant and adopted by the second defendant are in brief as follows:

The suit is barred by limitation. The original plaintiff Pachaiappan had filed an application in I.A.No.448 of 1989 in O.S.No.826 of 1985 on 09.03.1989 to set aside the exparte decree passed in O.S.No.826 of 1985 on the file of the Principal District Munsif, Salem and the same was dismissed for default on 26.02.1992 and later a decreed was passed against the said Pachaiappan. While such being the case, it is absolutely untenable to contend that he came to know about the exparte decree only when he was cross examined in O.S.No.1240 of 1984. The first defendant had filed E.P.No.23 of 1995 on the file of the Principal District Munsif, Salem for contempt and the same is pending and in the said EP, since the said Pachaiappan died, the plaintiffs 2 and 3 have been impleaded as respondents. The plaintiffs are not the owners of the suit property. It is only the first defendant who is the owner. The plaintiffs have not disclosed what was the fraud or misrepresentation made on the part of the first defendant. The plaintiffs have deliberately alleged that the first defendant procured a false endorsement of refusal. The alleged encroachment is false. It is only the said Pachaiappan, who attempted to trespass but with no success. Absolutely no case is made out to set aside the decree in O.S.No.826 of 1985. Therefore, the defendants prayed to dismiss the suit.

6. The averments made in the additional written statement filed by the first defendant and adopted by the second defendant in brief as follows:

The first plaintiff Pachaippan had filed a suit in O.S.No.1240 of 1984 on the file of the District Munsif, Salem for partition and other reliefs. The said suit was decreed against the second defendant and one Vadivel Gounder who is father of Pachaippan and one Palaniswamy, who is the brother of Pachaippan. The second defendant herein was arrayed as third defendant in that suit. She filed an appeal in A.S.No.10 of 1999 and the same was remanded for fresh trial and after remand, the suit in O.S.No.1240 of 1984 was dismissed with costs holding that he had already sold 1/3 divided share in favour of Vadivel Gounder and Palaniswamy. The second defendant herein had purchased the entire property of Vadivel Gounder under two sale deeds dated 14.10.1981. So, there was no property for partition as claimed by the said Pachaippan in O.S.No.1240 of 1984. The judgment and decree passed in O.S.No.1240 of 1984 dated 18.12.1990 will operate as res judicata. The present suit is not maintainable and the same is liable to be dismissed.

7. Based on the aforesaid pleadings, the learned II Additional District Munsif, Salem, had framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, the second plaintiff was examined as PW1 and two more witnesses were examined as Pws. 2 and 3. They had marked Exs.A1 and A25 as exhibits. On the side of the defendants, the first defendant examined himself as DW1 and he had marked Exs.B1 to B19 as exhibits. The Advocate Commissioner's report and plan were marked as Exs.C1 and C2 respectively.

8. The learned II Additional District Munsif, Salem, after considering the materials placed before her, found that the suit is not barred by limitation. She further found that the suit is not barred by the principle of resjudicata also. She further found that the decree in O.S.No.826 of 1985 was obtained by fraud. She further found that the plaintiffs are absolute owners of the suit property. Accordingly, she decreed the suit as prayed for with costs. Aggrieved by the same, the defendants had filed an appeal in A.S.No.14 of 2000 on the file of the I Additional District cum Chief Judicial Magistrate, Salem. The learned I Additional District Judge- cum-Chief Judicial Magistrate, Salem, had allowed the said appeal with costs and set aside the judgment and decree passed by the trial court and dismissed the suit. Feeling aggrieved, the plaintiffs 2 and 3 have filed the present second appeal.

9. This court at the time of admitting the second appeal has formulated the following substantial question of law.

" Whether the decree in O.S.No.826 of 1985 was obtained by playing fraud on court?"

10. Thereafter, the following additional substantial

question of law has been formulated.

" Whether the lower Appellate Court was justified in holding that the appellants had not established the title to the suit schedule property, by relying on extraneous material and ignoring relevant documents on the ground that they are self serving in nature."

11. Heard Mr.M.Vaidyanathan, learned counsel for the appellants and Mr.R.Sivaraman, learned counsel for the respondents 4 to 8.

12. Substantial question of law and additional substantial question of law.:

The learned counsel for the appellants has submitted that the first appellate court erred in reversing the well considered judgment of the trial court. He further submitted that the first appellate court erred in holding that the description of property under Ex.B6 sale deed had been wrongly given. He further submitted that the first appellate court failed to note that the defendants have not taken steps to rectify the defect if at all there are any. The first appellate court failed to note that the first defendant had not proved that the house on the western boundary of the property covered under Ex.B6 belonged to him. He further submitted that the first appellate court failed to note that the door number of the house in the suit property is 4/64 which is evidenced by the house tax receipts Ex.A1 to 6 and Ex.A15. He further submitted that the first appellate court failed to consider that the Advocate Commissioner also noted the door number as 4/64 only. He further submitted that the first appellate court failed to note that the father of the first defendant viz., Natesa Gounder did not have any share in S.No.83/13B and hence the first defendant could not have got any share in S.No.83/13B. He further submitted that the first appellate court failed to note that properties covered under Exs.B4, 5, 6 are totally different which is evident from the description of properties given in the said documents. He further submitted that the first appellate court failed to note that the deceased first plaintiff had sold his undivided 1/3rd share in that property only in Ex.B4 sale deed which is evidenced from the said sale deed. He further submitted that the first appellate court failed to note that there are other properties allotted to Vadivel Gounder, the father of first plaintiff, as evident by Exs.A1 and 12 and that the first plaintiff would have a share in each property.

13. The learned counsel for the appellants further submitted that the first appellate court failed to note that the suit in O.S.1240 of 1984 was filed by the deceased first plaintiff for partition of the entire properties and that it was dismissed

only on the ground that partition was already done and hence it will not mean that the deceased first plaintiff did not have any properties at all. He further submitted that the first appellate court failed to note the suit in O.S.826 of 1985 had been decreed exparte without any service of summons on the deceased first plaintiff. He further submitted that the suit in O.S.No.826 of 1985 was only for permanent injunction and since the defendants had admitted the plaintiffs' possession over the suit property in this case, in any event the decree has become a nullity. He further submitted that the first appellate court having found that the plaintiffs are in possession of the suit property, erred in holding that the plaintiffs are not entitled to permanent injunction against the defendants when the defendants had not proved that they are the true owners of the suit property. He further submitted that the trial court taking into consideration of the entire evidence in a proper perspective had rightly decreed the suit as prayed for, but the first appellate court without considering the evidence in a proper perspective erroneously reversed the findings of the trial court and hence he prayed to allow the second appeal and set aside the judgment and decree passed by the first appellate court and restore the trial court's judgment and decree.

14. Per contra, the learned counsel for the respondents/defendants has submitted that in the plaint itself, the plaintiffs have admitted that on 09.03.1989 itself, they got knowledge about the exparte decree passed in O.S.No.826 of 1985 and filed an application in I.A.No.448 of 1989 to set aside the exparte decree and the same was dismissed for default on 26.02.1992. He further submitted that the petition which was filed by the first plaintiff to restore the I.A.No.448 of 1989 was rejected on 06.08.1992 and therefore, the decree passed in O.S.No.826 of 1985 has become final. He further submitted that the plaintiffs pleaded that the said decree was obtained by fraud and misrepresentation and hence they are entitled to file the present suit, but necessary particulars have not been furnished as contemplated under Order 6 Rule 4 CPC. He further submitted that the decree passed in O.S.No.826 of 1985 will operate as res judicata. He further submitted that even though the first plaintiff got knowledge about the exparte decree on 09.03.1989 itself, he filed the present suit only on 31.10.1994, i.e., nearly after 5 years and hence the suit is clearly barred by limitation. He further submitted that the plaintiffs failed to prove that the first defendant had obtained decree in O.S.No.826 of 1985 by playing fraud or misrepresentation. He further submitted that the suit which was filed by the first plaintiff in O.S.No.1240 of 1984 was dismissed as he had already sold his property and that being so, he is not entitled to claim any right over the suit property. He further submitted that in the sale deed executed by the first plaintiff's brother

Palaniswamy in favour of the second defendant, the boundary has been wrongly mentioned and taking advantage of the same, the first plaintiff had filed the above suit, but actually, he is not having any right over the suit property and taking into consideration of the said facts, the first appellate court has allowed the appeal and dismissed the suit and in the said factual findings, this court cannot interfere and therefore, he prayed to dismiss the second appeal.

15. The learned counsel for the respondents in support of the aforesaid contentions, relied upon the decision in K.K.Swaminathan Vs. Srinivasagam 2003 (4) CTC 347.

16. In the plaint itself, the first plaintiff had stated that the first defendant in the course of his cross examination in O.S.No.1240 of 1984, on 03.03.1989, he proclaimed that he had obtained a decree for permanent injunction against the plaintiffs in respect of the present suit property in O.S.No.826 of 1985 and hence, he filed an application in I.A.No.448 of 1989 on 09.03.1989 to set aside the exparte decree passed in O.S.No.826 of 1985. He also filed certified copies of the affidavit and petition filed in I.A.No.448 of 1989 in O.S.No.826 of 1985 and marked as Exs.A16 and A17. In the said affidavit also, he has stated that he came to know about the passing of exparte decree on 03.03.1989, when the first defendant disclosed the said fact during cross examination in O.S.No.1240 of 1984 and hence he filed the said petition to set aside the exparte decree passed in O.S.No.826 of 1985. The said petition was dismissed for default on 26.02.1992. Further, it is averred in the plaint that an application was filed to restore the said I.A.No.448 of 1989 and the same was rejected on 06.08.1992. So, it is clear that the decree passed in O.S.No.826 of 1985 has attained finality.

17. A perusal of the affidavit filed in I.A.No.448 of 1989 (Ex.A17) would show that the first plaintiff has stated that the first defendant had filed a suit in O.S.No.826 of 1985 for permanent injunction and in the said suit, no summons was served on him. He further stated that he came to understand that the first defendant had suppressed his presence and made an endorsement to the effect that he refused to receive the summons but actually no summons was offered to him. The said petition was dismissed for default and the petition to restore the said I.A.No.448 of 1989 also rejected. By stating the same reasons, the plaintiff had filed the present suit. It is clearly an abuse of process of the court. If really he got any grievance against the rejection of his application which was filed by him to restore I.A.No.448 of 1989, he would have filed a revision but he has not chosen to file any revision against the said order. So, he cannot file a fresh suit on the same ground that too

after several years.

18. In the plaint, the plaintiff has stated that the first defendant has obtained a decree by making false endorsement in the summons as he refused to receive the same. Apart from the said allegation he has not given any other particulars as contemplated under Order 6 Rule 4 CPC. At this juncture, it would be relevant to refer to the decision in Bishundeo Narain And Another vs. Seogeni Rai And Jagernath 1951 AIR SC 280 wherein the Hon'ble Supreme court has held that if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. It was further held that general allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice however strong the language in which they are couched may be, and the same applies to undue influence and coercion.

19. In this case, as already pointed out that in the plaint, the plaintiff has simply stated that the first defendant had obtained a decree by fraud and misrepresentation, but he has not elaborated the nature of fraud or misrepresentation committed by the first defendant.

20. In K.K.Swaminathan Vs. Srinivasagam, (cited supra), this court in paragraph No.27 has observed as follows:

"27. One of the most abuse of process of the Court is re-litigation. It is an abuse of process of the Court and contrary to justice to re-litigate the same issue, which has already been tried and decided earlier against him. If the same issue is sought to be re-agitated by frivolous and vexatious suits, it is not as if the Court is powerless to stop the proceedings when it is brought to its notice. O.S.2473/1996 is sheer abuse of process of the Court reagitating the same issue, in my view, should not be allowed to continue."

In this case also, as already pointed out that the decree passed in O.S.No.826 of 1985 has attained finality and the present suit has been filed on the same ground which was raised in I.A.No.448 of 1989 and hence, it is an abuse of process of court.

21. As already pointed out that in the plaint itself, the first plaintiff has stated that he got knowledge about the passing of the exparte decree on 03.03.1989 in O.S.No.826 of 1985, but he filed the present suit only on 31.01.1994 i.e., after nearly 5 years. As per Article 59 of the Limitation Act 1963, the suit to cancel or set aside an instrument or decree or for the rescission of a contract has to be filed within three years from the date when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him.

22. When the plaint was returned by the trial court raising the question as to the limitation, the plaintiff had represented the plaint stating that since he filed the petition to set aside the exparte decree on 09.03.1989 in I.A.No.448 of 1989 and the same was dismissed on 26.02.1992, the aforesaid period has to be excluded and if the said period is excluded, the suit is in time. The trial court also excluded the aforesaid period and came to the conclusion that the suit is not barred by limitation. The said approach is contrary to the law.

23. In this context, it would be relevant to refer to sub-section (1) of Section 14 of the Limitation Act, 1963 which reads thus:

"(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

24. A plain reading of the aforesaid provision would show that where a suit or application has been filed in a wrong forum and diligently prosecuted the said proceedings, the period during which the aforesaid proceedings are pending can be excluded. In this case, it is not the case of the plaintiffs that I.A.No.448 of 1989 has been filed before a wrong forum and the same has been diligently prosecuted in good faith that the said forum will have the jurisdiction. I.A.No.448 of 1989 has been filed under Order 9 Rule 13 CPC to set aside the exparte decree before the court which passed the decree. The said

petition is certainly maintainable before the said court. In case the said petition is dismissed on the ground that the petition has been filed before the wrong forum or the said petition is dismissed by holding that the petitioner has to file only a suit, in such a case, the period during which the aforesaid application diligently prosecuted can be excluded. In this case, I.A.No.448 of 1989 has been filed before the proper court having jurisdiction. Further, the first plaintiff has not diligently prosecuted I.A.No.448 of 1989. He allowed the said application for dismissal for non-prosecution. Further, he filed a petition to restore the said IA and the same was also rejected and that being so, the plaintiffs cannot contend that the first plaintiff has diligently prosecuted the said application. Therefore, the plaintiffs cannot exclude the period from 09.03.1989 to 26.02.1992. As already pointed out that the present suit was filed only on 31.01.1994 i.e., after 5 years from the date of knowledge about the exparte decree. Therefore, the suit is hopelessly barred by limitation.

25. Admittedly, the partition suit filed by the first plaintiff in respect of the suit property against his father and brother and second defendant herein was dismissed and as such, the said judgment and decree also very well operate as res judicata.

26. It is also to be pointed out that the first appellate court found that in Ex.B6 wrong description has been given as though the house of the deceased first plaintiff was situated on the west of the suit property, but in fact the Eastern boundary of the suit property is the house of the first defendant who got the same from his father Natesa Gounder who got allotment of that house in the oral partition. The first appellate court further held that under what document or under what arrangement the deceased first plaintiff got a house on the west of the property purchased by the second defendant was not proved. In the said factual findings, this court cannot interfere.

27. For the aforesaid reasons, this court is of the view that the suit is barred by limitation and also barred by the principle of res judicata. Further, the plaintiffs have not pleaded and proved the fraud and misrepresentation as contemplated under Order 6 Rule 4 CPC. Therefore, the judgment and decree passed by the first appellate court have to be confirmed. Accordingly, the substantial question of law and additional substantial question of law are answered against the appellants.

28. In the result, the second appeal is dismissed. Consequently, connected miscellaneous petitions are closed. No costs.

Sd/-
Assistant Registrar(CS-VIII)

//True copy//

Sub Assistant Registrar

gv

To

1. The I Additional District Judge-cum-Chief Judicial Magistrate, Salem.

2. The II Additional District Munsif, Salem.

3. The Section Officer, VR Section, High Court, Madras.

+1cc to Mr.N.Damodaran, Advocate SR.No.44281

S.A.No.2004 of 2000
and
CMP.No.19734 of 2000
and M.P.No.191 of 2010

SKV(CO)
GMY(16/10/2019)

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