

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 06.03.2019

CORAM:

THE HONOURABLE MR. JUSTICE M.M. SUNDRESH
AND
THE HONOURABLE MR. JUSTICE C.SARAVANAN

O.S.A. Nos.40, 41 and 43 of 2019

S.Mukanchand Bothra

...Appellant
in all OSAs

Vs.

1. M.Pawan Kothari

..Contesting
Respondent in all OSAs

2. Jhaveri Lal

3. Bhimsa

4. Rattan

.. Respondents
2-4 given up

Prayer: Appeals under Order 36 Rule 1 of the Original Side Rules read with Clause 15 of the Letter Patent against the fair and decreetal order dated 15-11-2018 made in A.Nos.4639 of 2017, 7771 of 2018, 5143 of 2018 in C.S.No.703 of 2005 on the file of this Court.

For Appellant : Mr.S.V.Jayaraman, Senior Counsel
(in all) for Mr.T.Dhanasekaran

For Respondents
(in all) : Mr.N.Nagu Sah for R1

J U D G M E N T

(Delivered by M.M.SUNDRESH, J.)

These appeals have been preferred against the order of the learned Single Judge in setting aside the ex parte decree, condoning the delay in filing application for setting aside the ex parte decree which has been filed by abundant caution and impleading the applicant/first respondent herein as a party defendant in the suit.

2. The suit has been filed by the appellant seeking damages and for mandatory injunction, inter alia, alleging that construction has been made contrary to law. The suit was filed

on 06.10.2003. It was ex parte decreed on 06.03.2008. A perusal of the decree would show that the parameters required for passing an ex parte decree, which is on a prima facie consideration of the materials available on record, was not done. Be that as it may, we are not inclined to go into the said issue at this point of time.

3. On 07.10.2003 itself, the suit property has been sold by the original defendants in favour of the first respondent's parents whose application for impleadment has been allowed. Thereafter, sale deed has been executed in favour of the contesting respondent. Thus, the decree itself has been passed against the defendants, who lost their title at the relevant point of time. To be noted, before suit itself is taken up for hearing, the transfer has been effected.

4. After coming to know about the ex parte decree, the contesting respondent, who got the settlement in his favour and purchased the property from the original defendants, filed an application. It appears that the said application was already allowed as recorded by the learned Single Judge by the order dated 11.12.2017. However, this was not taken note of. By way of an amendment, another application was filed seeking to condone the delay. Similarly, one more application was filed seeking to set aside the ex parte decree.

5. A plea was taken on behalf of the appellant stating that the contesting respondent was aware of the decree passed, which at the cost of reiteration is only for damages and for mandatory injunction. The appellant averred in the counter affidavit that the applicant ought to have filed an application seeking leave of the Court to implead. This is on the premise that the contesting respondent, who is not the party to the decree, is trying to put up the construction. Learned Single Judge has made the observation that there is nothing on record to show that the contesting respondent was not aware of the decree obtained, which itself is for a different relief and the ex parte decree was already set aside on the earlier occasion. Learned single Judge also took note of the fact that on the very next day to the filing of the plaint, the transfer was effected by the original defendants in favour of the parents of the contesting respondent and thereafter the sale deed was executed. Therefore, all the applications have been allowed by holding that the contesting respondent's parents were the bona fide purchasers for value and he being not a party to the suit, is entitled to contest the suit on merit by impleading him as a party defendant.

6. Learned Senior Counsel appearing for the appellant submitted that the averments made to the effect that a police complaint was given in the year 2016 was not taken note of and,

therefore, to that extent, the order of the Learned Single Judge would require interference.

7. Learned counsel appearing for the contesting respondent would submit that inasmuch as the facts are not in dispute with respect to the transfer of title by way of sale deed and settlement which have been taken note of by the learned Single Judge, no interference is warranted.

8. When the court of the first instance applied its mind and set aside ex parte decree, while condoning the delay, this Court should be wary of interfering with the findings rendered resulting in such a decision. We are dealing with a case where the title has been transferred much before the decree was passed, that is on the very next day of the date of the presentation of the plaint. Therefore, the decree was passed against the defendants who lost title. The suit itself is filed for damages and for mandatory injunction. Now, the contesting respondent acquired title through sale deed executed by his parents. The ex parte decree was also set aside on the earlier occasion which has been taken note of by the learned Single Judge. Thus, looking from any perspective, we are of the view that the orders passed by the learned Single Judge do not require any interference. In fact, the impleading as ordered by the learned Single Judge would be in the best interest of the appellant himself as he may not have the problem of filing such an application against the party who acquired title immediately after presentation of the plaint and even before the passing of the decree.

9. We also do not find any reason to interfere with the findings of the learned Single Judge on the so-called complaint given to the police station which is not supported by any material.

In such view of the matter, we do not find any error in the order passed the learned Single Judge warranting interference. Appeals stands dismissed. No costs. Consequently, connected C.M.P.Nos.3760,4414 of 2019 are closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

ssm

To

The Sub Assistant Registrar
Original Side
High Court, Madras.

+1 cc to Mr.T.Dhanasekaran, Advocate SR.No.21841
+1 cc to Mr.N.Nagu Sha, Advocate SR.No.20772

O.S.A. Nos. 40, 41 and 43 of 2019

SSI(CO)
CSL/03.04.2019



WEB COPY