

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.03.2019
PRONOUNCED ON : 03.04.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.1237 of 2005

Chinnammal @ Kalammal

...Appellant/Plaintiff

Vs.

P.N.Natarajan

...Respondent/Defendant

Prayer:

Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 12.04.2005 made in A.S.No.16 of 2004 on the file of the II Additional Sub Court, Coimbatore against the judgment and decree dated 12.04.2004 made on O.S.No.575 of 2001 on the file of the II Additional District Munsif Court, Coimbatore.

For Appellant : Fr.sr.Xavier Arul Raj, Senior counsel
for Mr.S.M. Edward Stanley

For Respondents: Mr.S.Subbiah, Senior Counsel
for M/s. D.Sathya Sri.

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 12.04.2005 passed in A.S.No.16 of 2004 on the file of the II Additional Subordinate Court, Coimbatore, reversing the judgment and decree dated 12.04.2004 passed in O.S.No.575 of 2001 on the file of the II Additional District Munsif Court, Coimbatore.

2.The second appeal has been admitted on the following substantial questions of law.

"1. Whether the sub court, coimbatore went wrong in demanding separate documentary evidence for the 'B' schedule properties, when the entire extent is governed by the Ex.A1 and A.2?

2. Whether sub court, coimbatore committed an

error in allowing the appeal in A.S.No.16/2004 when the respondent has not prayed for a mandatory injunction against this appellant in the properties claimed by him in A.S.No.15 of 2004?

3. Whether the lower court committed an error in respect of the extent that will prevail over the boundaries in the connected appeals?"

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. The Parties are referred to as per their rankings in the trial Court for the sake of convenience.

5. Suffice to state that the plaintiff has laid the suit in O.S.No.575 of 2001 against the defendant seeking the reliefs of declaration of her title to the plaint 'B' schedule property and for the grant of the relief of permanent injunction restraining the defendant interfering with her possession and enjoyment of the plaint 'B' schedule property as put forth in the plaint and for the grant of the relief of mandatory injunction directing the defendant to remove the encroachment made by him in the plaint 'B' schedule property to the width of 2 feet east-west and 72 feet length north-south of the plaintiff's western side wall. The plaintiff claims title to the plaint 'A' schedule property by virtue of the sale deed dated 12.09.1963 executed in her favour by Kasturisamy naidu. That Kasturisamy naidu has executed the abovesaid sale deed in favour of the plaintiff in respect of the plaint 'A' schedule property is not seriously controverted by the defendant as such, however, the dispute between the parties is only as regards the plaint 'B' schedule property and with reference to the same, according to the plaintiff, even before Kasturisamy naidu had alienated the property in her favour, at the time of construction of the tiled house in the suit property, he had left a space about 2 feet towards the backyard of the property i.e. western side of the plaint schedule property and in the said tiled house, projections were extending for the purpose of the drainage of the water falling on the roof portion during rainy season and accordingly, it is also stated that the 2 feet space east west was left by Kasturisamy Naidu for the purpose of periodical white wash to reach the backyard wall. It is thus the case of the plaintiff that the space of 2 feet width east-west and 72 feet north-south of the property alienated to the plaintiff has been used for the extension of the roof projection with the object of

draining the water falling on the roof as well as for enabling the property holder to reach the backyard wall for white washing, etc., and accordingly, the plaintiff has come forward with the case that the plaint 'B' schedule property forms part of the plaint 'A' schedule property and complaining that the defendant, while putting up the construction in his property, had encroached into the 'B' schedule property without authority by raising the wall and also putting up the septic tank. Hence, according to the plaintiff, she has been necessitated to lay the suit for appropriate reliefs.

6. The defendant resisted the plaintiff's suit contending that he had purchased his property by way of two sale deeds dated 18.03.1974 and 24.09.1979 marked as Exs.B1 and B2 and accordingly based on his entitlement to the properties purchased by him under Exs.B1 and B2, he had put up the construction and accordingly, it is his case that the plaintiff cannot lay any claim of title to the property acquired by the defendant by way of Exs. B1 and B2 sale transactions and disputed the claim of the plaintiff that she is also having title to the 2 feet space on the western side of her property for the purpose of draining the rain water as well as for enabling her to clean the wall, etc., and accordingly prayed for the dismissal of the plaintiff's suit.

7. The defendant contending that the plaintiff without any authority is attempting to disturb his possession and enjoyment of the property acquired by him, on that premise, laid the suit against the plaintiff in O.S.No.2443 of 1999 seeking the relief of permanent injunction and thereby it is found that seeking his entitlement to the property in dispute, namely, 2 feet x 72 feet space i.e. the 'B' schedule property in O.S.No.575 of 2001, accordingly prayed for the appropriate relief. The above suit has been resisted by the plaintiff on similar lines as put forth by her in the suit laid by her in O.S. No.575 of 2001.

8. Therefore, it is found that inasmuch as the parties are at issue in respect of the same property in both the suits, each claiming right to the same one way or the other, as put forth by them, on the basis of their title deeds, accordingly both the suits were jointly tried and common evidence was adduced in both the suits and in support of the plaintiff's case P.Ws.1 and 2 were examined and Exs.A1 to A8 were marked and on the side of the defendant D.W.1 was examined and Exs.B1 to B6 were marked. Furthermore, Exs. C1 to C5 were also marked. The trial court, based on the appreciation of the materials placed on record and the submissions made, was pleased to decree the suit laid by the plaintiff in O.S.No.575 of 2001 and dismiss the suit laid by the defendant in O.S.No. 2443 of 1999. Aggrieved over the same, it is found that the defendant has preferred two appeals in A.S.No.

15 of 2004 challenging the dismissal of his suit in O.S.No.2443 of 1999 and A.S.No.16 of 2004 challenging the judgment and decree of the trial court granting the reliefs in favour of the plaintiff in O.S.No.575 of 2001. Both the appeals were disposed of by a common judgment by the first appellate court and the first appellate court, on a consideration of the materials placed on record and the submissions made, was pleased to dismiss the appeal preferred by the defendant in A.S.No.15 of 2004 and thereby confirmed the dismissal of his suit by the trial court in O.S.No.2443 of 1999. The first appellate court further set aside the judgment and decree of the trial court passed in O.S.No.575 of 2001 by way of allowing the appeal preferred by the defendant, resultantly, dismissed the suit laid by the plaintiff in O.S.No.575 of 2001.

9. Challenging the judgment and decree of the first appellate court in A.S.No.16 of 2004, the plaintiff has preferred the second appeal. However, it is found that as against the dismissal of the appeal in A.S.No.15 of 2004, the defendant has not chosen to prefer any second appeal. It is therefore found that as far as the dismissal of the defendant's suit in O.S.No.2443 of 1999, the same has become final and as abovenoted, in the abovesaid suit, the defendant has claimed title to the property in issue based upon his title deeds marked as Exs.B1 and B2. However, the courts below had refused to grant the relief in favour of the defendant as prayed for. As regards the plaintiff's case, with reference to the reliefs prayed for her in respect of the property in dispute, the trial court had accepted her case. However, the first appellate court had rejected her case. Impugning the same, the present second appeal has been laid.

10. In the light of the abovesaid factual matrix, the counsel for the plaintiff contended that inasmuch as the dismissal of the defendant's suit has become final and in the abovesaid suit also the defendant had put forth claim of title to the property in dispute on the basis of his title deeds and thereby sought for the appropriate relief against the plaintiff and inasmuch as the defendant has filed to impugn the same by way of the second appeal and on the other hand, it is only the plaintiff, who has preferred the second appeal as against the dismissal of her suit by the first appellate court, accordingly argued that the defendant is barred by res judicata to raise any challenge as regards the claim of title by the plaintiff to the property in dispute and according to him, he having avoided preferring the second appeal against the dismissal of his suit by the courts below, the cause of the defendant has become permanently sealed and foreclosed since Res judicata would apply against him, particularly, when the suits laid by both the parties had been tried together by conducting a common trial in which common issues had been framed with reference to the

property in dispute and as the defendant had failed to appeal in the High Court against the adverse decrees passed against him by the first appellate court, according to him, the decree not assailed, thereupon metamorphoses into the character of a former suit and in such view of the matter, it is put forth that the defendant cannot be allowed to raise any plea putting forth the claim of title to the property in dispute one way or the other and on that premise alone, it is contended that the present second appeal preferred by the plaintiff should be entertained. In this connection strong reliance is placed upon the decision of the Apex Court reported in 2015 1 LW.1 (Sri Gangai Vinayagar Temple and another vs. Meenakshi Ammal & others) whereunder, the Apex Court had held that where the suits laid by the respective parties, as regards the property in dispute, are tried in common, by conducting a joint trial, and the issues had been framed in common in both the suits and accordingly, the losing party must file appeals in respect of all the adverse decrees passed against him and further held that in the event of the losing party not assailing the same, the same would metamorphose into the form of a former suit and thereby held that the cause of the losing party will be permanently sealed and foreclosed by the application of the principle of res judicata and the position of law outlined by the Apex Court in the abovesaid decision is extracted below:

C.P.C., Section 11 / Res judicata, when applies, appeal against common decree, preferring of, need for, suit for injunction, title, scope.

Whether filing of an appeal against a common judgment in one case, tantamounts to filing an appeal in all the matters.

Held: suits in which common issues have been framed and a common trial, conducted, losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments - Decree not assailed thereupon metamorphoses into the character of a 'former suit' - where a common judgment has been delivered in cases in which consolidation orders have specifically been passed, filing of a single appeal leads to the entire dispute becoming subjudice once again consolidation orders are passed by virtue of inherent powers on courts by Section 151 of CPC.

Having avoided filing appeals against the decrees in 2 suits the cause of the respondents was permanently sealed and foreclosed since res judicata applied against them.

An appeal ought to have been filed by tenant in respect of O.S.5/78 which was dismissed, for fear of inviting the rigours or res judicata as also for correcting the 'dismissal' order - Tenant had been completely non-suited once it was held that no cause of action had arisen in its favour and the suit was dismissed. Para 23.

Facts: property in question belonged to appellants and leased to respondents 1 to 6. Tenants filed the sit O.S.No.5 of 1978 seeking for injunction. The appellant-Trust filed 2 suits, being O.S.6/78 and O.S.7/78, claiming arrears of rent from the tenants (respondent No.s 1 to 6 before us, in which the transferees were not impleaded) pertaining to the period prior to the transfer of suit lands by them to transferees. O.S.5/78 came to be dismissed. O.S.6/78 was partially decreed. Whilst O.S.7/78 was dismissed on the ground that the alleged claim of arrears of rent in this suit was not tenable as the said land was part of and encompassed in the suit land which was the subject matter of O.S.7/78 and accordingly, the claim was covered and subsumed therein.

All three suits have been decided, after recording of common evidence, by a common judgment passed on 06.11.1982 by the court of 2nd Additional District Judge at Pondicherry. Pursuant to this judgment three different decrees have been drawn. The tenants have not filed any appeal in respect of O.S.5/78 and O.S.7/78 and an appeal was filed only against judgment and decree in O.S.6 of 1978.

Question that arise is whether the court while entertaining an appeal from judgment and decree in 'A' suit can reverse a finding rendered in suit 'B', especially when no appeal was filed from findings rendering in suit 'B'.

It has been correctly observed in the common judgment dated 06.11.1982 by which all three suits have been decided, that the issues framed in O.S.6/78 and O.S.7/78 were one and the same.

It permeates, as in the case in hand, into the sinews of all suits (O.S.5/78 and O.S.7/78) since common issues had been framed, a common trial had been conducted, common evidence was recorded, and a common judgment had been rendered. Facially, all the factors are common to each suit, namely, the commonality of issues, trial and verdict rendering any effort to differentiate them to be an exercise in futility. A reading of the plaint and of issue No.2 in O.S.5/78 (supra) will make it impossible to harbour the view that the contours of controversy in that case concerned only the apprehension of forcible dispossession of the tenants by the trust as well as the transferees.

Where a common judgment has been delivered in cases in which consolidation orders have specifically been passed, we think it irresistible that the filing of a single appeal leads to the entire dispute becoming sub judice once again. Consolidation orders are passed by virtue of the bestowal of inherent powers on the courts by Section 151 of the CPC.

In the instance of suits in which common issues have been framed and a common trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments. While so opining we do not intend to whittle down the principle that appeals are not expected to be filed against every inconvenient or disagreeable or unpropitious or unfavourable finding or observation contained in a judgment, but that this can be done by way of cross objections if the occasion arises. The decree not assailed thereupon metamorphoses into the character of a 'former suit'. If this is not to be so viewed, it would be possible to set at naught a decree passed in Suit A by only challenging the decree in Suit B.

11. In the light of the abovesaid principles of law enunciated by the Apex Court, when admittedly the defendant has failed to challenge the dismissal of his suit by the courts below in the High Court, in such view of the matter, considering

the joint trial of both the suits laid by the respective parties by the trial court and the common issues framed in both the suits as regards the property in dispute, the defendant would not be entitled to raise the question of his title to the property in dispute, and as put forth by the plaintiff, as his defence has got permanently sealed and foreclosed by the application of the principles of res judicata as adumbrated in the abovesaid decision, and on the abovesaid factors alone, in my considered opinion, the defendant would not be entitled to seek his claim of title to the property in dispute and on that reasonings, the plaintiff's title should be upheld.

12. In addition to that, the first appellate court seems to have rejected the plaintiff's case, merely on the footing that her title deed does not cover the property in dispute i.e. 2 feet x 72 feet on the western side of the property where the roof projection of her house is protruding for the purpose of draining the water during the rainy season as well as for enabling her to clean the wall etc., by reaching the backyard portion. With reference to the same, according to the first appellate court, as the documents of title projected by the defendant marked as Exs.B1 and B2 recite that the property comprised therein are only shown to be lying to the west of the plaintiff's house and not to the west of 2 feet x 72 feet space and on that premise, proceeded to hold that the 2 feet space left accordingly on the western side of the plaintiff's property had not been acquired by her by way of Ex.A1 sale transaction and the same had also not been in the usage of her vendor for the purpose of draining the rain water, etc., and on that footing dismissed the plaintiff's suit. However, in my considered opinion, the abovesaid approach of the first appellate court may not be legally sustained.

13. It is the specific case of the plaintiff that even prior to her purchase, her vendors had put up the tiled house in the property wherein the projection of the house has been protruding on the 2 feet space for draining the water falling on the roof portion and for white washing the wall by reaching the rear portion etc., and accordingly she had also purchased the property and enjoying the same as enjoyed by her vendor by projecting the roof portion of her house 2 feet on the western side only for the purpose of draining the rain water and cleaning the wall and therefore, as put forth by the plaintiff, the defendant cannot be allowed to interfere with her possession and enjoyment of the same as she had been conveyed the right to the said space / area. In this connection, it has to be remembered that the plaintiff's title deed is dated 12.09.1963 and nearly 11 years thereafter, the defendant is found to have purchased his property as one portion by way of the sale deed dated 18.03.1974 and the other portion by way of the sale deed dated 24.09.1979. In this connection, the defendant examined as

D.W.1 has admitted that while acquiring the property under Exs.B1 and B2, he had not measured the property with the assistance of surveyor, but he would only claim that both he and his vendors had measured the same by putting stones. That apart, D.W.1 has clearly admitted that while purchasing the property, the plaintiff's house roof was protruding on the western side and he had not asked his vendors as to the extent of the property purchased by the plaintiff by way of Ex.A1 sale transaction and also further admitted that he has purchased only the vacant property by way of Ex.B1 and the same lies to the west of the plaintiff's house.

14. In addition to that, the vendor of the plaintiff alienated the property to the defendant by way Ex.B1 and after his demise his son and wife by name Gopalakrishnan and Lakshmi ammal had alienated the remaining property to the defendant by way of Ex.B2 sale deed. In this connection, the plaintiff has examined the vendor of the defendant Lakshmi ammal as P.W.2 and she has deposed that she is the wife of Kasturisamy naidu and admitted that while her husband alienated the vacant area to the defendant, the house of the plaintiff was in existence with the projection on the western side of an extent of 2 feet wide for the purpose of draining rain water falling on the roof portion and excluding the said space alone, the property had been alienated to the defendant as the defendant had requested to alienate the remaining property in his favour and accordingly, the property lying to the west of the plaintiff's house had been alienated to the defendant and thereby put forth that the 2 feet space left on the western side of the plaintiff's house belongs only to the plaintiff and the same had been left and ear marked only for the purpose of drainage of the rain water as well as for the maintenance of wall and to the said area / space, the defendant is not entitled to claim any right. Considering the abovesaid evidence of P.W.2, it is found that when to the knowledge of the defendant, the house of the plaintiff had been in existence with the roof portion projecting or protruding into the 2 feet space, and knowing the abovesaid factual matrix, the defendant having chosen to purchase the property by way of Exs.B1 and B2, to say that, the plaintiff had, subsequent to the purchase, put forth the roof portion protruding into the 2 feet space, as such, cannot be accepted in any manner. Furthermore, at the time of the purchase of the properties under Exs.B1 and B2, the defendant had only purchased the vacant area and only thereafter, put up the construction. However, as rightly determined by the trial court though the defendant would claim that he had put up water tank, septic tank, etc., during 1976 and 1988, with reference to the same, there is absolutely no reliable material projected on the part of the defendant. In this matter, the commissioner had also inspected the properties concerned and filed his report and plan and therefrom also, it

could be gathered that the said tiled house roof portion is also projecting on the western side to an extent of 2 feet and accordingly it is seen that even the defendant had not sought for any relief in the suit laid by him seeking for the removal of the abovesaid projection of the roof portion of the plaintiff's house to an extent of 2 feet and accordingly, it is seen that inasmuch as the defendant is very well aware and had knowledge that the plaintiff and her predecessor in interest had been enjoying the property by extending the roof portion to an extent of 2 feet on the western side for enabling them to drain the rain water falling on the roof and for maintaining the wall in question, to say that inclusive of the said portion, the defendant had purchased the property under Exs.B1 and B2, has been rightly disbelieved by the trial court. As above noted, the only point that weighed with the mind of the first appellate court while dismissing the plaintiff's suit is that inasmuch as the defendant's property sale deeds had not described the properties comprised therein as lying to the west of the 2 feet space, in particular, shown as lying to the west of the plaintiff's house, on that footing held that the sale deed of the plaintiff does not cover the disputed area. But considering the materials placed on record in entirety, in my considered opinion, the first appellate court had not gone into the same in detail and the reasonings offered by the trial court for accepting the plaintiff's case by analyzing the materials placed on record in entirety had not been considered by the first appellate court and on the other hand, the judgment and decree of the first appellate court proceeded to reject the plaintiff's case, without giving any valid reason as to in what manner the judgment of the trial court gets vitiated for upholding the plaintiff's case. In all, no acceptance can be made to the reasonings and conclusions of the first appellate court for rejecting the plaintiff's case.

15. In the light of the above discussions, the first appellate court has failed to consider the materials placed on record by the plaintiff in entirety and furthermore, failed to note that the defendant has not claimed any relief of declaration of title to the property in dispute in the suit laid by him also not sought for any removal of the alleged protrusions and the roof portion of the plaintiff in the 2 feet space and when the defendant had admitted that he had not purchased the properties under Exs.B1 and B2 after measuring the same with the aid of the surveyor, in such view of the matter, the first appellate court seems to have erred in dismissing the plaintiff's suit based on the boundaries contained in the defendant's documents without analyzing the other materials projected by the plaintiff in support of her case as well as considering the

commissioner's report and plan projected in the matter as Exs.C1 to C5 in entirety. As above noted, when the defence raised by the defendant for claiming title to the disputed area gets foreclosed and sealed on account of the application of the principle of res judicata on his failure to challenge the dismissal of his suit by the first appellate court, in such view of the matter also, it is found that inasmuch as the defendant has no entitlement to the property in dispute, it is seen that he has not evinced interest to throw any further challenge in the High Court as against the dismissal of his suit by the first appellate court.

16. For the reasons aforesaid, the substantial questions of law formulated in this second appeal are accordingly answered against the defendant and in favour of the plaintiff.

17. In conclusion, the judgment and decree of dated 12.04.2005 passed in A.S.No.16 of 2004 on the file of the II Additional Subordinate Court, Coimbatore are set aside and the judgment and decree dated 12.04.2004 passed in O.S.No.575 of 2001 on the file of the II Additional District Munsif Court, Coimbatore are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1. II Additional Subordinate Judge, Coimbatore.
2. II Additional District Munsif Judge, Coimbatore.

Copy to

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

+2 Ccs to Fr.Xavier Associates sr 31896.

+1 CC to Mr.P.Raja , Advocate sr 31852.

S.A.No.1237 of 2005

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SP(07/06/2019)