

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 08.11.2019	Delivered on 19.11.2019
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CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No. 52 of 2014

1.Devaki
2.Subramani @ Mani
3.Chinnaraji

...Appellants/ Appellants/
Defendants

Vs.

Manickam

...Respondent/ Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree made in A.S.No. 15 of 2011 dated 31.01.2012 on the file of the Sub-Ordinate Judge, Dharmapuri confirming the judgment and decree made in O.S.No. 90 of 2000 on the file of the District Munsif-cum-Judicial Magistrate, Pennagaram dated 30.11.2010.

For Appellants : Mr.M.Selvam

For Respondent :Mr.S.V.Jayaraman, Senior Counsel
for Mr.V.Chinnasami

J U D G M E N T

The defendants in O.S.No. 90 of 2000 have come up with this second appeal challenging the decree for permanent injunction granted against them concurrently by the Courts below. The said suit was filed by the sole respondent herein seeking permanent injunction restraining the defendants/appellants from interfering with his possession of the property.

2. According to the plaintiff, the suit properties belonged to one Govindasamy, who died in the year 1985 leaving a Will dated 17.03.1984 in and by which he had bequeathed the suit properties to his wife Pottiammal @ Kanniammal. The brother of the plaintiff, Poovasi entered into sale agreement with Pottiammal @ Kanniammal on 27.08.1987. Subsequently, the said

Pottiammal @ Kanniammal along with plaintiff's brother Poovasi sold the property to the plaintiff under a sale deed dated 27.02.1997. According to the plaintiff, he has been in continuous possession and enjoyment of the property right from the date of the purchase. Since the defendants attempted to interfere with his possession of the suit property, the plaintiff had filed a suit in O.S.No.145 of 1997 seeking a declaration of his title and consequent permanent injunction. The said suit came to be decreed on 19.01.1998. Since the first defendant attempted to interfere with his possession, despite the decree for injunction, the plaintiff had filed execution petition in E.P.No.32 of 1999 for arresting the first defendant. Pursuant to an order made in the said Execution Petition, the first defendant was arrested and produced in Court. She was let off after execution of an undertaking on 13.10.2000. Despite the said decree, the defendants have been indulging in acts of trespass by removing the ridges, boundary stones etc., and had continued their attempts to occupy the suit property. Therefore, the plaintiff was forced to file a second suit for permanent injunction on the basis of the cause of action that arose on 10.12.2000.

3. The defendants would resist the suit contending that Govindasamy had no title. The Will executed by Govindasamy in favour of Pottiammal @ Kanniammal dated 17.03.1984 cannot convey any right on her, since the Govindasamy himself has no title over the property. The claim of the plaintiff that there was an agreement between Pottiammal and plaintiff's brother Poovasi on 27.08.1987 and a subsequent sale in favour of the plaintiff on 27.02.1997 were also denied by the defendants. The defendants would claim that the suit property belonged to father-in-law of the first defendant, Chinnakali. The said Chinnakali had two sons by name, Kali and Kolandhai. While the first defendant is the wife of Kolandhai, defendants 2 and 3 are the children of the first defendant. The said Chinnakali died about 45 years prior to the suit and his sons Kali and Kolandhai were in possession of the property.

4. At a partition that took place in the year 1969, the suit property was allotted to the share of Kolandhai and the said Kolandhai along with defendants have been in joint possession of the property. Therefore, according to the defendants, the plaintiff's vendor or the plaintiff have no title to the property and they were never in possession of the property as claimed. The second defendant had filed a separate written statement claiming that the defendants 2 and 3 along with their sister Madhu had filed a suit against the plaintiff

and his vendor Pottiammal @ Kanniammal in O.S.No.63 of 2002 and an ex-parte decree came to be passed in the suit declaring the title of the said Madhu and defendants 2 and 3 in the present suit on 28.01.2003. Therefore, the present suit is barred by res-judicata.

5. The Trial Court, on a consideration of the evidence on record concluded that the decree in O.S.No.63 of 2002 would not operate as res-judicata inas much as it is not a decision on merits. The Trial Court also found that the issues that arose in the present suit were not substantially part of the suit in O.S.No.63 of 2002. On the above findings, the Trial Court concluded that the suit is not barred by res-judicata, in view of the decree in O.S.No.63 of 2002. On the question of possession, the Trial court, on the evidence on record, found that the plaintiff has proved that he was in possession of the property right from the date of the sale from Pottiammal @ Kanniammal in the year 1987. In support of its findings regarding possession, the Trial Court relied upon the revenue records produced as Exs.A5, A9 to A14 and 'A' Register, which was filed as Ex.A17. Upon the finding that the plaintiff had established his possession on the date of the suit, the Trial Court decreed the suit as prayed for. The Trial Court also found that the changes in the revenue records were effected after notice to the parties and the first defendant had not filed an appeal against the order effecting changes in the revenue records. Aggrieved, the defendants preferred an appeal in A.S.No.15 of 2011 on the file of the Sub-Court, Dharmapuri.

6. The learned Sub-Ordinate Judge, upon a re-appreciation of the evidence affirmed the findings of the Trial Court on the question of res-judicata as well as on the factual aspects regarding possession. The lower Appellate Court also found that the suit in O.S.No.63 of 2002, which has a prayer for setting aside the judgment and decree in O.S.No.145 of 1997 was in fact barred by limitation. The lower Appellate Court further found that the plaintiff in the present suit, who was the second defendant in O.S.No.63 of 2002 was served by affixture, which is not a well recognized mode of service. The lower Appellate Court concluded that the ex-parte decree in O.S.No.63 of 2002 has been obtained by playing fraud on Court. Therefore, the learned Sub-Ordinate Judge held that the decree in O.S.No.63 of 2002 will not operate as res-judicata in the present suit. Having agreed with the Trial Court on the question of possession, the lower Appellate Court dismissed the appeal and confirmed the judgment and decree of the Trial Court. Aggrieved, the defendants have come up with this second appeal.

The following question of law was framed at the time of admission:-

"i) Whether the lower Appellate Court was right in concluding that the decree in O.S.No.63 of 2002 will not operate as res-judicata in the present suit, since the present suit has been filed prior to O.S.No.63 of 2002 ?"

7. I have heard Mr.C.Uma Shankar and Mr.M.Selvam, learned counsel for the appellants and Sri.S.V.Jayaraman, learned Senior Counsel for Mr.V.Chinnasami for the respondent.

8. Mr.C.Uma Shankar, learned counsel appearing for the appellants would vehemently contend that in the absence of a plea that the decree in O.S.No.63 of 2002 has been obtained by fraud, the lower Appellate Court was not right in concluding that the said decree was obtained by fraud. It is the further contention of the learned counsel that the O.S.No.63 of 2002 was decreed ex-parte on 28.01.2003 was brought on record in the present suit by the additional written statement filed by the second defendant on 01.09.2006. Therefore, the plaintiff, who was aware of the passing of such a decree had not chosen to even seek a prayer for setting aside the said decree in the present suit. Therefore, according to Mr.C.Uma Shankar, the Courts below were not right in concluding that the ex-parte decree in O.S.No.63 of 2002 would not operate as res-judicata in the present suit. Though the lower Appellate Court has concluded that the ex-parte decree granted in a subsequently instituted suit will not operate as res-judicata in a suit, which was instituted prior in point of time. On a thorough examination of the judgment of the lower Appellate Court, I find that it is not the only reason for the lower Appellate to come to the conclusion that the decree in O.S.No.63 of 2002 will not operate as res-judicata in the present suit. A complex situation had arisen because of the casual manner in which proceedings have been conducted in the Courts below. Originally, O.S.No.145 of 1997, which was a suit for a declaration and injunction came to be decreed on 19.01.1998. That decree was put in execution and the arrest of the first defendant was ordered and she was let off after she filed an undertaking that she would not disturb the possession. Subsequently, the plaintiff came forward with the second suit for injunction in O.S.No. 90 of 2000. During the pendency of this suit for injunction, the defendants in this suit along with one Madhu filed a suit in O.S.No.63 of 2002 seeking a declaration that the decree in O.S.No. 145 of 1997 was not valid and for consequential reliefs of injunction. The said suit namely, O.S.No.63 of 2002 came to be decreed ex-parte on

23.01.2003. The judgment in O.S.No.63 of 2002 has been marked as Ex.B4 and the decree has been marked as Ex.B5, while the plaint has been marked as Ex.B3. A perusal of the said judgment would show that it is not a judgment in accordance with Order 20 of the Code of Civil Procedure. The judgment in O.S.No.63 of 2002 reads as follows:-

“பிரதிவாதியை நீதிமன்றத்தில் அழைத்தபோது ஆஜரில்லாததால் தோன்றாத் தரப்பினர் நிலையில் வைக்கப்படுகிறார், வா,சா, 1 ஆக மணி என்பவர் விசாரிக்கப்பட்டார், வா,த,சா,ஆ, 1 முதல் 3 வரை குறியீடு செய்யப்பட்டு கோரிக்கை நிரூபிக்கப்பட்டது, எனவே. தாவாப்படி செலவத் தொகையுடன் தீர்ப்பாணை பிறப்பித்து தீர்ப்பளிக்கப்படுகிறது,”

9. The Trial Court had not appreciated the evidence that was on record and has not given any reasons for its conclusions. The plaint contains a prayer for a declaration that the decree in O.S.No.145 of 1997 is null and void. At least, the first plaintiff was a party to the said suit in O.S.No.145 of 1997. Therefore, the relief that should have been sought for by her is to set aside or cancel the decree and not for a declaration as such. The appropriate relief namely, cancellation or setting aside the decree was barred by limitation on the date when O.S.No. 63 of 2002 came to be filed on 17.12.2002. None of these questions were addressed by the Trial Court namely, the District Munsif Court, Pennagaram when it granted ex-parte decree in a very casual manner without complying with the provisions of Order 20 of the Code of Civil Procedure. The Hon'ble Supreme Court has in Shanthilal Gulabchand Mutha Vs. Tata Engineering and Locomotive Company Ltd., and another reported in 2013 (3) LW 748 had held that it is the duty of the Court, even in the absence of the defendants to examine the evidence on record at least on a prima facie basis before passing a decree. It has been also been pointed out that the question of limitation should also be examined by the Court. In doing so, the Hon'ble Supreme Court observed as follows:-

“5. In Bogidhola Tea & Trading Co.Ltd. & Anr. Vs. Hira Lal Somani, AIR 2008 SC 911, this Court while reiterating a similar view observed that a decree under Order VIII, Rule 10 CPC should not be passed unless the averments made in plaint are established. In the facts and circumstances of a case, the Court must decide the issue of limitation also, if so, involved.

6. In view of the above, it appears to be a settled legal proposition that the relief under Order VIII Rule 10 CPC is discretionary, and court has to be more cautious while exercising such power where defendant fails to file the written statement. Even in such circumstances, the Court must be satisfied

that there is no fact which need to be proved in spite of deemed admission by the defendant, and the Court must give reasons for passing such judgment, however, short it be, but by reading the judgment, a party must understand what were the facts and circumstances on the basis of which the Court must proceed, and under what reasoning the suit has been decreed.

9. The appellant take Notice of Motion to set aside the aforesaid judgment and decree which was dismissed and the said order of dismissal has been approved by the Division Bench. We are not examining the issue as to whether such a judgment and decree ex-parte could be subjected to the provisions of Order IX Ruel 13 CPC but the Court has not examined as to whether the suit was filed within limitation and whether on the basis of pleadings, the relief granted by the Court could have been granted. The Court did not even consider it proper to examine the case prima facie before passing the decree, as is evident from the above quotation. The same is complete impugned judgment."

10. A Hon'ble Division Bench of this Court had an occasion to consider a similar situation in M/s.Meenakshisundaram Textiles Vs. M/s.Valliammal Textiles Ltd., reported in 2011 (3) CTC Page 168. Of course, the said proceeding arose out of an application under Order 9 Rule 13 to set aside the ex-parte decree. The Hon'ble Division Bench after referring to the earlier decisions of the Hon'ble Supreme Court in Balraj Taneja Vs. Sunil Madan reported in AIR 1999 SC Page 3381 and Swaran Lata Ghosh Vs. H.K.Banerjee reported in 1969 (1) SCC 709 had observed that the judgment of a Court should be in affirmity with the Order 20 of the Code of Civil procedure. After extensively referring to the provisions of the Code of Civil Procedure as well as various precedents on the subject, the Hon'ble Division Bench had expressed its opinion in the following lines:-

"21. From the above discussions, it is manifestly clearly that even a judgment rendered ex-parte and a decree is drawn on the basis of that judgment, it is appealable. In case that judgment and decree become final without there being any appeal, the decree is executable. In the sense, there is no difference between a judgment and decree and an ex-parte judgment and decree. In view of the above, in the event the defendant is set ex-parte, the Court should be extra careful in such case and it should consider the

pleadings and evidence and arrive at a finding as to whether the plaintiff has made out a case for a decree. In this context, it may also be mentioned that though a detailed judgment is required in a contested matter, an ex-parte judgment should show the application of the minimum requirement of consideration of the pleadings, issues, evidence and the relief sought for rendering such judgment."

In a recent judgment in Premkrishna's case Reported in 2019 (4) LW Page 846, the said principles were reiterated.

11. Mr.S.V.Jayaraman, learned Senior Counsel appearing for the respondent would contend that the decree in O.S.No. 63 of 2002 has been obtained playing fraud on Court, pointing out that in the plaint itself an averment has been made regarding the pendency of O.S.No. 90 of 2000 in the very same Court. The plaint in the suit has not been produced as a document before the Trial Court in O.S.No. 63 of 2002. Drawing my attention to the judgment in O.S.No. 63 of 2002, which has been marked as Ex.B4, Mr.S.V.Jayaraman, learned Senior Counsel would point out that the Court while granting the decree has not even examined the evidence on prima facie basis. Even the decree in O.S.No.145 of 1997, which was sought to be set aside was not made subject matter of the record in the said suit. Mr.S.V.Jayaraman would also point out that the second defendant in the said suit namely, the plaintiff herein was shown to be served by affixture. It is a common knowledge that affixture is not a well recognized mode of service. If affixture is to be taken as mode of service, the servicing official must have been examined by the Court and his affidavit must have been filed before the Court. There is nothing on record to suggest that the said procedure was adopted. In the absence of such evidence, affixture cannot be taken as a complete service.

12. No doubt true that the plaintiff herein could have taken steps to have the ex-parte decree set aside in the manner known to law but, once the Court finds that a fraudulent decree has been obtained, it is a duty of the Court to see that the same is set aside and the parties are restored to the original position. The Hon'ble Supreme Court in S.P.Chengalvaraya Naidu Vs. Jagannath reported in 1994 (1) SCC Page 1 had quoted the following observation of Chief Justice Edward Coke of England "fraud avoids of judicial acts, ecclesiastical or temporal". The Hon'ble Supreme Court has concluded that once it is found that the decree or a judgment has been obtained by playing fraud, the same can be set aside even in the collateral proceedings also. It is not necessary that the Court must feel

bound by such fraudulent judgments and decrees obtained by unscrupulous litigants. Therefore, the respondent/ plaintiff in the present suit is not remediless. This Court in Annaporani Vs. Janaki reported in 1995 (1) LW 141 had even exercised the power under Article 227 of the Constitution of India to set aside the decree, which was found to be against law. While doing so, this Court had observed as follows:

"There is no period of limitation for exercising suo motu power under Section 115, C.P.C - vide Chowdhury Ram Prasad Rai Vs. Mahesh Kant Chowdhury*, AIR 1922 Page 525; and P.C.Muthu Chettiar Vs. Narayanan Chettiar, AIR 1928 Mad 528: 1915 (28) LW 297. It is also held that if a provision of law is completely disregarded by a subordinate Court, that will be a ground for exercising the powers under Section 115, C.P.C. - vide Rasu Vs. Rattara, AIR 1924 Ran 349. It is held in that case, "When a Court has applied its mind to the law and decides wrongly, then there is ground for revision; but where it disregards some provision of law, and has not applied its mind to that provision, then there is ground for revision. In Imam Din Vs. Shag Singh, AIR 1931 Lah 746, Jai Lal, J.held that if an obvious principle of law is omitted to be applied by the subordinate judge, it would amount to illegally acting in the exercise of jurisdiction."

13. When this Court finds that the decree suffers from non-application of mind, it has to be set aside. I have already extracted the judgment in O.S.No.63 of 2002. It is needless to point out that the Court has not even examined the evidence on a prima facie basis to show that the conclusions were arrived at after the consideration of the evidence on record. I therefore, have no hesitation in setting aside the decree in O.S.No.63 of 2002.

14. Coming to the question of res-judicata, the Courts below have held because it is an ex-parte decree, demand operates as res-judicata. No doubt, the Courts below were not right in coming to such conclusion. But, now that I exercised the power under Article 227 to set aside the decree in O.S.No. 63 of 2002, the question of res-judicata does not loom large.

15. On the factual matrix, the Courts below have

concurrently concluded that the plaintiff has proved that he was in possession of the property on the date of the suit. The effect of setting aside the decree in O.S.No. 63 of 2002 would be that the decree in O.S.No.145 of 1997 dated 19.01.1998 will stand automatically revived. The said decree is a decree for declaration and injunction. Therefore, there is a valid decree declaring title of the plaintiff herein. Hence, I do not find any difficulty in confirming the findings of the Courts below regarding the entitlement of the plaintiff to a decree for permanent injunction. In view of the above, the appeal fails and it is accordingly dismissed with costs through out.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

kkn

To:-

1. The District Munsif - cum- Judicial Magistrate, Pennagaram.
- 2.The Sub-Ordinate Court, Dharmapuri.

Copy to:

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

+1cc to Mr.M.Selvam , Advocate SR.No. 96165

+1cc to Mr.V.Chinnasami , Advocate SR.No. 95952

A.SK(23/11/2020)

S.A.No. 52 of 2014

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