

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 03.12.2020	Pronounced on: 10.12.2020
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Coram::

THE HONOURABLE Dr.JUSTICE G.JAYACHANDRAN

S.A.No.219 of 2010

&

M.P.No.1 of 2010

Rukumani Ammal,
W/o.Late, Arunachala Gounder.

... Appellant/
Plaintiff

/versus/

1. P.A.Periyasamy,
2. P.Vengana Gounder,
3. C.Palanisamy,
4. P.Gunasekaran,
5. Thangaraj @ A.Palanisamy,

... Respondents/
Defendants

Prayer:

Second Appeal is filed under Section 100 of C.P.C against the judgment and decree passed in A.S.No.105 of 2008 dated 09.09.2009 on the file of Principal District Court, Erode, confirming the judgment and decree passed in O.S.No.172 of 2004 dated 27.04.2007 on the file of District Munsif-cum-Judicial Magistrate, Perundurai, Erode District.

For Appellant : Mr.A.Sundaravathanan

For R1 : Mr.N.Manokaran,

For R2 : died (Time Expired)

For R3 to R5 : No appearance

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J U D G M E N T

(The case has been heard through video conference)

The Second Appeal is filed by the unsuccessful plaintiff in her suit for permanent injunction.

2. The defendants in the suit are admittedly the owners of the land west of the suit property. The cause of action for the suit alleged to have arisen on 05.04.2003, when the 1st defendant with the active support of his men, attempted to trespass into the suit property and form a cart track in the suit property.

3. According to the plaint, she is the widow of Late.Arunachala Gounder. On 06.07.1977 Arunachala Gounder and his brother C.Palanisamy through the partition deed divided the family property among themselves. The suit property measuring 0.76 acres was allotted to the Arunachala Gounder. On the death of Arunachala Gounder, who died intestate in the year 1979, the plaintiff and her son Thangaraj @ A.Palanisamy, the 5th defendant, became the absolute owners of the suit property. On the northern side of the suit property, the residential building of the plaintiff and 5th defendant is located. On the East of the suit property, the land and building of the 2nd defendant is located. Further, on the East, the land of the 1st defendant is located. The lands of the respective parties are well de-marked with specific survey numbers. On the north of the plaintiff and defendant's land, runs the water channel of 2 feet breadth in the middle of 15 feet width porambokku land of Lower Bavani Project. The Porumbokku land on the South of the water channel is the access to the plaintiff and defendants 3 to 5 land. Except the channel prombokku land, no other space was used for access. Though, in the partition deed of the year 1979 some space on the north of the patta land was left, the second defendant has constructed his house in the year 1957 without leaving any space on the north. The access to his property is from the east. Similarly, the 3rd and 4th defendants had constructed their house leaving only 4 feet on the northern side. In that space, there are old trees. The space left on the north of the plaintiff's patta land was never used as access by the first defendant. While so, claiming that, he have an order of the Court to use the northern space of the plaintiff as cart track, the first defendant is making attempt to create a cart track.

4. The first defendant, in his written statement, denying all the averments of the plaintiff, contended that, when Arunachala Gounder (husband of the plaintiff and father of the 5th defendant) and his brother the third defendant C.Palanisamy divided the family property, in the partition deed there is a recital that the parties are entitled to enjoy the 8 feet pathway starting from North-West corner to the end of east leading to Koppu Vaikkal. It is also stated that the parties are entitled to take their cattle and carts through it. The pathway is shown as the boundaries of the parties. The recital

in the partition deed dated 06.06.1997 is binding on the plaintiff. The revenue records and field map for S.Nos.189 & 192 shows the existence of pathway. Earlier, the 2nd defendant Vengana Gounder filed suit in O.S.No.188 of 1992 on the file of District Munsif Court, Erode, against the defendants 3 & 4. In the said suit, the Advocate Commissioner's visited the suit property and noted the existence of cart track. The defendant has filed suit for permanent injunction in O.S.No.435 of 1996 against the defendants 2 to 5 and one P.A.Subramaniam on 18.01.1997, for permanent injunction against the said persons restraining not to obliterate the cart track that suit was allowed and prayer granted. Therefore, the present suit is barred by res judicata. The 5th defendant in the earlier suit O.S.No.435 of 1996 was the 4th defendant. The plaintiff in this suit is none other than the mother of the 5th defendant. Being restrained from obliterating the suit cart track, the 5th defendant through his mother has filed the suit with oblique motive. The cart track existing on the north of the plaintiff's and runs upon of Koppu Vaikkal, where there is a temple. Public use this cart track to reach the temple. Hence, the suit is liable to be dismissed for suppression of facts and by res judiciata.

5. The plaintiff in response to the written statement filed by the 1st defendant filed reply statement, wherein, the plaintiff feigned ignorance of the previous proceedings on the file of District Munsif, Erode and the injunction order passed against her in O.S.No.435 of 1996 by the District Munsif, Perundurai. The plaintiff cannot take advantage of the decree passed behind her back.

6. Based on the pleadings, the following issues were framed.

(i). Whether the principle of res judiciata applies to the facts of the case.

(ii). Whether the description of the property not properly given.

(iii). Whether the plaintiff is entitled for the relief of permanent injunction.

(iv). What relief the plaintiff is entitled.

7. Before the Trial Court, the plaintiff examined three witnesses and marked 11 Exhibits. On behalf of the defendant, one witness examined and 10 Exhibits marked. The Advocate Commissioner's report and sketch were marked as Ex.C.1 & Ex.C.2.

8. The Trial Court, on considering the Ex.P.4 to Ex.P.8 which are the decree and judgment passed in previous suit in O.S.No.188 of 1992 and O.S.No.435 of 1996 held that the subsequent suit filed by the plaintiff herein is barred by res judicata.

9. As far as description of the property in the plaint schedule, the Court referred the recital in Ex.A.1 partition deed dated 06.07.1977, wherein, pathway of 8 feet mentioned as a common pathway for the parties to take cattles and carts. The plaintiff claim title over 0.76 cents of land in S.F.No.172/1 of Pungampadi Village, Perundurai Taluk. Whereas, in the schedule of property in the plaint, the extent is shown as 0.80 cents. There is no explanation how this 4 cents in excess shown in the plaint schedule. Hence, the Trial Court held that there is error in description of the suit property. After examining the survey number for the respective portion of the land and allegation of attempt to put up the cart track in R.S.No.181/2A, B and C is not supported by Ex.A.2 and Ex.A.3 which are the "A-Register" and "Patta". The existence of cart track is well established from the partition deed of the year 1977 and in the subsequent two suits. While so, the imaginary allegation of attempt to create cart track which is already found to be in existence rendered the suit misconceived and badly hit by the principle of res judicata. Hence, Court dismissed the suit.

10. On appeal, the First Appellate Court, after appreciating the evidence, has confirmed the trial Court judgment and decree. The First Appellate Court reiterating the principle of res judicata and on applying it to the facts of the case, has held that the suit is barred by res judicata

11. In the Second Appeal, the Learned Counsel appearing for the appellant submitted that the earlier suit ended is an exparte decree and not a suit heard and decided on merits. Therefore, the Principle of res judicata will not apply. Also he pleaded that the plaintiff is not a party in those two previous suits. No issue was framed and decided on merits regarding the existence of cart track in the earlier suits, therefore the said decision will not fall under Section 11 of C.P.C.

12. The Learned Counsel for the respondent submitted that Section 11 of C.P.C has not distinguished the exparte decree and contesting decree. Any issue directly and substantially heard and decided in the previous suit will act as a bar under the principle of res judicata in the subsequent suit. In both the

previous suits, the existence of cart track on the north of plaintiff's property was the issue directly and substantially covered. It is a decree passed by the competent Court and prior in point of time. The plaintiff herein vest her right over the property through her husband Arunachala Gounder. One of the legal heirs of Arunachala Gounder, Thangaraj is a party in the earlier suit. Both the plaintiff and the 5th defendant derived their title only through Arunachala Gounder.

13. Relying upon the judgment of the Hon'ble Supreme Court in Nand Ram (Dead) through legal representatives and others Vs. Jagdish Prasad (Dead) through Legal representatives reported in (2020) 9 SCC 393 and Saroja vs. Chinnusamy (Dead) by LRs and another reported in (2007) 8 SCC 329, the Learned Counsel for the respondent submitted that the facts of the case squarely falls under the Principle of res judicata and the decision of the Courts below dismissing the suit is legally and factually sustainable.

14. Heard the Learned Counsel for the appellant and the Learned Counsel for the respondents. Records perused.

15. The decision of the Courts below is based on facts as well as on law. On facts, the Courts below have read the recital in Ex.A.1 partition deed through which the plaintiff as well as 5th defendant claim right over the property. This is a document executed on 06.07.1977. In this document, 8 feet common pathway on the north of the plaintiff and 2nd defendant's property is clearly mentioned. The field map and A-Register also shows the existence of pathway on the northern extreme on the plaintiff's land.

16. The case of plaintiff is that, other defendants having land on the east of his land, have encroached upon the pathway. The Porambokku land on the South Lower Bavani Project is used as pathway by the parties. This fact is contrary to the filed map, the Commissioner's report in the previous proceedings and the Commissioner's report in the present proceedings. A common pathway is found and established through records that a common pathway is already in existence and there is no attempt by the 1st defendant to create new cart track.

17. On law also, the subsequent suit on very same issue is bound to be dismissed. Since in the earlier suit, decree has been passed observing that there is a cart track running on the

north in the suit schedule property. The Courts below have rightly pointed out that when admittedly there is only 0.76 cents of land owned by the plaintiff, the measurement shown in the suit schedule property is 0.80 cents and this embellishment in the measurement is to mislead the Court and there is no explanation from the plaintiff for the said embellishment.

18. When the identical defence was taken in suit by a plaintiff that he was not a party to the previous suit and the said proceedings is an ex parte decree, so res judicata principle will not apply. The Hon'ble Supreme Court in *Saroja vs. Chinnusamy (Dead) by LRs* and another reported in (2007) 8 SCC 329, after analysing Section 11 of C.P.C., and the explanations has held that,

11. Having examined the contentions raised by the learned counsel for the parties and having considered the admitted facts of the present case and other materials on record, we are unable to agree with the submission of the learned counsel for the appellant. In our view, the ex parte decree passed in Suit No.233 of 1989 would operate as res judicata in the subsequently filed suit of the appellant as all the conditions indicated herein earlier were duly satisfied in the present case. So far as the conditions namely (i), (ii) and (iii) are concerned, no dispute can be raised or was raised by the parties before us as the said conditions have been fully satisfied in the facts of this case.

12. Let us, therefore, deal with Condition No. (iv) first which says, "the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the former suit". Learned counsel for the appellant sought to argue that since the former suit was decided ex parte, it could not be said that it was finally heard and decided by the court and therefore, Condition (iv) was not satisfied and the principle of res judicata could not be applied and accordingly the ex parte decree in the former suit would not operate as res

judicata in the subsequent suit. We are unable to agree with this contention of the learned counsel for the appellant. In this case, admittedly, summons was duly served upon Kuppusamy and inspite of such service of summons, Kuppusamy thought it fit not to appear or to contest the suit filed against him. Once an ex parte decree is passed against Kuppusamy, in our view, the same should be taken as a final decision after hearing.

13. It is well settled that an ex parte decree is binding as a decree passed after contest on the person against whom such an ex parte decree has been passed. It is equally well settled that an ex parte decree would be so treated unless the party challenging the ex parte decree satisfies the court that such an ex parte decree has been obtained by fraud. Such being the position, we are unable to hold that Condition No. (iv) was not satisfied and accordingly it cannot be held that the principle of res judicata would not apply in the present case. (emphasis added)

19. Reverting to the present facts of the case, the plaintiff and 5th defendant in the present suit, derived their title only through Arunachala Gounder. The 5th defendant in this suit was the 4th defendant in the earlier suit in O.S.No.435 of 1996. Though, it is an exparte decree, the said decree is not been questioned. Contrarily, the present suit held to be a collusive suit. Therefore, both on facts as well as on law, the case has been decided against appellant. Hence, this Court finds no merit in the appeal. Accordingly, the Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

bsm

To:-

- 1.The Principal District Judge, Erode.
- 2.The District Munsif-cum-Judicial Magistrate,
Perundurai, Erode District.

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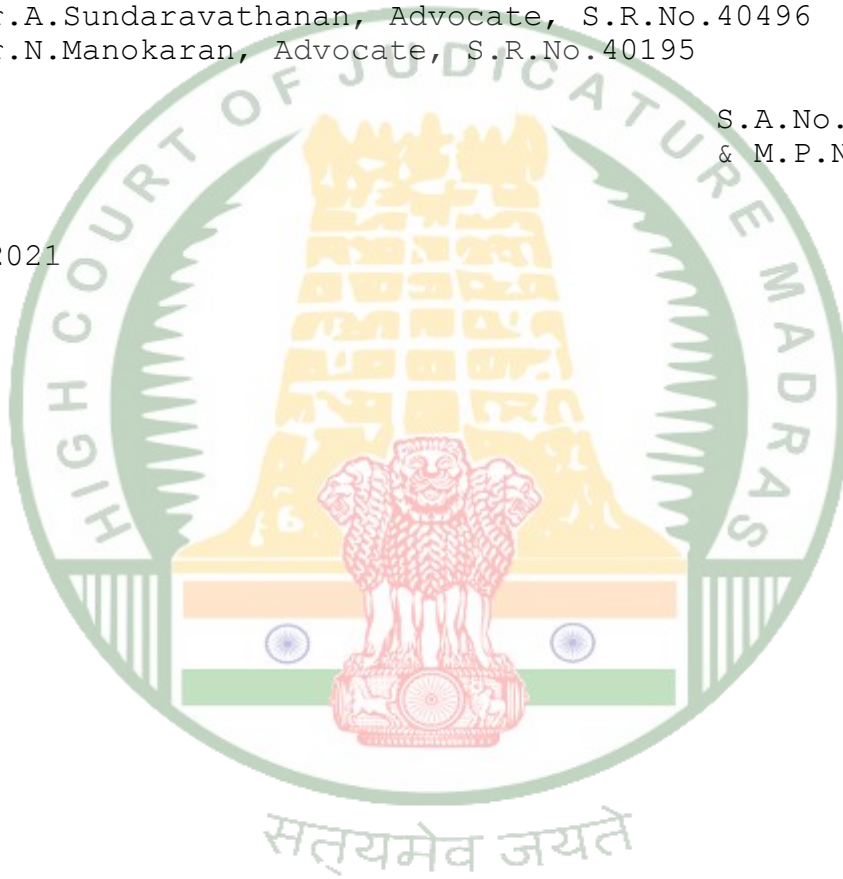
The Section Officer, V.R.Section,
High Court, Madras.

+1cc to Mr.A.Sundaravathanan, Advocate, S.R.No.40496

+1cc to Mr.N.Manokaran, Advocate, S.R.No.40195

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