

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.02.2020

Date of Verdict : 23.03.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.147 of 2002

1. Pradeep ...Appellant/1st respondent/1st defendant

Vs.

1. Thankamma

2. Kousaliya

3. Kamala

4. Lalitha

5. Dhamodharan ... Respondents 1 to 5/plaintiffs 2 to 6

6. Krishnan

7. The Sub Registrar,

Sub Registrar's Office,

Gudalur, The Nilgiris.

... Respondents 6 & 7 /Defendants 2 & 3

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 06.09.2001 made in A.S.No.13 of 2001 on the file of the District Court, Nilgiris at Uthagamandalam, reversing the judgment and decree dated 31.10.2000 made in O.S.No.174 of 1995 on the file of the District Munsif Court, Gudalur.

For Appellant : Mr.T.N.Rajagopalan

For Respondents

R1,R3, R4,

R6 & R7 : Set ex-parte

R2 : Dismissed vide Court order
dated 15.12.2009

For R5 : Mr.T.M.Naveen

For Ms.D.Kamatchi

JUDGMENT

This second appeal is directed as against the judgment and decree dated 06.09.2001 made in A.S.No.13 of 2001 on the file of the District Court, Nilgiris at Uthagamandalam, reversing the judgment and decree dated 31.10.2000 made in O.S.No.174 of 1995 on the file of the District Munsif Court, Gudalur.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial Court.

3. The case of the plaintiff in brief is as follows :-

3.1. The suit is filed for declaration declaring that the sale deed dated 19.10.1992 executed in favour of the first defendant is null and void. The second defendant is the first plaintiff's son. The first defendant is the son of the second defendant. The first plaintiff owned two acres of patta land. On 18.10.1992, the first defendant intoxicated the first plaintiff and obtained his thumb impressions in blank papers. Thereafter, the first plaintiff came to understand that the first defendant without his knowledge purchased the property. Therefore, the first plaintiff lodged complaint on 16.12.1992 before the Tashildhar alleging that the first plaintiff never executed any sale deed for the sale consideration of Rs.29,000/-. Therefore, he filed for the suit for declaration as sale deed executed in favour of the first defendant is null and void.

4. Resisting the same, the defendants filed written statement and stated that the suit itself liable to be dismissed for non issuance of notice under Section 80 of the C.P.C., to the defendants. The first plaintiff was taking treatment at Cuddalore from 18.09.1992 to 27.10.1992, as such he instructed the first defendant to purchase the suit property ad measuring 1.09 acres. Therefore, the first defendant purchased the same for valid sale consideration. The first plaintiff also executed power of attorney in favour of the first defendant to manage his remaining property. In fact, the first defendant also filed suit in O.S.No.143 of 1992 for permanent injunction as against one Dhamotharan and Vasu. The said Dhamotharan is none other than the son of one Kuttan, who is the plaintiff in the present suit in O.S.No.174 of 1995. Therefore prayed for dismissal of the suit.

5. The trial Court clubbed both the suits in O.S.No.143 of 1992 & 174 of 1995 and tried together. While pending trial in O.S.No.174 of 1995, the sole plaintiff viz., Kuttan died and his legal heirs were impleaded as plaintiffs, in which one Dhamotharan impleaded as sixth plaintiff as his one of the sons. The said Dhamotharan is the first defendant in O.S.No.143 of 1992. On the side of the plaintiff in O.S.No.143 of 1992 and the defendants in O.S.No.174 of 1995, they examined P.W.1 to P.W.3 and were marked Ex.A.1 to Ex.A.3. On the side of the defendants in O.S.No.143 of 1992 and the plaintiffs in O.S.No.174 of 1995, they examined D.W.1 and were marked Ex.B.1 to Ex.B.6. On perusal of the material produced on record and on considering both the oral and documentary evidences adduced by the respective parties and also the submissions made, the trial Court by an common judgment dated 31.10.2000, decreed the suit in O.S.No.143 of 1992 and dismissed the suit in O.S.No.174 of 1995. For clear understanding, the suit filed by the appellant herein for

permanent injunction was allowed and also granted injunction as against the respondents herein. The suit filed by the respondents herein to null and void the sale deed executed in favour of the appellant herein was dismissed. The respondents did not preferred any appeal suit as against the judgment and decree passed in O.S.No.143 of 1992. They preferred an appeal suit in A.S.No.13 of 2001 as against the judgment and decree passed in O.S.No.174 of 1995 only. The first appellate Court allowed the appeal and decreed the suit in O.S.No.174 of 1995. Aggrieved by the same the first defendant in O.S.No.174 of 1995 filed this present second appeal.

6. At the time of admission of this second appeal on 08.02.2002, the following substantial questions of law were formulated for consideration:-

"1. Whether the lower appellate Court is right in allowing the appeal inasmuch as the respondents 1 to 5 have not filed any appeal against the decree in O.S.No.143/1992 which was tried along with O.S.No.173/1995 and the decree in O.S.No.143/1992 has become final?

2. Is not A.S.No.13 of 2001 is barred by resjudicata by reason of the finality of the decree in O.S.No.143/2002?

3. Whether the lower appellate Court is right in holding that sale deed was not executed by Kuttan when the prayer in the suit is to cancel the execution of Sale deed and the execution is admitted?

4. Whether the lower appellate Court is right in placing the burden of proof on the appellant when the exeuction is admitted and there is no proof of fraud or coercion?"

7. The learned Counsel appearing for the appellant/first defendant contended that initially, the first defendant filed suit in O.S.No.143 of 1992 for permanent injunction as against one Dhamotharan and Vasu. The said Dhamotharan is none other than the son of one Kuttan, who is the plaintiff in O.S.No.174 of 1995. The suit filed by the first defendant was decreed in his favour and granted injunction as against the defendants in that suit. The defendants in O.S.No.143 of 1992, did not prefer any appeal suit as against the judgment and decree passed in O.S.No.143 of 1992. Now the said Dhamotharan and others viz., the respondents herein preferred an appeal suit in A.S.No.13 of 2001 as against the judgment and decree passed in O.S.No.174 of 1995 and they did not file any appeal as against the judgment and decree in O.S.No.143 of 1992.

7.1. The appeal suit preferred by the plaintiff hit by the principles of res judicata, since the issues in both the suits in O.S.Nos.143 of 1992 and 174 of 1995 are one and the

same. The suit property is one and the same and the parties are also one and the same. When it being so, the plaintiffs in O.S.No.174 of 1995, ought to have preferred an appeal suit as against the judgment and decree passed in O.S.No.143 of 1992 also. The plaintiffs without preferring an appeal suit, they filed an appeal suit only as against the judgment and decree passed in O.S.No.174 of 1995. Without considering the preliminary objection raised by the defendants in O.S.No.174 of 1995, the first appellate Court allowed the appeal and decreed the suit in favour of the plaintiffs in O.S.No.174 of 1995. In support of his contention, he relied upon the judgment reported in 1990(2) MLJ 66 in the case of M.Subramaniam & ors Vs. C.Chhottabhai and company & ors.

8. Per contra the learned counsel appearing for the respondents submitted that though both the suit filed in respect of the very same property, the parties are different and the issues are also different as such the principles of resjudicata would not apply to the case on hand and prayed for dismissal of this appeal. In support of his contention, he relied upon the following reported judgments :-

- i. (2008)5 SCC 647 - Williams Vs. Lourdusamy & anr
- ii. (2009) 2 SCC 526 - Harbans Singh and ors Vs. Sant Hari Singh & ors
- iii. (2000) 3 SCC 350 - Sajjadanashin Sayed (D) by Lrs Vs. Musa Dadabhai Ummer & ors.
- iv. (2016) 2 SCC 200 - City Municipal Counsl Bahlki Vs. Gurappa (D) by Lrs and anr.

9. Heard Mr.T.N.Rajagopalan, learned counsel appearing for the appellant/first defendant and Mr.T.M.Naveen, learned counsel appearing for the respondents/plaintiffs.

10. Admittedly, the suit property is one and the same in both suits in O.S.Nos.143 of 1992 and 174 of 1995. Initially, the first defendant viz., appellant herein filed the suit in O.S.No.143 of 1992 for injunction as against the respondents in O.S.No.174 of 1995. Pending the suit the grandfather of the first defendant filed another suit in O.S.No.174 of 1995 for declaration declaring that the sale deed executed in favour of the first defendant i.e., plaintiff in O.S.No.143 of 1992 is null and void. Pending the said suit he died as such the first defendant in O.S.No.143 of 1992 i.e., one of his sons and others legal heirs were impleaded as parties.

11. The suit filed in O.S.No.143 of 1992 was decreed as against one of the plaintiff in O.S.No.174 of 1995 and the suit in O.S.No.174 of 1995 was dismissed. Aggrieved by the same, the plaintiffs in O.S.No.174 of 1995 preferred an appeal suit in A.S.No.13 of 2001. The same plaintiffs, who are the defendants in O.S.No.143 of 1992 did not prefer any appeal as

against the judgment and decree of injunction granted against him. Therefore, without preferring any appeal as against the injunction decree passed against him, he filed an appeal suit only against the dismissal of their suit in O.S.No.174 of 1995. The first appellate Court concluded that the plaintiffs in O.S.No.174 of 1995 filed comprehensive suit and it is enough. On that basis allowed the appeal and decreed the suit in O.S.No.174 of 1995.

12. In this regard, the learned counsel appearing for the appellant/first defendant cited the judgment reported in 1990(2) MLJ 66 in the case of M.Subramaniam & ors Vs. C.Chhottabhai and company & ors., as follows :-

"6. These two appeals have been filed only against the decrees in O.S. No.248 of 1969 and O.S. No. 296 of 1967 respectively. Admittedly, there is no appeal against the decree passed in O.S. No.346 of 1968 in the partition suit. The result is that the decree in the partition suit has become final and conclusive. That decree is based on the finding that the transactions with the plaintiffs in O.S. No.248 of 1969 and O.S. No.296 of 1969 are binding on the appellants herein. Since the decree in O.S. NO. 346 of 1968 has become final and conclusive, both the appeals are barred by the principle of res judicata.

7. Learned Counsel for the appellants contended that the principle of 'res judicata' would not apply to the present case as there was no confirmation of the decrees in O.S. Nos. 248 of 1969 and 296 of 1967 by an appellate court. According to learned Counsel, the judgment being common, there is no necessity for filing a separate appeal against the decree in O.S. No.346 of 1968. It is also argued that the doctrine of res judicata is based on the principle that no litigant should be vexed twice. Learned Counsel contends that when an appeal has been filed against a common judgment, there is no question of vexing the litigant more than once. He relied upon a Full Bench decision of this Court in Pappammal Alias Muthukaruppayee Ammal v. Meenammal and Ors. (1943) 1 MLJ 1 : 205 I.C. 618 : 56 LW 12 AIR 1943 Mad. 139 (F.B.). He also placed reliance on the decisions in Parasuram v. Amarchand and Ramagya Prasad Gupta and Ors. v. Muri Prasad and Ors. . He distinguished the decision of the Supreme Court in Sheodan

Singh v. Daryao Kunwar .

8. It is not necessary to consider the aforesaid decisions in detail in view of a later Supreme Court decision which concludes the question beyond doubt. In Lonakutty v. Thomman and Ors. , there were two cross suits by two parties. The trial court disposed of the same by two different judgments on two different dates. As the parties had succeeded partly in the two suits, there were four appeals before the appellate court. All the four appeals were heard together and a common judgment was rendered by the appellate Judge. He dismissed all the appeals and confirmed the decrees passed by the trial Court. While one of the parties filed appeals to the High Court, the other party did not challenge the correctness of the judgment of the appellate Court. When the High Court took up the second appeals for hearing, it was contended that the question raised by the respondents in the second appeal was barred by res judicata as the decree passed by the Subordinate Judge in the appeals arising out of the suit filed by the respondent had become final not having been appealed against. The High Court over-ruled that contention and remanded the matter for fresh disposal to the lower appellate court on merits. After the lower appellate court disposed of the matter, it came again to the High Court by way of appeal and after the judgment of the High Court rendered for the second time, the matter was taken up to the Supreme Court. One of the contentions raised before the Supreme Court was that the High Court was in error in dealing with the merits on the first occasion and ought to have disposed of the appeals on the basis of res judicata. The Supreme Court accepted that contention and held that the decision of the appellate Court rendered in a common judgment would constitute res judicata when no appeals were filed against the said judgment with reference to one of the suits out of which the same arose....."

This Court after referring catena of judgments of the Hon'ble Supreme Court of India held that the appellate Court rendered in a common judgment would constitute res judicata when no appeals were filed against the said judgment with reference to one of the suits out of which the same arose.

13. In the case on hand, admittedly both the suits are clubbed together and tried jointly. The parties in both suits let in common evidence and marked documents. The suit property also one and the same in both suits. One suit is filed for injunction, who purchased the suit property and another suit is filed to null and void the sale deed executed in favour of whom filed the suit for injunction. The parties are also same in both the suits. The seller who filed the suit for declaration declaring that the sale deed executed in favour of the purchaser is null and void. The another suit for injunction was filed by the purchaser and pending suit the seller died and therefore, his son and other legal heirs were impleaded as legal heirs in the suit, in which one of the legal heir is the defendant in the suit filed by the purchaser. That apart all the parties are close relatives ie., grandfather, father and grandson. Therefore, the principles of resjudicata applies to the case on hand and the above judgments cited by the learned counsel appearing for the appellants squarely applies to the case on hand.

14. The learned counsel appearing for the respondents/plaintiffs relied upon the reported judgments as follows :-

(i) (2008)5 SCC 647 in the case of Williams Vs. Lourdusamy & anr, which reads as follows :-

"11. The principles of res-judicata although provide for a salutary principle that no person shall be harassed again and again, have its own limitations. In O.S. No. 402 of 1987, the respondent No. 2 was not impleaded as a party. In his absence therefore, the issue as to whether respondent No. 2 had entered into an oral agreement of sale or not could not have been adjudicated upon. The said Court had no jurisdiction in that behalf. If that was decided in the said suit, the findings would have been nullities."

(ii) (2009) 2 SCC 526 in the case of Harbans Singh and ors Vs. Sant Hari Singh & ors., which reads as follows :-

14. Appellant herein does not claim any right, title and interest in his individual capacity. He was the Vice-President of the Managing Committee. Thus, for all intent and purport, he was also a plaintiff in Civil Suit No. 367-T/1996. The judgment and decree passed in the suit filed by Sant Hari Singh might not have been binding upon the appellant herein had he claimed any right or interest over the said property in his individual capacity and not as a member of the Managing Committee. Indisputably, the Managing

Committee did not file any Second Appeal against the judgment and decree passed against it. The said judgment and decree, therefore, attained finality.

15. Both the suits, as noticed hereinbefore, were consolidated. They were heard together. The disputes between the parties to both the suits were common. The issues raised therein also were common. The Managing Committee filed a suit for declaration that it was in management and control of the said Gurudwara Sahib and was entitled thereto as also a declaration that the respondent was not a Mohtim of the said Gurudwara and, thus, not entitled to manage its affairs. As the said decree had attained finality, it is binding on the appellants also. Appellants, therefore, in law, were required to prefer another Second Appeal against the judgment and decree passed in the said suit."

(iii) (2000) 3 SCC 350 in the case of Sajjadanashin Sayed (D) by Lrs Vs. Musa Dadabhai Ummer & ors., which reads as follows :-

"12. It will be noticed that the words used in Section 11 CPC are "directly and substantially in issue". If the matter was in issue directly and substantially in a prior litigation and decided against a party then the decision would be res judicata in a subsequent proceeding. Judicial decisions have however held that if a matter was only 'collaterally or incidentally' in issue and decided in an earlier proceeding, the finding therein would not ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue.

13. As pointed out in Halsbury's Laws of England (Vol. 16, para 1538) (4th Ed), the fundamental rule is that a judgment is not conclusive if any matter came collaterally in question (R Vs. Knaptoft Inhabitants (1824) B & C 883; Heptulla Bros Vs. Thakore (1956(1) WLR. 289 (297)(PC); or if any matter was incidentally cognizable (Sanders (otherwise Saunders) Vs. Sanders (otherwise Saunders) 1952 (2) All ER p. 767 at 771).

14. A collateral or incidental issue is one that is ancillary to a direct and substantive issue; the former is an auxiliary issue and the latter the principal issue. The expression 'collaterally or incidentally' in issue implies that there is another matter which is 'directly and substantially' in issue (Mulla, CPC 15th Ed., p.104).

.....

19. We have here to advert to another principle of caution referred to by Mulla (p.105). "It is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the Court considers the adjudication of the issue material and essential for its decision".

.....

23. These three cases are therefore instances where in spite of a specific issue and an adverse finding in an earlier suit, the finding was treated as not res judicata as it was purely incidental or auxiliary or collateral to the main issue in each of these cases, and not necessary for the earlier case nor its foundation."

(iv) (2016) 2 SCC 200 in the case of City Municipal Council Bahlki Vs. Gurappa (D) by Lrs and anr, which reads as follows :-

18. The principle of res judicata is a need of any judicial system, that is, to give finality to the judicial decisions of the disputes between parties. It also aims to prevent multiplicity of proceedings between the same parties of the same subject matter of the lis. An issue which was directly and substantially involved in a former suit between the same parties, and has been decided and has attained finality cannot be re-agitated before the courts again by instituting suit or proceeding by the same parties on the same subject matter

of earlier lis.

19. This court in a catena of cases has laid down the law relating to the essential elements that need to be satisfied before a plea of res judicata can be raised by a party. In the case of Sheodan Singh v. Daryao Kunwar[1] it was held as under: "A plain reading of s. 11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely - (i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit; (ii) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim; (iii) The parties must have litigated under the same title in the former suit; (iv) The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and (v) The matter directly and substantially in issue in the

subsequent suit must have been heard and finally decided by the Court in the first suit."

20. The above legal principles laid down by this Court have been reiterated in the case of Syed Mohd. Salie Labbai & Ors. v. Mohd. Hanifa & Ors[2] as under: ".....it may be necessary to mention that before a plea of res judicata can be given effect, the following conditions must be proved-

(1) that the litigating parties must be the same

(2) that the subject-matter of the suit also must be identical;

(3) that the matter must be finally decided between the parties; and

(4) that the suit must be decided by a court of competent jurisdiction."

<https://hcservices.ecourts.gov.in/hcservices/> 21. Thus, for the bar of res judicata

to operate in the subsequent original suit proceedings, the litigating parties must be the same, and the subject matter of the suit must also be identical. Further, it has also been held by this court in the case of Ram Gobinda v. Bhakta Bala[3] that for the bar of res judicata to operate in the subsequent original suit proceedings, the decision in the former suit must have been decided on merits on the same substantial questions both on facts and in law that would arise in the subsequent original suit."

15. In all the above cases, the Hon'ble Supreme Court of India held in completely different facts and circumstances as such those judgment are not helpful to the case of the respondents herein, since for the very same property on the one hand injunction was granted and on the another hand, the first appellate Court nullified the sale deed, as such the plaintiff herein ought to have filed an appeal against the injunction decree also. Therefore, the appeal filed by the plaintiff is barred by resjudicata. That apart, the plaintiffs did not also seek any leave to file appeal as against the decree of injunction granted against him in O.S.No.143 of 1992. Therefore, the appeal plaintiff as against the judgment and decree passed in O.S.No.174 of 1995 was barred by resjudicate.

16. Therefore, this Court constrained to interfere with the judgment and decree of the first appellate Court since the same is barred by resjudicata. Accordingly the second substantial question of law formulated by this Court is answered in favour of the first defendant and as against the plaintiffs. Therefore, this Court need not to answer the other substantial questions of law formulated by this Court, while admitting the second appeal.

17. In fine, the second appeal stands allowed. The judgment and decree dated 06.09.2001 made in A.S.No.13 of 2001 on the file of the District Court, Nilgiris at Uthagamandalam, is hereby set aside and consequently the judgment and decree dated 31.10.2000 made in O.S.No.174 of 1995 on the file of the District Munsif Court, Gudalur, is restored. There is no order as to costs.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

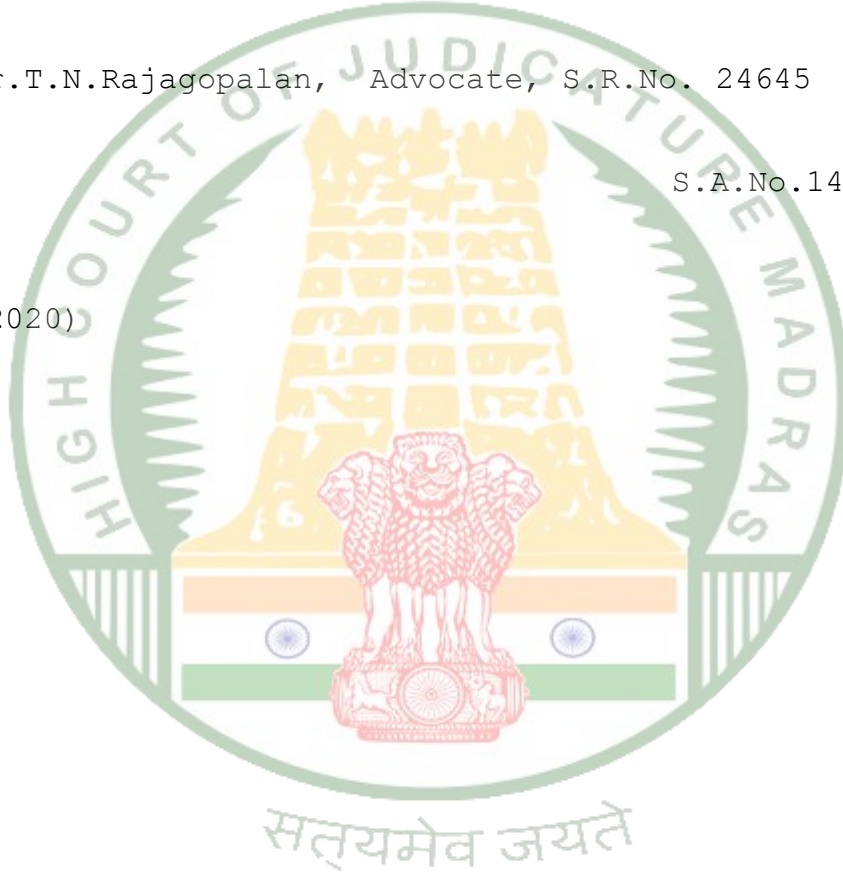
To

1. The District Judge,
Nilgiris at Uthagamandalam.
2. The District Munsif,
Gudalur,
3. The Section Officer,
V.R.Section,
Madras High Court,
Chennai.

+1cc to Mr.T.N.Rajagopalan, Advocate, S.R.No. 24645

S.A.No.147 of 2002

EV(CO)
GN(11/09/2020)



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