

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13-01-2020

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

A.S.No.572 of 2017

And

C.M.P.No.19010 of 2017

R.Angathal (Died)

1.Mohanraj

2.Amsavani

3.A.Devaraj

4.Krishnasamy

5.Bhoopathy

6.Manjula

7.Chandra

8.Thangamani

.. Appellants/Plaintiffs

vs.

1.Panneerselvam

2.A.Sakunthala

3.Ramathal

4.Subramanian

5.Palanisamy

6.Sundararajan

.. Respondents/Defendants

Appeal Suit is preferred under Section 96 of the Code of Civil Procedure read with Order 41, Rule 1 of the Code of Civil Procedure, against the judgment and decree dated 06.09.2016 passed in O.S.No.271 of 2012 on the file of the learned V Additional District Judge, Coimbatore.

For Appellants : Mr.M.Kalyanasundaram,
Senior Counsel for Mr.R.Vasudevan.

For Respondents-1&2 : Mr.J.Ramakrishnan

For Respondents-3to6: Given up

J U D G M E N T

The present appeal suit is directed against the judgment and decree dated 06.09.2016 passed by the learned V Additional District Judge, Coimbatore in O.S.No.271 of 2012.

2. The appellants in the appeal suit are the plaintiffs in the suit and the respondents in the appeal suit are the defendants in the suit.

3. The appellants/plaintiffs instituted a suit for partition.

4. The defendants 1 and 2/respondents 1 and 2 filed an interlocutory application in I.A.No.16 of 2016 for rejection of plaint under Order VII, Rule 11 of the Code of Civil Procedure read with Section 151 of the Code of Civil Procedure. The said interlocutory application was allowed by the Trial Court and the plaint was rejected, against which the present appeal suit is filed.

5. The facts in nutshell, as enumerated, are that on 19.08.1945, the suit property was purchased by four brothers viz., 1) Raja Boyan, 2) Ammasi Boyan, 3) Nanjappan and 4) Arumuga Boyan. The plaintiffs are the wife, son and daughter of branches of Raja Boyan, Ammasi Boyan and Nanjappan. The defendants 1 and 2 are the son and daughter of Arumuga Boyan.

6. In the year 1953, the aforesaid Raja Boyan, Ammasi Boyan and Nanjappan, having received a sum of Rs.100/- from Arumuga Boyan, released their right and share in the suit property. Right from the year 1953, Arumuga Boyan and thereafter his son and daughter viz., the defendants 1 and 2 are in possession and enjoyment of the suit property for more than six decades. On 27.01.1975, Nanjappan claiming a share in the suit property and consequently, issued a legal notice. On 03.02.1975, a reply was sent by Arumuga Boyan stating about the release executed by other three brothers and asserted his absolute right and possession. On 17.02.1975, Nanjappan filed O.S.No.368 of 1975 against Arumuga Boyan and other two brothers on the file of the District Munsif Court, Coimbatore. On 01.03.1978, O.S.No.368 of 1975 was dismissed for default. I.A.No.827 of 1978 was filed to restore the suit. I.A.No.827 of 1978 was ordered on condition to pay Rs.75/- towards costs.

7. On 01.09.1978, the Trial Court found that the cost was not paid and consequently, I.A.No.827 of 1978 also was dismissed. C.M.A. No.151 of 1978 was filed before the District Court, Coimbatore against the order passed in I.A.No.827 of 1978. On 09.07.1979, C.M.A.No.151 of 1978 was dismissed for default. I.A.No.1441 of 1979 was filed to restore C.M.A.No.151 of 1978. On 16.07.1979, I.A.No.1441 of 1978 was allowed on condition to pay the cost of Rs.50/-. On 12.10.1979, the cost was not paid and I.A.No.1441 of 1979 was dismissed. Dismissal of suit in O.S.No.368 of 1975 became final as no further appeal was preferred by the parties.

8. On 04.12.1980, Ammasi Boyan issued legal notice, claiming share in the suit property. A reply notice was sent by Arumuga Boyan, who is the father of the first respondent, disputing the claim of Ammasi Boyan. In January 1982, Raja Boyan filed O.S.No.246 of 1982 on the file of the District Munsif Court, Coimbatore, seeking the relief of partition of suit property. On 19.07.1983, written statement of late Arumuga Boyan was filed and the suit was contested. On 27.01.1988, O.S.No.246 of 1982 was dismissed for default. The decree became final. During the year 1998, Arumuga Boyan died, on 25.05.1999 Nanjappan died, on 24.09.1999 Ammasi Boyan died and on 17.01.2001 Raja Boyan died.

9. In the year 2002, suppressing the above suits, the plaintiffs 1 to 11, who represent the branch of Nanjappan, Ammasi Boyan and Raja Boyan have filed yet another suit in O.S.No.1221 of 2002 on the file of the III Additional Sub Court, Coimbatore, seeking the relief of partition of suit properties. The respondents 1 and 2 and the mother Mylathal filed a detailed written statement, mentioning the oral release and dismissal of earlier suits and further stated that findings in the earlier suits are binding and the subsequent suit in O.S.No.1221 of 2002 is barred by law. The title to the suit property is perfected by ouster and adverse possession and that the suit is barred by limitation. On 23.06.2004, the learned III Additional Sub Judge dismissed the suit, holding that oral release is true and the decree in the earlier suits binding on the plaintiffs on the principles of res judicata and that the suit is barred by limitation. The said judgment and decree became final.

10. On 09.05.2012, after the disposal of O.S.No.1221 of 2002 and after the lapse of 10 years, the plaintiffs have filed the present suit for partition, alleging the grounds mentioned in the earlier suits and also suppressing all the previous suits. In November, 2014, the first and the second defendants were filed their written statement.

11. The defendants 1 and 2, during December, 2015, narrating all the aforesaid facts and consequently, filed I.A.No.16 of 2016 in O.S.No.271 of 2012 for rejection of plaint under Order VII, Rule 11 of Civil Procedure Code. A counter statement was filed and the Trial Court allowed I.A.No.16 of 2016, rejected the plaint, against which the present appeal suit is filed.

12. The learned Senior Counsel appearing on behalf of the appellants, beyond the facts, narrated as above, mainly contended that the rights of the parties have not been

ascertained so far and therefore, a fresh suit was instituted. The earlier suits were not decided on merits and was dismissed for default, which were not restored for the reasons best known to the litigants during the relevant point of time and those litigants are also no more. Now the legal heirs have filed a civil suit in O.S.No.271 of 2012 for partition mainly on the ground that the principles of res judicata would not apply in view of the fact that they are raising the question of law.

13. In reliance, the learned Senior Counsel appearing on behalf of the appellants, contended that the release was allegedly oral and based on such oral release, the Trial Court dismissed the suit for default and under these circumstances, the parties are unable to raise the question of law by instituting a fresh suit.

14. In reliance, the learned Senior Counsel appearing on behalf of the appellants, cited the judgment of the Hon'ble Supreme Court of India in the case of SCG Contracts India Pvt. Ltd vs. K.S.Chamankar Infrastructure Pvt Ltd [2019 SCC OnLine SC 226], wherein in paragraphs 22 and 23, it has been held as under:-

"22. Factually speaking, this is not correct as a Special Leave Petition from the said order has been filed. Even otherwise, this Court in Canara Bank v. N.G. Subbaraya Setty (supra) has held (page 3414):

"(ii) An issue of law which arises between the same parties in a subsequent suit or proceeding is not res judicata if, by an erroneous decision given on a statutory prohibition in the former suit or proceeding, the statutory prohibition is not given effect to. This is despite the fact that the matter in issue between the parties may be the same as that directly and substantially in issue in the previous suit or proceeding. This is for the reason that in such cases, the rights of the parties are not the only matter for consideration (as is the case of an erroneous interpretation of a statute inter parties), as the public policy contained in the statutory prohibition cannot be set at naught. This is for the same reason as that contained in matters which pertain to issues of law that raise jurisdictional questions. We have seen how, in Natraj Studios, ((1981) 1 SCC 523 : AIR 1981 SC 537) (supra), it is the public policy of the statutory

prohibition contained in Section 28 of the Bombay Rent Act that has to be given effect to. Likewise, the public policy contained in other statutory prohibitions, which need not necessarily go to jurisdiction of a Court, must equally be given effect to, as otherwise special principles of law are fastened upon parties when special considerations relating to public policy mandate that this cannot be done."

23. The aforesaid para applies on all fours to the facts of the present case, as even assuming that the 05.12.2017 order is final, res judicata cannot stand in the way of an erroneous interpretation of a statutory prohibition. The present is one such case. Therefore, the second order must also be set aside."

15. Relying on the abovesaid judgment of the Supreme Court, the learned Senior Counsel appearing on behalf of the appellants reiterated that the facts of the case on hand reveals that the fresh suit is instituted, raising an issue of law arises between the same parties and therefore, the principles of res judicata would not operate against the plaintiffs in the suit.

16. The learned counsel appearing on behalf of the respondents strenuously disputed the said contentions of the learned Senior Counsel appearing on behalf of the appellants, by stating that the cogent events raised by the respondents before the Trial Court reveals that it is not once, but more than several occasions, the efforts by the parties failed and the earlier judgments and decrees became final and therefore, now after a lapse of several years, a fresh suit for partition cannot be entertained mainly on two grounds, namely, on the ground of limitation as well as on the ground of res judicata.

17. The Trial Court rightly pressed into service the principles of res judicata by appreciating the evidences as well as the adjudication occurred between the same parties in the earlier suits and thus, the judgments and the decrees became final.

18. This Court is of the considered opinion that the arguments of the learned Senior Counsel appearing on behalf of the appellants that the fresh suit is instituted raising an issue of law.

19. Such a contention raised by stating that the Release Deed executed in the year 1953 was oral and there is no documents to establish such a release. It is pertinent to note that though it was oral and was raised in a suit between the parties, then the same is to be adjudicated by producing the documents and the evidences. In the absence of producing any such documents and the evidences, then the parties are at liberty to prove the same by way of evidences. Earlier the decree also reveals that the oral release was established by the father of the first respondent, Arumuga Boyan and the judgment and decree became final.

20. Even in case, there is an error, then the parties would have preferred an appeal against such judgment and decree. Contrarily, another suit cannot be instituted as the ground regarding oral release, cannot be construed as a point of law for the purpose of entertaining a fresh suit. The very spirit of the Supreme Court's judgment, cited supra, by the learned Senior Counsel appearing on behalf of the appellants, is that "an issue of law which arises between the same parties in a subsequent suit or proceeding is not res judicata."

21. However, considering the facts and circumstances of the present case on hand, it was not an issue of law. It was an issue of fact. The oral release or the Release Deed executed. It is to be established before the Court of Law at the first instance. Even in case of oral release, the parties are at liberty to prove the same or to rebut the same by way of evidences. Contrarily, they cannot institute a fresh suit by stating that the oral release executed by the Trial Court in earlier suit is not a bar for institution of a fresh suit for re-adjudication of the very same issue raised by the very same parties.

22. The spirit of Section 11 of the Code of Civil Procedure contemplates bar of jurisdiction enumerating "no Court shall try any suit or issue in which the matter has been directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court".

23. A plain reading of the above Section of the Code unambiguously stipulates that no Court shall try any

suit when the matter has been directly and substantially in issue has been directly and substantially in issue in a former suit.

24. Admittedly, the earlier suit between the same parties were instituted for a partition. It is further admitted that based on the oral release, the rights of the parties were crystallised by the Trial Court on earlier occasions. Admittedly, the parties, who were denied the relief, had not preferred any further appeal against such judgment and decree and admittedly, the judgment and decree became final as far as the parties are concerned. Therefore, the contention of the appellants that the earlier judgment and decree was based on the oral release and the same was not a bar under Section 11 of the Code of Civil Procedure is undoubtedly unacceptable.

25. Perusal of the entire facts cogently, this Court has no doubt regarding the principles adopted by the Trial Court for rejecting the plaint itself. When the facts reveals that the suit was instituted not only belatedly but suppressing the material facts regarding the earlier judgment and decree, then this Court is of the considered opinion that the appellants had not approached the Trial Court with clean hands and the suit is dismissed. Even on that ground also, a person who has not approached the Court with clean hands, is not entitled for any relief from the hands of the Court.

26. In the present case on hand, beyond the unclean approach, the earlier judgment and decree passed on between the parties were not revealed before the Trial Court and the same amounts to suppression of material facts and under these circumstances, this Court has no hesitation in arriving a conclusion that the Trial Court has passed the judgment and decree and rightly appreciating the documents as well as the evidences and there is no perversity or infirmity, as such.

27. Accordingly, the judgment and decree dated 06.09.2016 passed by the learned V Additional District Judge, Coimbatore in O.S.No.271 of 2012 is confirmed and Consequently, the present appeal suit is dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is also dismissed.

s/d-

Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

To

The V Additional District Judge,
Coimbatore.

Copy to
The Section officer
VR Section
High Court, Madras 104.

+1 CC to Mr.J.Ramakrishnan, Advocate sr 3152.

A.S.No.572 of 2017

PM(CO)
SP(14/08/2020)



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