

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 22.12.2020

Pronounced on : 20.01.2021

Coram:

THE HONOURABLE MR.JUSTICE P. RAJAMANICKAM

REV.APPLN.No.98 of 2020
in SA.No.501 of 2013
and CMP.No.11498 of 2020

1. B.K.Babu Sahib (Died)
2.B.Shanawas
3.M.Y.Luthfiya Tabasum (Minor)
4.M.Y.Omeraa Tabasum (Minor)
Minor petitioners 3 and 4
are represented by their
Father, N. Mohammed Yasin. ..Petitioners/Respondents 2 to 4

Vs.

1.Motilal
2.Jawaharlal .. Respondents/Appellants 1 and 2

PRAYER: Review Application filed under Section 114 of CPC r/w
Order 47 Rule 1 of CPC to review the decree and judgment dated
23.05.2019 in S.A.No.501 of 2013.

ORDER

This Review Application has been filed by the respondents 2 to 4 to review the judgment and decree passed by this court in S.A.No.501 of 2013 dated 23.05.2019.

2. The respondents herein had filed a suit in O.S.No.368 of 2000 on the file of the Principal Sub-Judge, Tiruvannamalai, against the plaintiffs 1 and 2 herein for the relief of partition to divide the suit property into two equal shares and allot one such share to them. In the said suit, both the parties entered into a compromise and based on the said compromise, a final decree was passed on 05.09.2001 directing that the plaintiffs therein shall take northern $\frac{1}{2}$ share of the suit property and the first defendant therein (first plaintiff herein) shall take southern $\frac{1}{2}$ share in the suit property. Thereafter, the petitioners herein along with the first plaintiff namely B.K. Babu Sahib (deceased) had filed a suit on 13.08.2010 on the file of the Principal District Munsif, Tiruvannamalai, to declare the decree which was passed in O.S.No.368 of 2000 on the file

of the Principal Sub-Judge, Tiruvannamalai, dated 05.09.2001 is null and void and inoperative and not binding on the plaintiffs; to restrain the defendants, their men, etc., by means of permanent injunction from claiming any right under the said impugned decree and to restrain the defendants, their men, agents, etc., by means of permanent injunction from interfering with the exclusive possession and enjoyment of the plaintiffs 3 and 4 in the suit property.

3. The learned Principal District Munsif, Tiruvannamalai, by the order dated 11.04.2012 had rejected the said plaint on the ground that the said final decree was already acted upon and hence, the *principle of estoppel* will apply and also on the ground that the suit is barred by limitation. Feeling aggrieved, the plaintiffs therein had filed an appeal in A.S.No.29 of 2012 on the file of the Principal Sub-Judge, Tiruvannamalai. The learned Principal Sub-Judge, Tiruvannamalai, by the judgment and decree dated 01.04.2013 had allowed the said appeal and set aside the order passed by the trial court and directed the plaintiffs to represent the said plaint within 30 days from the date of receipt of copy of the said judgment and on such representation, the trial court shall

take the case on file and dispose of the case in accordance with law. Feeling aggrieved, the defendant had filed a second appeal in S.A.No.501 of 2013 before this court. This court after hearing both sides had allowed the said appeal by the judgment and decree dated 23.05.2019 and set aside the judgment and decree passed by the first appellate court and restored the order passed by the trial court. Feeling aggrieved, the plaintiffs 2 to 4 have filed the present review application.

4. Heard Mr.R.Rajarajan, the learned counsel for the petitioners/plaintiffs and Mrs.Chithra Sampath, learned Senior Counsel assisted by Mr.S.Panneer Selvam, the learned counsel for the respondents/defendants.

5. The point for determination is whether this review application can be entertained?

6. Point:

The learned counsel for the petitioners has submitted that the trial court had rejected the plaint on the ground that the alleged compromise

decree was acted upon and hence, the *principle of estoppel* will apply and also on the ground that the suit is barred by limitation, but in the second appeal, the appellants/defendants have taken a new plea that the present suit is barred under Order 23 Rule 3-A of CPC. He further submitted that this court had allowed the second appeal without considering the fact that the trial court did not reject the plaint on the ground that the present suit is barred under Order 23 Rule 3-A of CPC. He further submitted that the provision of Order 23 Rule 3-A of CPC will apply only when the parties to the compromise wanted to set aside the decree on the ground that the compromise is not lawful, whereas, in this case, both the parties are Muslims, the concept of joint family system will not apply to them and hence, the decree passed in the previous suit itself is against the law. He further submitted that this court while allowing the second appeal failed to consider that the petitioners herein wanted to declare their title to the suit property de hors the compromise decree and therefore, the bar under Order 23 Rule 3-A will not apply. He further submitted that the limitation for registering the compromise decree and also for executing the decree was already expired and as such, the said compromise decree is a stale decree and by using the same,

the defendants are trying to disturb the possession of the plaintiffs only in the year 2010 and immediately, the petitioners herein had filed a suit within three years and as such, the suit is not barred by limitation. He further submitted that the question of limitation is a mixed question of fact and law and as such, the same cannot be decided under Order 7 Rule 11 of CPC and therefore, he prayed to review the judgment and decree passed by this court in S.A.No.501 of 2013 dated 23.05.2019 and dismiss the said second appeal.

7. The learned counsel for the petitioners in support of his contentions relied upon the following decisions:-

- 1. Alka Gupta Vs. Narender Kumar Gupta, (2010) 10 SCC 141;***
- 2. C.Natarajan Vs. Ashim Bai and Another (2008) 1 MLJ 1278 (SC) and***
- 3. Shakti Bhog Food Industries Ltd., Vs. The Central Bank of India and Another (C.A.No.2514 of 2020) (Arising out of SLP (C) No.30209 of 2017 of the Hon'ble Supreme Court dated 05.06.2020.***

8. Per contra, the learned Senior Counsel for the respondents /appellants has submitted that the plaint was rejected even before numbering the same on the ground that the *Principle of Estoppel* will apply and also the suit is barred by limitation and hence, there was no occasion for the defendants to put forth their case before the trial court as the suit is barred under Order 23 Rule 3-A of CPC. She further submitted that the plaintiffs filed the appeal before the Principal Sub-Judge, Tiruvannamalai, challenging the rejection of their plaint and in the said appeal, the defendants had raised a plea that the suit is barred under Order 23 Rule 3-A of CPC also but without considering the said contention, the learned Principal Sub-Judge, Tiruvannamalai, had allowed the said appeal. Aggrieved by the same, the defendants had filed the second appeal in S.A.No.501 of 2013 before this court. She further submitted that this court, after considering the rival submissions, had allowed the said second appeal on the ground that the suit is barred under Order 23 Rule 3-A of CPC and also by the law of limitation. The points now urged by the petitioners were already canvassed in the second appeal itself and after considering the same, this court had allowed the second appeal and now the petitioners are trying to re-argue the same

facts in the review application. She further submitted that if the petitioners feel that they are aggrieved by the judgment and decree passed by this court in second appeal, they ought to have filed an appeal before the Hon'ble Supreme Court by filing Special Leave Petition and instead of that, they cannot once again re-agitate the matter before this court. She further submitted that this court cannot sit in appeal over its own judgment and therefore, she prayed to dismiss this review application.

9. The learned Senior Counsel for the respondents, in support of her contentions, relied upon the decision in *Shri Ram Sahu (Dead) through LRS & Others Vs. Vinod Kumar Rawat & Others, C.A.No.3601 of 2020 (Arising out of SLP(Civil) No.28150 of 2017* of the Hon'ble Supreme Court dated 03.11.2020)

10. Since the trial court had rejected the plaint even before numbering the suit, the respondents/defendants had no occasion to raise a point that the suit is barred under Order 23 Rule 3-A of CPC. Anyhow, when the plaintiffs filed an appeal against the rejection of their plaint, the

defendants had raised the point that the suit is barred under Order 23 Rule 3-A of CPC apart from the law of limitation but without considering the said contentions, the appellate court had allowed the said appeal and as against the same, they had filed the second appeal before this court. After considering the said facts, this court had allowed the second appeal on both the grounds viz., the suit is barred under Order 23 Rule 3-A of CPC and also by law of limitation. Merely because the trial court, in its order, had not pointed out that the suit is barred under Order 23 Rule 3-A of CPC will not preclude the appellants to raise the said defence, because the said point is purely a question of law.

11. Though the petitioners in the review application have raised a ground that the petitioners herein wanted to declare their title to the suit property dehors the compromise decree, in the plaint they have not asked the relief for declaration of their title. On the contrary, they simply asked the court to declare that the decree passed in O.S.No.368 of 2000 as null and void and is not binding upon them. Therefore, the petitioners cannot raise a new ground for the first time in the review application.

12. The petitioners herein also raised a ground in the review application that the defendants started to disturb their possession only in the year 2010 and the suit was filed within three years from the date of the said disturbance and as such, the suit is not barred by limitation. This plea also has not been taken in the plaint.

13. At this juncture, it would be relevant to refer to Order 7 Rule 6 of CPC which reads thus:

“Grounds of exemption from limitation law -

Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed .

“[Provided that the Court may permit the plaintiff to claim exemption from the law of limitation on any ground not set out in the plaint, if such ground is not inconsistent with the grounds set out in the plaint.]”

14. A bare reading of aforesaid provision of law would show that where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed. In this case, the petitioners have

asked the court to declare that the decree passed in O.S.No.368 of 2000 dated 05.09.2001 as null and void and not binding upon them. The said suit was filed on 13.08.2010 i.e., after nearly 9 years. It is not the case of the plaintiffs that for filing suit for the relief of declaration, the period of limitation prescribed is more than 3 years. As per Article 59 of the Limitation Act, the suit to cancel or set aside the decree has to be filed within three years from the date of decree. In this case, as already pointed out that the alleged decree was passed on 05.09.2001, whereas the present suit has been filed on 03.08.2010. So, the suit is hopelessly barred by Limitation. Further, the plaintiffs have not stated in their plaint, how they are seeking exemption in respect of limitation as contemplated under Order 7 Rule 6 of CPC.

15. In *Alka Gupta Vs. Narender Kumar Gupta*, (cited supra), the appellant therein filed a suit before the Delhi High Court for rendition of accounts with regard to the partnership firm. The said suit was resisted by the respondent by raising 3 preliminary grounds viz.,

1. Suit is barred by resjudicata,
2. Suit is barred under partnership 69 of Partnership Act and

3. Suit is liable to be dismissed on suppression of material fact.

16. Based on the said pleadings, a preliminary issue was framed as whether the suit is barred by the *Principle of resjudicata*. Thereafter, the learned Single Judge had dismissed the said suit summarily on the grounds of abuse of process of court, the partnership was illegal and unenforceable, the suit was barred under Rule 2 of CPC and also barred under the *Principle of resjudicata*. Feeling aggrieved, the appellant filed an intra court appeal before the same High Court. The appeal was dismissed. As against the same, she filed an appeal before the Hon'ble Supreme Court. Taking into consideration of the facts and circumstances of the said case, the Hon'ble Supreme Court has held that when the suit is listed for consideration for a preliminary issue, the court cannot make a roving enquiry into the alleged conduct of the plaintiff, tenability of the claim, the strength and validity and contents of documents, without a trial and on that basis, dismiss a suit. It also held that a suit cannot be short-circuited by deciding the issues of fact merely on pleadings and documents produced without a trial.

17. In this case, the facts are totally different. In this case, the plaintiffs had filed the present suit to declare the decree which was passed in the previous suit as null and void. So the questions involved in this case is whether the suit is barred under Order 23 Rule 3-A of CPC and also by law of limitation. The said questions can be decided without taking evidence. Therefore, the aforesaid decision will not apply to the facts of this case.

18. In *C.Natarajan Vs. Ashim Bai and Another* (cited supra), the plaintiffs filed a suit to declare their title and for recovery of possession. According to them, the suit was filed within 12 years from the date of trespass and hence, the suit was not barred by limitation, whereas the defendants claimed that the plaintiffs never in possession and hence they perfected title by adverse possession. The Hon'ble Supreme Court has held that since the defendants claimed adverse possession, the burden is upon them to prove from which date the possession has become adverse to the true owner. It has also held that since both the parties claimed rights based on different limitations, the said question has to be decided only after taking evidence, whereas in this case, there is no dispute that

only one limitation for filing a suit to declare the decree as null and void. Therefore, oral evidence does not require for deciding the said question. So, the aforesaid decision also will not apply to the facts of this case.

19. In ***Shakti Bhog Food Industries Ltd., Vs. The Central Bank of India and Another*** (cited supra), also, both the parties claimed different limitations and hence the Hon'ble Supreme Court has held that the said question has to be decided only after taking evidence. But in this case, there is no dispute with regard to the limitation that only 3 years prescribed under the limitation Act for seeking the relief of declaration that the decree is null and void. Further, in this case, the plaintiffs 1 and 2 are parties in the previous suit. So, they cannot take a plea that they did not have any knowledge about the said decree. They got knowledge on the very date of the passing of the decree. So, the limitation runs from the date of passing of the decree. The suit has been filed after 9 years. Therefore, the suit is clearly barred by limitation.

20. In ***Shri Ram Sahu (Dead) through LRS & Others Vs. Vinod Kumar Rawat & Others***, (cited supra), the Hon'ble Supreme Court, after

referring to several decisions including the decision in ***State of Haryana Vs. M.P. Mohla, (2007) 1 SCC 457***, has held that an application for review is more restricted than that of an appeal and the Court of review has limited jurisdiction as to the definite limit mentioned in Order 47 Rue 1 of CPC itself. The powers of review cannot be exercised as an inherent power nor can an appellate power can be exercised in the guise of power of review. In this case, as already pointed out that the grounds which have been raised in this review application were already considered by this court in second appeal and the same cannot be re-agitated. Therefore, the present review application is liable to be dismissed.

21. In the result, this Review Application is dismissed.
Consequently, connected miscellaneous petition is closed. No costs.

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Index: Yes / No
Speaking/Non-speaking Order
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P. RAJAMANICKAM., J.

gv



**Pre-delivery Order made in
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