BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 21.03.2024

CORAM:

THE HON'BLE MR.JUSTICE **P. DHANABAL**

A.S(MD)No.54 of 2015
and
M.P(MD)No.1 of 2015
and
C.M.P(MD)No.12700 of 2023

D.Krishnaveni @ Veni ... Appellant/1st Defendant

Vs.

1.M.Velselvi ... 1st Respondent/Plaintiff

2.K.Alagarsamy ... 2nd Respondent/2nd Defendant

Prayer : This Appeal Suit filed under Section 96 r/w Order 41, Rule 1 of CPC., against the judgment and decree, dated 04.09.2014 passed in O.S.No.195 of 2012 on the file of the learned VI Additional District Judge, Madurai.

For Appellant	: Mr.M.Vallinayagam Senior Counsel for Mr.A.Jayaramachandran
For R-1	: Mr.J.Barathan for Mr.B.Prasanna Vinoth
For R-2	: No appearance

JUDGMENT

This Appeal Suit has been preferred as against the decree and judgment passed in O.S.No.195 of 2012 on the file of the VI Additional District Judge, Madurai, wherein, the first respondent herein has filed a suit for declaration declaring that the suit in O.S.No.58 of 2008 on the file of the Additional District Judge, (FTC No.2), Madurai is null and void. The suit was decreed. Aggrieved by the decree and judgment, the first defendant has preferred this Appeal.

2. For the sake of convenience and brevity, the parties herein after will be referred to as per their status / ranking in the Tribunal.

3. The brief facts of the plaint averments are as follows:

The suit schedule property originally belongs to second defendant. The second defendant executed an agreement in favour of the husband of the plaintiff to sell the property for a sum of Rs.4,56,000/- and advance of sale price of Rs.1,00,000/- was paid on 26.04.2007. Thereafter, the said second defendant executed a power of attorney deed, dated 08.05.2008 in favour of the husband of the plaintiff, namely, Mathan. Based on the said power deed, the said Mathan executed a sale deed in favour of the plaintiff on 23.01.2009. The second defendant also executed an agreement for sale in respect of the same property on 31.12.2007 in favour of first defendant. Thereafter, the first defendant filed a suit in O.S.No.58 of 2008 on the file of the Additional District Judge, (FTC No.2), Madurai. The said suit was decreed on 25.01.2010 and the first defendant also filed execution petition in E.P.No.18 of 2012 and the same is pending. The plaintiff purchased the property and thereafter, mutation of revenue records also taken place in her name. While so, the second defendant has no right to execute any deed in favour of the first defendant. Therefore, the decree passed in O.S.No.58 of 2008 on the file of the Additional District Judge, (FTC No.2), Madurai, dated 25.01.2010 are liable to be set aside. Further the plaintiff is entitle to relief of permanent injunction as against the first defendant from interfering with the plaintiffs peaceful possession and enjoyment of the suit property.

4. **The brief averments of the written statement are as follows:**

The second defendant is the owner of the suit property and he entered into agreement with first defendant. The sale price is fixed as Rs.9,000/- per cent for total extent of 57 cents price was fixed as Rs.5,13,000/- and also executed an agreement for sale on 31.12.2007. On the date of agreement itself, the first defendant paid a sum of Rs.50,000/- and the second defendant also handed over the original documents to the first defendant. The balance sale price of Rs.20,000/- was also paid by the first defendant to the second defendant. The balance amount of Rs. 4,53,000/- has to be paid by the first defendant. On 25.03.2008, when he was waiting for getting sale deed in his favour along with balance amount of Rs.4,53,000/-, the second defendant failed to come to the Registrar Office. Thereafter, on 27.03.2008, the first defendant issued a notice to the second respondent and the same was received by him. But he neither issued reply nor executed any sale deed. Therefore, the first defendant filed a suit in O.S.No.58 of 2008 on the file of the Additional District Judge, (FTC No.2), Madurai. The second defendant has not stated in the written statement as about the alleged sale agreement, dated 24.06.2007 and the power deed, dated 08.05.2008 in favour of the plaintiff. The said suit in O.S.No.58 of 2008 was decreed in favour of the plaintiff therein on 25.01.2010. Thereafter, E.P.No.18 of 2012 was also filed and the same is pending. Since the suit is filed on 28.04.2008, the power deed and the encumbrances created over the property are not binding upon these defendants and the decree in O.S.No.58 of 2008. The second defendant also in the suit in O.S.No.58 of 2008, in the proof affidavit assured that he would not create encumbrance over the property. The present suit is filed by the plaintiff in collusion with the second defendant. Therefore, the suit is liable to be dismissed.

5. The second defendant did not appear before the Trial Court and he was set *ex parte*.

6. Based on the above said pleadings, the Trial Court has framed the following issues and additional issues:

1. 2ம் பிரதிவாதி 1ம் பிரதிவாதிக்கு எழுதிக் கொடுத்த கிரையம் சொத்து மாற்றுச் சட்டம் பிரிவு 52ன் கீழ் பாதிக்கப்பட்டுள்ளதா?

2. அசல் வழக்கு எண்.58-08ல் பிறப்பிக்கப்பட்ட தீர்ப்பாணை வஞ்சக் கூட்டாக பெறப்பட்டதா?

3. வாதிக்கு கிடைக்கக் கூடிய இதர பரிகாரம் என்ன?

கூடுதல் எழுவினா

1. வாதிக்கு அ வ எண் 58-08 வழக்கின் தீர்ப்பாணையை null and void என ரத்து செய்யக் கோரும் பரிகாரம் கிடைக்கத்தக்கதா?

2. வாதிக்கு இந்த வழக்கில் கண்ட வழக்கிடை சொத்தை பொறுத்து பிரதிவாதிகள் மீது நிரந்தர தடை உத்தரவு பரிகாரம் கிடைக்கத்தக்கதா?

7. On the side of the plaintiff, the plaintiff herself examined as P.W.1 and P.W.2 was also examined and marked Exhibits A.1 to A.10. On the side of the defendants, D.W.1 was examined and marked Exhibits B.1 to B.5.

8. After considering the evidences adduced on both sides, the Trial Court has decreed the suit and declared that the decree and judgment passed in O.S.No.58 of 2008 on the file of the Additional District Judge, (FTC No.2), Madurai, dated 25.01.2010 is null and void and consequently, the permanent injunction was granted not to interfere with the plaintiffs possession and enjoyment over the suit property.

9. Aggrieved by the said judgment, the present Appeal has been filed by the defendant on the following grounds:

"1. The judgment and decree passed by the Trial Court is against all the probabilities of evidence and against the facts as well as law.

2. The Court below erred in concluding that the alleged sale of the suit property between the first and second respondents herein during the pendency of the earlier suit filed by the appellant for specific performance, that too after entering appearance by the second respondent herein in the suit is not lis-pendense solely because the agreement for sale Exhibit A.1 is prior to the agreement for sale entered into between the appellant and the second respondent and erred in concluding that the prior agreement for sale only prevail over the subsequent one.

3. The Court below while making assumptions regarding the happenings for absence of pleading about the agreement for sale with the first respondent herein in the written statement filed by the second respondent herein in O.S.No.58 of 2008 deliberately failed to appreciate the fact whether the agreement, dated 26.04.2007 between the first and second respondents is the genuine one or made for the purpose of defeating the claim of the appellant herein. The Court below deliberately failed to frame it as a separate issue in spite of specific allegations made

by this appellant in respect of the same.

4. The Court below lost sight of the fact that all the pleadings put forth by the first respondent in the present suit were already placed before the Execution proceedings of the decree of the earlier suit in O.S.No.58 of 2008 filed by this appellant and the same were discarded as unacceptable by a competent Court. Hence the pleadings on the present suit itself is hit by the principle of *res judicata* or much less by constructive *res judicata*.

5. The Court below erred in law in as much as declaring the judgment and decree of the earlier suit in O.S.No.58 of 2008 as null and void without proper perspective and without jurisdiction. It is not the case of the first respondent that the earlier suits decree was obtained by fraud or by making false representations. Especially when the Court below found that the decree of earlier suit was not obtained on collusion between the appellant herein and the second respondent, the Court below cannot have jurisdiction to declare the judgment and decree of a competent Court of equal cadre as null and void.

6. The Court below miserably failed to appreciate the fact that the sale of suit property is not made by virtue of the agreement for sale dated, 26.04.2007 but in furtherance of power of attorney executed by the second

respondent herein in favour of the husband of first respondent. As a matter of fact the agreement, dated 26.04.2007 was between the husband of the first respondent and the second respondent. So the agreement for sale, dated 26.04.2007 has become unenforceable in view of the power of attorney executed by the second respondent in favour of the first respondent's husband. Admittedly the sale cannot prevail over the agreement for sale entered into between the appellant and the second respondent herein which is earlier one to the power of attorney as well as sale deed.

7. The judgment and decree passed by the Court below are unsustainable in any corner of law and as such the same is liable to be set aside. The appellant crave leave of this Court to raise additional grounds at the time of argument."

10. During the pendency of the appeal, the appellant has filed petition to receive the additional evidence under Order 41, Rule 27 of C.P.C and documents of copy of petition in E.A.No.93 of 2013 and order in E.A.No.93 of 2013 in E.P.No.18 of 2012 in O.S.No.58 of 2008. The petitioner in his affidavit stated that the suit in O.S.No.58 of 2008 was filed for specific performance based on the sale agreement, dated 31.12.2007 and the same was decreed on 25.01.2010. Thereafter, he filed execution petition in E.P.No.18 of 2012. In the meantime, the first respondent herein filed a suit in O.S.No.195 of 2012 and the same was decreed on 04.09.2014. The first respondent after filing the suit in O.S.No. 195 of 2012 filed an application in E.A.No.93 of 2013 in E.P.No.18 of 2012 in O.S.No.58 of 2008 to adjudicate upon her claim of title in respect of the suit property. The said petition was dismissed on 30.04.2014 holding that the sale deed in favour of the first respondent by her husband is hit by *lis-pendens*. As against the order passed by the competent Court, the first respondent herein has not filed any appeal. Therefore, the said order became final. Since the order was passed on 30.04.2014, by that time, the suit in O.S.No.195 of 2012 evidence in suit was closed on 09.04.2014. The said orders could not be produced before the Trial Court. Therefore, the said copies of the order are very essential to decide the case. Hence, those documents have to be received additional evidence in this appeal in the interest of justice.

11. The first respondent had filed counter stating that all the allegations in the affidavit are all denied as false and incorrect. The allegations in paragraph Nos.2, 3 and 4 in the affidavit are correct. It is correct that she filed O.S.No.195 of 2012 on the file of the VI Additional Distirct Court, Madurai and also the first respondent filed claim petition in E.A.No.93 of 2013 in E.P.No.18 of 2012 in O.S.No.58 of 2008 on the file of the V Additional District Court, Madurai to adjudicate upon her claim of title in respect of the suit property. The suit in O.S.No.195 of 2012 was filed on 27.11.2012, whereas the claim petition in E.A.No.93 of 2013 was filed on 01.02.2013. In the said suit in O.S.No.195 of 2012, the trial was concluded on 09.04.2014. The claim petition filed under Order 21, Rule 58 of CPC, the execution Court only decides her claim of the title. But in the present suit in O.S.No.195 of 2012 is in respect of the fraud played by the plaintiff in O.S.No.58 of 2008. The issues are dealt with by both Courts are totally different. Therefore, the question of *res judicata* would not arise. The petitioner failed to produce the copy of claim petition and counter affidavit filed in the execution petition. Therefore, the petitioner has not complied with the requirements of Order 41, Rule 27 of CPC. Hence, the petition is liable to be dismissed.

12. The learned Counsel appearing for the appellant / first defendant would contend that the second defendant is the original owner of the suit property and he entered into sale agreement with this appellant on 31.12.2007 and thereafter, she filed a suit in O.S.No.58 of 2008 on the file of the Additional District Court, Madurai for specific performance and the same was decreed on 25.11.2010. The first respondent herein alleged that the suit property was already sold to her through sale deed, dated 23.01.2009. Prior to that, the same second defendant executed an agreement for sale in favour of one Mathan, who is the husband of first respondent and thereafter, the second defendant executed a power of attorney deed in favour of Mathan on 08.05.2008. Therefore, the power of attorney and the subsequent sale in favour of the first respondent are during the pendency of suit in O.S.No.58 of 2008 filed by the appellant. Therefore, the sale in favour of the first respondent and the power of attorney deed are all hit by doctrine of *lis pendens.* The transaction between the second respondent and the first respondent are subject to the result of O.S.No.58 of 2008. Therefore, the sale in favour of the first respondent is not valid and will not confer any title upon the first respondent. While so, the first respondent herein filed a suit in O.S.No.195 of 2012 on 27.11.2012, after the disposal of suit in O.S.No.58 of 2008.

13. The first respondent also filed a claim petition before the Execution Court in E.A.No.93 of 2013 in E.P.No.18 of 2012 in O.S.No.58 of 2008 after filing the suit in O.S.No.195 of 2012. The said claim petition is nothing but replica of the plaint in O.S.No.195 of 2012. In the said E.A, the Execution Court held that the sale is hit by *lis pendens* and thereby, the claim petition was dismissed. Once the claim petition was dismissed, the first respondent cannot file suit for the same relief. As per Order 21, Rule 58 (2) of CPC, all the questions relating to right, title or interest in the property shall be determined only in the said proceedings that cannot be dealt in a separate suit. Therefore, adjudicating the claim of title in the separate suit in O.S.No.195 of 2012 filed by Velselvi is barred under Order 21, Rule 58 (2) of CPC. The first respondent herein has not preferred any appeal as against the order in E.A.No.93 of 2013. Therefore, the order passed by the Execution Court in E.A.No.93 of 2013 became final. Therefore, the present suit is hit by principle of *res judicata*. Now, the appellant has filed an application to receive the additional documents of the order passed in E.A.No.93 of 2013 and the said documents are very essential to decide the case. Therefore, the documents filed along with the appeal in Order 41, Rule 27 application have to be received in the interest of justice. The Trial Court has failed to consider the above said facts and erroneously decreed the suit. Therefore, the decree and judgment passed by the Trial Court are liable to be set aside.

14. The learned Counsel appearing for the appellant has relied upon the following judgments:

i) The Hon'ble Supreme Court in a judgment reported in ***2011 SAR (Civil) 443 [Deb Ratan Biswas and Others Vs. Most. Anand Moyi Devi and Others],***

ii) This Court in a judgment reported in ***2024 (1) L.W 923 [Sowbakkiam Ammal and Another Vs. Gunasekaran]*** and

iii) This Court in a judgment reported in ***1992 (1) L.W 578 [Dewan Bahadur M.O.Parthasarathy Iyengar's Charities, Represented by its Trustee M.A.Rajagopalan, 10, South Mada Street, Triplicane, Madras-600 005 Vs. P.Satyam, Proprietor, Sathyam Motors, 20,***

Nungambakkam High Road, 4th Lane, Nungambakkam, Madras-34].

15. The learned Counsel appearing for the respondent would contend that the second defendant has entered into an agreement with the husband of the plaintiff on 26.04.2007 and thereafter, executed a power of attorney deed, dated 08.05.2008 and based on the power deed, the husband of the plaintiff sold the property to the plaintiff. The agreement in favour of the first defendant by the second defendant is subsequent to the agreement of the plaintiff's husband and the first defendant filed a suit in O.S.No.58 of 2008 by suppressing the material facts and the second and first defendants colluded each other and got decree for specific performance. The plaintiff came to know about the decree about the pendency of suit only in the year 2012, when they attempted to claim the property. The sale of the plaintiff is much earlier to the decree of the first respondent. The plaintiff has no knowledge about the pendency of the suit and thereby, the question of *lis pendens* would not arise. The first respondent already filed a petition in E.A.No.93 of 2013 on 01.02.2013 and the same was dismissed and the said E.A. was filed to adjudicate the right of the first respondent over the suit property. But the present suit in

O.S.No.195 of 2012 is filed to set aside the decree and judgment to declare the suit in O.S.No.58 of 2008 is null and void, since it was obtained by playing fraud.

16. The Trial Court after analyzing the evidences adduced on both sides, fairly came to a conclusion that the decree was obtained by playing fraud and the plaintiff in O.S.No.195 of 2012 has no knowledge about the suit in O.S.No.58 of 2008. Thereby, the sale is not hit by *lis pendens*. The documents produced by the appellant during the pendency of the appeal are pertaining to the E.A filed by these first respondent and the respondent has not filed document before the Trial Court and now after a long gap, they filed this application and the petitioner has not complied with any of the requirements of Order 41, Rule 27. Therefore, the petition is liable to be dismissed and the present appeal is also liable to the dismissed.

17. This Court had heard both sides and perused the records and upon perusing the documents, the points for determination in this appeal are as follows:

"1) Whether the C.M.P(MD)No.12700 of 2023 is liable to be allowed and the documents are to be received?

2) Whether the sale in favour of the first respondent / plaintiff is hit by *lis pendens,* since it was purchased during the pendency of O.S.No.58 of 2008?

3) Whether the decree and judgment obtained in O.S.No.58 of 2008 by playing fraud?

4) Whether the suit is barred by principle of *res judicata* in view of the order passed in E.A.No.93 of 2013 in E.P.No.18 of 2012 in O.S.No.58 of 2008?

5) Whether the first respondent / plaintiff is entitled to decree for declaration of suit in O.S.No.58 of 2008 is null and void?

6) Whether the judgment and decree passed by the Trial Court are sustainable in law and on facts?

7) Whether the appeal has to be allowed or not?"

Point No.1:

18. During pendency of the appeal, the appellant has filed a petition under Order 41, Rule 27 of CPC., to receive the additional documents as additional evidence. According to the appellant, the documents are pertaining to the earlier claim petition filed by the first respondent herein and after closing the evidence in the main suit in O.S.No.195 of 2012, the order was passed in E.A.No.93 of 2013 on 30.04.2014. Thereby, they unable to produce those documents before the Trial Court. The respondent also admitted that the order passed by the Trial Court in E.A.No.93 of 2013 but his contention is the appellant has not taken any steps to produce those documents before the Trial Court. Moreover, the said order is only to adjudicate the claim of the first respondent / plaintiff but the present suit is filed for declaration of the suit based on the fraud played by the parties in that suit and the order was passed after closing the evidence and reserved for judgment in O.S.No.195 of 2012. Therefore, the petition filed by the petitioner / appellant is not within the purview of Order 41, Rule 27 of CPC. It is admitted fact that E.A.No.93 of 2013 was filed for adjudication of claim of the first respondent / plaintiff herein in the suit. The said E.A was filed for the same suit. The documents are orders of the Court and parties are also already aware of the order of the Court. According to the petitioner, those documents are relevant to decide the case since the claim of the respondents was already decided by the competent Court. Since the petition mentioned documents are certified copies of orders passed in E.A proceedings between the same parties and the claim was already decided by the competent Court, the said documents are essential to decide the appeal effectively. By receiving the said documents, no prejudice would be caused to either parties and since the documents sought to be received are only the order of execution Court, there is no need of adducing any oral evidence. Therefore, the documents filed by the petitioner are to be received by this Court and the petition is to be allowed. The documents are marked as Exhibits B.6 and B.7. The copy of the petition in E.A.No.93 of 2013 is marked as Exhibit B.6. Order in E.A.No.93 of 2013 in E.P.No.18 of 2012 in O.S.No.58 of 2008 is marked as Exhibit B.7.

Point No:2

19. The suit is filed by plaintiff for the relief of declaration to declare that the suit in O.S.No.58 of 2008 on the file of the Additional District Judge, (FTC No.2), Madurai is null and void. According to the plaintiff, he purchased the property through sale deed, dated 23.01.2009. Prior to that, her husband obtained sale agreement in respect of the property through sale agreement, dated 26.04.2007 and thereafter, the second defendant executed a power of attorney deed in favour of the husband of the plaintiff, namely, Mathan on 08.05.2008. Based on the power, the sale deed was executed on 23.01.2009. According to the appellant / first defendant, the same second defendant in the suit has executed sale agreement in favour of the appellant on 31.12.2007 and he received the advance of Rs.50,000/- on the date of agreement itself and thereafter, the appellant was ready to get sale deed by paying the balance of sale consideration. But the second defendant in the suit failed to execute the sale deed and thereby, he filed a suit in O.S.No.58 of 2008 on the file of the Additional District Judge, (FTC No.2), Madurai and the same was decreed on 25.01.2010. The suit was filed on 28.04.2008. The alleged power of attorney deed was executed on 08.05.2008. The sale deed was executed on 23.01.2009. Therefore, the sale in favour of the first respondent / plaintiff is hit by *lis pendens*.

20. The learned Counsel appearing for the first respondent would contend that the plaintiffs in suit in O.S.No.195 of 2012 had no knowledge about the suit and thereby, the sale is not hit by *lis pendens* and the first respondent / plaintiff is *bona fide* purchaser. In this context, the learned Counsel appearing for the appellant had relied judgment of this Court reported in ***2024 (1) L.W 923 [Sowbakkiam Ammal and Another Vs. Gunasekaran]***, wherein this Court in paragraph No.24 has held as follows:

> *"24. Turning to the point of Section 19 of the Specific Relief Act that has been pleaded by Mr.Rajarajan, it is an interesting plea, but without any basis. Section 19 operates in case a person has purchased the property without due notice of the agreement 'prior to the presentation of the plaint'. Once the purchase takes place after the presentation of the plaint, Section 52 is attracted. The plane in which Section 52 operates is fundamentally different from the one under Section 19. Lis pendens does not know of a bonafide purchase. A person who purchases the property gets whatever is the result of the decree. In this particular case, since the plaintiff has purchased the property pending the lis in O.S.No.142 of 2004 from the legal heirs of Vijayaramareddiar, he gets what the defendants in that suit would have obtained. The defendants in that suit only suffered a judgment of specific performance and faced the ignominy of delivery of possession through process of Court. Therefore, the plaintiff in the present suit would be bound by the decree in O.S.No.142 of 2004 on the file of the II Additional District Munsif and cannot take a*

plea of Section 19. This issue has been specifically dealt with in number of cases."

21. On careful perusal of the above said judgment, it is clear that the *lis pendens* does not know of a *bona fide* purchase and a person, who purchases the property gets whatever is the result of the decree. The suit is filed on 28.04.2008 and the sale deed was executed on 23.01.2009 and power deed also executed on 08.05.2008. Therefore, the sale is hit by *lis pendens.*

<u>Point No.3:</u>

22. According to the first respondent / plaintiff, the suit in O.S.No. 58 of 2008 was obtained by suppressing the earlier agreement, dated 26.04.2007 in favour of the husband of the first respondent / plaintiff and the power deed, dated 08.05.2008. The second defendant, who is the owner of the property colluded with appellant have obtained decree before the Additional District Judge Court in O.S.No.58 of 2008. The suit is filed by the appellant is not known to the plaintiff in the suit and the defendant also admitted that the plaintiff has no knowledge about the pendency of the suit in O.S.No.58 of 2008. According to the first respondent after purchase of the property, she was in possession and enjoyment of the property. After the sale deed executed in favour of the first respondent / plaintiff, the second defendant has no right over the property to execute any deeds. According to the appellant, he entered into agreement with the second defendant, dated 31.12.2007 and thereafter, filed the suit and the suit was decreed in his favour and thereafter, filed E.P and in the E.P, the same first respondent / plaintiff filed claim petition and the same was dismissed. Thereafter, in the suit, the said fact was suppressed and then the decree was granted by the Trial Court. Though the first respondent / plaintiff pleaded that the sale agreement in favour of her husband is prior to the sale agreement of the appellant, there is no any suit filed as against the above said sale agreement. Moreover, the sale deed executed by the husband of the plaintiff in her favour is not based on the previous agreement, on the other hand, it is based on power deed. The plaintiff is not an agreement holder and her husband only entered into alleged agreement.

23. Per contra, in the present sale agreement, in favour of the appellant, the original documents are also handed over to the appellant and thereafter, he filed a suit. If the first respondent / plaintiff purchased the property, she would have asked about the original sale deed of the property. But there is no reference in the plaint about the original sale deed in favour of her vendor second defendant. When the original sale deed was under the custody of the appellant, it is for the first respondent / plaintiff to establish that there is a collusion between the appellant and the second respondent. Therefore, there is no any evidence to show that the decree was obtained based on by playing fraud. In fact the second defendant has not contested the suit and he is the competent person to speak about the alleged fraud and he not even pleaded in his written statement about the agreement and power deed in favour of the husband of plaintiff. While so, it is for the plaintiff to prove that the appellant herein had knowledge about the prior sale agreement in favour of the husband of the plaintiff. Once the first respondent / plaintiff taken plea of fraud, she has to specifically pleaded and prove the alleged fraud. But in this case, only because the husband of the first respondent / plaintiff obtained sale agreement and subsequently the appellant entered into sale agreement with the same second defendant, it cannot be presumed that it was obtained by playing fraud.

24. The learned Counsel appearing for the appellant also relied the judgment in ***Deb Ratan Biswas and Others Vs. Most. Anand Moyi Devi and Others reported in 2011 SAR (Civil) 443*** and ***Dewan Bagadur M.O.Parthasarathy Iyengar's Charities Vs. P.Satyam, Proprietor Sathyam Motors reported in CDJ 1991 MHC 701***.

25. On a careful perusal of these judgments, it is clear that the party, who signed in the document cannot be allowed to say that their own Act of signing the document was collusive and fraudulent and the fraud in order to vitiate a decree must be an extrinsic one and failure on the part of parties to place the relevant evidence before the Court will not amount to fraud, so as to vitiate the decree and extrinsic fraud alone can be ground for setting aside an earlier judgment and suppression of evidence and even negligent conduct in the prior litigation would not be proper grounds for setting aside an earlier order. In the case on hand also, there is no proper pleadings and evidence to prove the fraud or collusiveness between the parties. Only because the husband of the plaintiff entered into agreement prior to the agreement with the defendants cannot be presumed as fraud and there should be materials to prove the same, but no materials produced by the first respondent / plaintiff. Per contra, the appellant had custody of the original document and he also paid the balance amount before the Court and after filing of the suit only the first respondent / plaintiff has purchased the property and thereby, the plaintiff failed to prove that the decree was obtained by playing fraud.

Point No.4:

26. According to the appellant, the suit is barred by *res judicata* since already the first respondent / plaintiff has filed E.A petition in E.A.No.93 of 2013 and the same was dismissed on merits. There is no appeal filed as against the order passed by the execution Court and thereby, this suit is barred by *res judicata*. In this context, it is pertinent to note that the plaintiff filed the suit in the year 27.11.2012 and the E.A petition was filed on 01.02.2013 and there is no pleadings in respect of *res judicata*. The E.A was filed while pending suit. In order to attract the provisions of *res judicata*, the conditions mentioned in Section 11 of CPC have to be complied in order to comply Section 11 of CPC., there is no pleadings and evidence. In this context, it is pertinent to note that already the first respondent / plaintiff has filed E.A.No.93 of 2013 in E.P.No.18 of 2012 in O.S.No.58 of 2008 to decide her claim of right over the suit property, but the said E.A was dismissed on 30.04.2014. As against the said order, no any appeal was preferred. Thereby, the said order became final and the said order is binding upon the first respondent / plaintiff but the said E.A was filed during the pendency of the suit in O.S.No.195 of 2012. Once the plaintiff in the suit in O.S.No.195 of 2012 filed a suit for declaration in respect of the decree, once again the same first respondent / plaintiff filed a petition in E.A.No.93 of 2013 to decide her claim. Therefore, she already availed the jurisdiction of the Order 41, Rule 58 and the same was decided on merits. Therefore, the order in E.A.No.93 of 2013 became final and is binding. Without challenging the said order, the present suit is not maintainable. It is true, that the E.A filed after the suit and there is an order as against the first respondent / plaintiff. Both the parties have not brought to the knowledge of the Trial Court in respect of the order passed in E.A.No.93 of 2013.

27. The learned Counsel appearing for the first respondent relied the judgment in ***Bengal Coal Company Limited Vs. Balmukunda Goenka***

reported in I.L.R (1951) 1 Cal. 168.

28. On a careful perusal of the judgment, it is clear that plea of *res judicata* is to be founded upon a legally existent and valid decree in the case on hand already the competent Court passed order but no pleadings. However, the first respondent / plaintiff filed the suit in O.S.No.195 of 2012 for the relief of declaration while pending suit, the same plaintiff filed petition in E.A.No.93 of 2013 for the same relief and the same was dismissed on merits. No appeal was filed against the order. Therefore, the order become final. The previous order in E.A.No.93 of 2013 was filed to decide the claim of the petitioner. The suit was also filed for the same prayer with same set of pleadings. The parties are same, subject matter is same, prayer is also same and the matter was decided by competent Court. Since the suit was pending at the time of filing E.A petition, there is no occasion to take plea of *res judicata*. However, the parties are aware about the both proceedings and particularly the plaintiff only filed petition in E.A.No.93 of 2013 while pending suit. Therefore, the claim of the plaintiff was already decided by the competent Court and the subsequent suit is hit by *res judicata*.

29. The learned Counsel appearing for the appellant relied the judgment in ***Dewan Bagadur M.O.Parthasarathy Iyengar's Charities Vs. P.Satyam, Proprietor Sathyam Motors reported in CDJ 1991 MHC 701.***

30. On a careful perusal of the said judgment, it is clear that as per explanation VII to Section 11 of CPC., the provisions shall apply to a proceedings for the execution of a decree and if the respondent contested the execution petition and Execution Court passed order, the decision of the Executing Court will operate as *res judicata* and bar the present suit.

31. In the case on hand also, the respondent / plaintiff already filed E.A.No.93 of 2013 claim petition by reiterating the plaint averments and the same was dismissed. Therefore, the said case law squarely applicable to this case and the case is barred by *res judicata*. Therefore, the suit is hit by *res judicata* and the parties are bound by the order of the Court in E.A.No.93 of 2013. Thus the point is answered.

Point No.5:

32. Already this Court has decided in the previous points that the plaintiffs failed to prove that the suit in O.S.No.58 of 2008 was obtained by playing fraud and the first respondent / plaintiff is bound by the order of the E.A.No.93 of 2013 and thereby, the first respondent / plaintiff is not entitled to decree for declaration in respect of O.S.No.58 of 2008 as null and void. Thus the point is answered.

Point Nos.6 and 7:

33. The Trial Court in the order elaborately discussed about the *lis pendens* and the entitlement of the plaintiff for decree of declaration. The Trial Court discussed in its judgment that the plaintiff has no knowledge about the pendency of the suit and thereby, the sale is not hit by *lis pendens*. This Court already in the previous point decided that even if the plaintiff has no knowledge about the pendency of the suit, the *lis pendens* would attract once the sale is after filing of the suit. Therefore the finding of the Trial Court in respect of the *lis pendens* is not acceptable and the same is liable to be set aside. Further the Trial Court, in the judgment discussed that since the first respondent / plaintiff purchased the property for valuable consideration and she is in possession and enjoyment of the property after the sale and once the sale agreement was entered between the second defendant and the husband of the plaintiff and thereafter, the plaintiff purchased the property through power deed and the second defendant has no right over the property to execute the power deed. The Trial Court, in issue No.1 and additional issue No.1 decided that since the plaintiff purchased the property for valuable consideration, the decree and judgment will not binding on her, but at the same time, in Issue No.2, decided that there is no collusion or fraud between the parties in getting decree of O.S.No.58 of 2008 and decline to grant relief for declaration. In the result portion, the Trial Court declared that the decree and judgment in O.S.No.58 of 2008 on the file of the Additional District Judge, (FTC No. 2), Madurai, dated 25.01.2010 is null and void and consequently, granted decree for permanent injunction. Therefore, the decree and judgment passed by the Trial Court are un-sustainable and liable to be set aside.

34. In the result, C.M.P(MD)No.12700 of 2023 stands allowed and the documents received and marked as Exhibits B.6 and B.7.

35. In the result, this Appeal Suit stands allowed and the decree and judgment passed by the Trial Court in O.S.No.195 of 2012 on the file of the VI Additional District Judge, Madurai, dated 04.09.2014 are set aside and the suit is dismissed. There shall be no order as to costs. Consequently, M.P(MD)No.1 of 2015 stands closed.

Exhibits:

(1) B6 - The copy of petition in E.A.No.93 of 2013.

(2) B7 - Order in E.A.No.93 of 2013 in E.P.No.18 of 2012 in O.S.No.58 of 2008.

21.03.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes
BTR

To

1.The VI Additional District Judge,
Madurai.

2.The Section Officer,
Vernacular Record Section,
Madurai Bench of Madras High Court,
Madurai.

P. DHANABAL, J.

BTR

A.S(MD)No.54 of 2015

21.03.2024