

(2015) 06 MAD CK 0463

In the Madras High Court

Case No : S.A. (MD) No. 744 of 2014 and M.P. (MD) No. 2 of 2014

E.S. Mohammed Yusuf Khan and Others

APPELLANT

Vs

D. Raju

RESPONDENT

Date of Decision : 10-06-2015

Acts Referred:

Citation : (2015) 06 MAD CK 0463

Hon'ble Judges : P.R. Shivakumar, J

Bench : Single Bench

Advocate : A. Senthilkumar for P. Sesubalan Raja, Advocates for the Respondent

Final Decision : Dismissed

Judgement

P.R. Shivakumar, J—This appeal stand listed today for admission under the caption "adjourned admission" since on the earlier dates on which the appeal came to be listed for admission, adjournments were sought for and granted.

2. The defendants in the original suit are the appellant in the Second Appeal. The suit is one for specific performance of an agreement for sale in respect of an immovable property described in the plaint schedule. After hearing, the said suit was decreed by the trial Court granting the relief of specific performance by a decree dated 13.1.2013 made in O.S. No. 26 of 2000 on the file of the Principal Subordinate Judge, Thanjavur. However, the learned Trial Judge chose to negative the plea for a direction to the defendants to pay the litigation cost.

3. The respondent herein/Plaintiff preferred an appeal in A.S. No. 55 of 2003 on the file of the Principal District Judge, Thanjavur. The appellants herein/defendants who figured as respondents in the said appeal did not file any cross-objection in the said appeal challenging the decree granting the relief of specific performance. They did not even file the appeal in time. In fact, till the disposal of the Appeal filed by the respondent herein/Plaintiff namely A.S. No. 55 of 2003, the appellants herein/defendants did not prefer any appeal. The said appeal A.S. No. 55 of 2003 came to be allowed by a decree of the lower appellate Court. As

against the decree of the lower appellate Court made in A.S. No. 55 of 2003, the appellants herein/defendants preferred a Second Appeal.

4. Admittedly, the Second Appeal preferred by the defendants against the said decree passed in A.S. No. 55 of 2003 was also dismissed by the High Court. Only thereafter, the appellants herein/defendants chose to file an appeal against the decree of the trial Court granting specific performance with a delay excuse petition. The Petition filed for condoning the delay in filing the appeal came to be dismissed by the lower appellate court and against the order dismissing the said application, a revision came to be filed on the file of this Court in C.R.P. No. 1375 of 2011. The said Civil Revision Petition came to be allowed on 13.12.2011. Thereafter, the appeal filed by the appellants herein before the lower appellate Court came to be taken on file as A.S. No. 3 of 2012. But the learned lower appellate Judge, after hearing, held that the appeal was not maintainable as it stood barred by the principle of res-judicata in view of the decree passed in A.S. No. 55 of 2003 which came to be confirmed by this Court in the Second Appeal. It is as against the decree of the lower appellate Court dated 17.12.2013 made in A.S. No. 3 of 2012 dismissing the Appeal as not maintainable, the present Second Appeal has been preferred.

5. The learned counsel for the appellants would contend that since the appeal filed by the decree-holder in O.S. No. 26 of 2000 was confined to the question whether he was entitled to cost, the dismissal of the earlier appeal namely A.S. No. 55 of 2003 would not constitute res-judicata for the appeal subsequently filed by the appellants herein namely A.S. No. 3 of 2012. It is the further contention of the learned counsel for the appellants that since the lower appellate Court also took into consideration the subsequent development, namely execution and registration of sale deed in terms of the decree for specific performance on decree-holder levying execution by filing execution petition, as a ground for dismissal of the appeal filed by the appellants herein, the appellants are having the cause for challenging the decree of the lower appellate Court.

6. Of course, it is true that the learned Lower Appellate Judge, while enumerating the reasons for the dismissal of the appeal filed by the appellants herein before the lower appellate Court referred to the execution and registration of the sale deed in execution of the decree for specific performance, as one of the grounds for holding the appeal to be not maintainable. But the same is not the sole ground on which the appeal came to be dismissed by the lower appellate Court as not maintainable. The appeal or Second Appeal is preferred not against the findings but against the decree of the court below.

7. Here is a case in which we cannot hold that the Second Appeal is not maintainable because it purports to challenge the above said finding. The principle that the appeal shall not lie against the finding alone, especially if the finding is not made the basis of the decree or one of the grounds on which the decree has been passed. Here is a case in which, the lower appellate Court has rendered two findings, 1) about the disposal of the earlier appeal constituting res-

judicata and (2) subsequent circumstances, namely the execution of the decree, as the grounds for holding that the appeal was not maintainable. If both the grounds cannot be sustained, this Court shall interfere with the decree of the lower appellate Court. On the other hand, if one of the grounds can be sustained, then the Court shall not be justified in interfering with the decree as the decree can be sustained on the sole ground of the disposal of the earlier appeal constituting res-judicata.

8. While coming to the said conclusion, it is made clear that the lower appellate Court has committed an error in holding that the appeal will not be maintainable after its execution. It will go against established provisions of law and specific provisions of law providing restoration in case of reversal of the decree and it is unnecessary to state all those provisions and it is suffice to state that such a notion is totally unsustainable. At the same time, this Court comes to the conclusion that the disposal of the earlier appeal filed by the respondent herein, namely A.S. No. 55 of 2003, definitely constitutes a bar for hearing the appeal in A.S. No. 3 of 2012 as the findings rendered regarding the entitlement of the plaintiff to get the relief of specific performance in the earlier appeal constitutes res-judicata.

9. The contention of the learned counsel for the appellants that the only question that was canvassed before the lower appellate Court in A.S. No. 55 of 2003 and the Second Appeal arising there from was regarding disallowance or allowance of cost and have the courts ought not to have gone into the question of entitlement of the respondent herein/Plaintiff to the relief of specific performance. Such a contention may be termed as ridiculous. Without going into the merits of the case regarding the main relief sought for in the suit, the question of allowing or disallowing cost cannot be decided.

10. Furthermore. It is an admitted fact that till the disposal of the earlier appeal filed by the respondent herein and the Second Appeal filed by the appellants herein, they had not chosen to prefer an appeal. After suffering a set-back in the appeal filed by the respondent herein and in the previous Second Appeal filed by the appellants herein, the appellants had chosen to prefer an appeal with a delay excuse petition and after the dismissal of the same, preferred a revision. The order in the Civil Revision Petition should have been obtained without bringing it to the notice of this Court in the revision that the earlier appeal filed by the respondent herein and the earlier Second Appeal preferred by the appellants herein ended against the appellant herein. Had it been brought to the notice of the High Court, the High Court would not have allowed the revision. By suppressing the material facts, the order seems to have been obtained in the revision. That is the reason why the appellants have not chosen to produce the copies of the judgments in the earlier appeal suit filed by the respondent herein and the earlier Second appeal preferred by the appellants herein before this Court. They have also not produced the copy of the order passed in the revision. The appellants have deliberately omitted to mention the dates and events either

in the appeal or in the affidavit filed in support of the petition seeking condonation of delay filed before the lower appellate Court. All these aspects will show that the present Second Appeal is a glaring example of abuse of process of Court. The dismissal of an appeal which is clearly barred by the principle of res-judicata which is sought to be challenged in the Second Appeal. Hence the Second Appeal does not even merit admission and the same deserves dismissal at the threshold.

11. Accordingly, the Second Appeal is dismissed. Connected Miscellaneous Petition is dismissed. No costs.