
(1998) 01 MP CK 0046
In the Madhya Pradesh High Court
Case No : S.A. No. 118 of 1988

Gatoley Lal Nathoo Ram Soni	Vs	APPELLANT
Mathura Prasad Laxman Prasad Dalal and Another		RESPONDENT

Date of Decision : 29-01-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 11

Citation : (1998) 2 MPJR 209 : (1998) 2 MPLJ 299

Hon'ble Judges : V.K. Agarwal, J

Bench : Single Bench

Advocate : Govind Upadhyaya, for the Appellant; T.C. Nayak, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Agarwal, J.

This appeal is directed against the judgment and decree dt. 18.09.1987 in Civil Appeal No. 6-A of 80 by District Judge, Sagar, affirming the judgment and decree dt. 3-11-1980 in Civil Suit No. 10-A of 1979 by Ist Civil Judge, Class-I, Sagar, whereby the plaintiff/appellant's suit for declaration and injunction was dismissed.

The plaintiff/appellant's case was that he was neighbour of respondent/defendant No. 1, who is a broker in real estate. It was alleged by the plaintiff/appellant that the respondent/defendant No. 1 by practicing fraud obtained the documents of title, etc., of his house No. 226, situate at ward Itwari Toria, Sagar and had also obtained plaintiff/appellant's signature on a stamp of Rs. 7/-. The plaintiff/appellant later came to know that the said blank stamp paper of Rs. 7/- signed by him has been misused and an agreement to sell the house for Rs. 20,000.00 was prepared thereon by the respondent/defendant No. 1. The plaintiff/appellant served a notice dt. 23-4-1979 on the respondent/defendant No. 1 and also lodged a report against him with the police.

It has been averred by the plaintiff/appellant that he never entered into an

agreement with the defendant/respondent No. 2 to sell his house for Rs. 20,000/- and never acknowledged to have received Rs. 15,000/- as earnest money, as has been intimated by defendant No. 2 in response to above notice. He has therefore sought a declaration that the said stamp purporting to be "agreement to sell" dt. 30-12-1976 was null and void having been obtained by fraud with a further relief that the defendants be restrained from evicting the plaintiff/appellant from the suit house.

The defendants/respondents resisted the suit and denied the above allegations. They urged that the plaintiff/appellant and defendant No. 1/respondent No. 2 had entered into an agreement whereby plaintiff/appellant had agreed to sell his house to respondent/defendant No. 1; and the plaintiff/appellant had received a sum of Rs. 15,000/- towards earnest money. They thus denied that the document i.e. the agreement to sell, executed by the plaintiff/appellant was a forged or fabricated one. They also pleaded that the defendant No. 2 had filed a civil suit in regard to the said document, i.e. agreement to sell dt. 30-12-1976 which was registered as Civil Suit No. 9-A of 1979, and a decree of specific performance has been granted in favour of defendant/respondent No. 2. The said judgment and decree having become final, will operate as res judicata, and thus constitute a bar to the present suit.

Both the Courts below have held that the decision in earlier suit (C.S. No. 9-A/79) operates as res judicata and the present suit is therefore not maintainable.

This second appeal has been admitted on the following substantial question of law

"Whether the decree passed in Civil Suit No. 9-A/79 (Nirmal Kumar v. Gotulal) operates res judicata in the present suit?"

Learned counsel for plaintiff/appellant has urged that since the document dt. 30-12-1976 which purports to be an agreement of sale of the house by the plaintiff in favour of defendant/respondent No. 2, was obtained by fraud, he is entitled to bring a suit raising contentions as he has done by way of present suit. It has also been urged by him that since the earlier suit (9-A of 1979) was not decided on merits, but ex parte, present suit is maintainable and is not barred by principles of res judicata. In this connection he has placed reliance on Mahboob Sahab Vs. Syed Ismail and Others, ; Ibne Hasan v. Hasina Bibi, AIR 1984 All. 216, AIR 1948 168 (Privy Council) and Jaswant Singh and Another Vs. Custodian of Evacuee Property, New Delhi, .

As against this, the learned counsel for respondents has urged that, the earlier suit (C. S. No. 9-A/79) was filed regarding the above document "agreement of sale" dt. 30-12-1976. It was decreed, though ex parte against the plaintiff/appellant. The application under Order 9, Rule 13 of CPC filed by the plaintiff/appellant to set aside the ex parte decree, was dismissed. Thereafter, appeal against the said order of dismissal of application under Order 9, Rule 13, Civil Procedure Code, was also dismissed. Thus, the judgment and decree in Civil Suit No. 9-A of 1979 has attained finality. By the said judgment and decree the

respondent/defendant No. 2 has been granted relief of specific performance of "agreement of sale" executed by the plaintiff/appellant. Therefore, the principles of res judicata would apply. The suit of the plaintiff/appellant therefore is barred, as has been held by both the Courts below.

It is undisputed that the Civil Suit No. 9-A/79 was for specific performance of document dt. 30-12-1976 purporting to be agreement to sell. The present suit has been filed mainly for declaration that the above document was obtained by fraud and be declared as illegal. It is also clear that the ex parte decree by judgment dt. 19-12-1979 was granted, in Civil Suit No. 9-A/79. Certified copy of the said judgment is (Ex. D-2). It is also not in dispute that the application of the plaintiff/appellant under Order 9, Rule 13, CPC praying that the ex parte decree and judgment be set aside, was dismissed and an appeal filed against the said order dismissing the application, was also dismissed. Therefore, the judgment dt. 19-12-1979 in Civil Suit No. 9-A/79 (Ex. D-2) has attained finality. It was for specific performance of the agreement dt. 30-12-1976. The above agreement is also the subject matter of the present suit, and thus, the contention and questions involved in the two suits was substantially the same. The parties in the two suits are also undisputedly the same. It is clear therefore that such a judgment and decree in the previous litigation Civil Suit No. 9-A of 1979 would operate as res judicata even though ex parte decree was granted.

Reference in this connection may be made to the case of Shri Ramo Barman and Others Vs. Smt. Dagripriya Kachari and Others, . It has been held that an ex parte decree operates as res judicata between parties in any subsequent suit, because an ex parte decree is a decree on merit. Reference in this connection may also be made to the case of The Commissioner, Hindu Religious and Charitable Endowments, Madras v. V. Krishnaswami and Anr., AIR 1975 Madras 167, wherein it has been held that though the dismissal for default of a suit would not amount to an adjudication on merits, however, the position is different when the case is decided ex parte. Therefore, a dismissal of suit in default would not amount to res judicata, while an ex parte judgment would operate as such.

In view of the above, it is clear that though ex parte decree is passed in the absence of defendant, but the defendant has to blame himself in not defending the suit. Therefore, the ex parte decree shall be treated at par with a decree on merits. Consequently, it is clear that ex parte decree passed against the plaintiff/appellant in the earlier suit (C. S. No. 9-A/79) shall be treated as passed on merits and would operate as res judicata.

Though the learned counsel for plaintiff/appellant has cited several authorities, but none of those authorities are contrary to the above proposition that ex parte decree cannot be treated to be on merits. In fact, the contentions of the plaintiff/appellant would have been relevant if the previous decree was obtained by fraud. However, that is not so in the present suit. Therefore, the contention of the plaintiff/appellant that the suit is not barred by the principles of res judicata despite a decree in previous Civil Suit No. 9-A/79, is not well founded. The

plaintiff/appellant is therefore not entitled to maintain the present suit and cannot challenge the document dt. 30-12-1976, purporting to be an "agreement to sell".

Therefore, I am of the considered view that there is no error in the finding of two courts below that the present suit of plaintiff/appellant is barred by principles of res judicata.

Accordingly, since the decree in Civil Suit No. 9-A of 1979 operates as res judicata, suit of plaintiff/appellant was rightly dismissed. This appeal has therefore no merit and deserves to be dismissed. This appeal is accordingly dismissed. Parties shall however bear their own cost of this appeal, as incurred.