

(2010) 01 MAD CK 0158

In the Madras High Court

Case No : OSA No's. 195 of 2007 and MP No's. 1 of 2007 and 1 of 2008 in OSA 195 of 2007 and MP No's. 1 of 2007 and 1 of 2008 in OSA 196 of 2007

Sarojini Varadappan and R. Somasundaram

APPELLANT

Vs

R. Kannan Adityan, B.S. Adityan, The Educational Trustee Co (P) Ltd. and Thanthi Trust
Thanthi Trust Vs R. Somasundaram

RESPONDENT

Date of Decision : 08-01-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 29

Citation : (2010) 1 LW 946

Hon'ble Judges : T. Raja, J;M. Chockalilngam, J

Bench : Division Bench

Advocate : Murari, in OSA 195/2007, Vinod Bobde for V. Shanmugam, in OSA 196/2007, for the Appellant; Murari, for Respondents 2 and 3 in OSA 196/2007, Vinod Bobde for V. Shanmugam, for Respondents 2 to 4 in OSA 195/2007 and C. Harikrishnan for Iyer and Thomas, for the Respondent

Final Decision : Allowed

Judgement

M. Chockalilngam, J.—These two intracourt appeals have arisen from the order of the learned Single Judge of this Court made in Application Nos. 5183 of 2006 and 30 of 2007 filed by the Defendants 1 to 3 and the Defendants 5 and 6 respectively for rejection of plaint in C.S. No. 1509 of 1994 under Order VII Rule 11 of Code of Civil Procedure

2. The Court heard the learned Counsel on either side.

3. These appeals have emerged under the following facts and circumstances.

(a) In the year 1981, the first Respondent and his brother Kadiresa Adityan filed an Application in A. No. 165 of 1981 under Section. 92 of the CPC seeking leave. The said application was contested by the Respondents therein stating that the applicants were not persons interested in the Trust within the meaning of

Section. 29 of the Code of Civil Procedure. In order to satisfy their contentions, the Respondents filed Application No. 879 of 1981 seeking permission to cross-examine the applicants on their affidavit. On the dismissal of the said application, the Respondents filed OSA No. 152 of 1981. A Division Bench of this Court allowed the appeal and permitted the cross-examination. The applicants filed Civil Appeal No. 6040 of 1981 before the Supreme Court. While dismissing the appeal, the Apex Court has held that the cross-examination would be confined only to the question of sanction and the principles governing the same. Thereafter, the Respondents called upon the applicants to place the original documents for inspection. Since copies alone were given, the Respondents filed Application No. 3124 of 1982 seeking a direction for production of the originals and for permission to make inspection of the same. On dismissal of the said application OSA No. 160 of 1982 was made. The same was allowed by the Division Bench. At the time of the cross-examination of the first applicant, the documents were inspected and the Respondents complained that they were spurious.

(b) While the matter stood thus, the Respondents filed Application No. 473 8 of 1982 to dismiss the leave application in A. No. 165/81 for non-compliance with the order of the Court. The learned Single Judge allowed A. No. 4738/82 and consequentially dismissed A. No. 165/81. Challenging the orders made in those applications, the applicants in A. No. 165/81 filed OSA Nos. 105 and 106 of 1983, and they were dismissed by the Division Bench. Pursuant to the same, the applicants preferred SLP Nos. 3362 and 3363 of 1987 which were also dismissed by the Supreme Court. Under such circumstances, the instant suit C.S. No. 1509/94 was filed seeking a declaration that the order of dismissal passed in Application No. 165 of 1981 filed by the Plaintiffs herein under the provisions of Section 92 of the CPC for grant of leave of this Hon"ble Court and the unnumbered suit filed along with the said application and confirmed by the Division Bench of this Hon"ble Court and by the Supreme Court of India by order dated 18.1.1993, made in SLP No. 3362 and 3363 of 1987 are vitiated by fraud, without jurisdiction, nonest in law and void and consequentially to set aside all the orders made therein and restore A. No. 165 of 1981 along with the suit.

(c) The Respondents on appearance filed Application No. 6571 of 1994 under Order VII Rule 11 of CPC to reject the plaint alleging that it did not disclose any cause of action. The said application was allowed by the learned Single Judge. The first applicant alone filed OSA No. 54 of 1996 against the order impleading the second Respondent as Respondent No. 7. The Division Bench allowed OSA No. 54 of 1996. Pending the appeal, the second Plaintiff who was impleaded as 7th Respondent in OSA No. 54/96, filed an affidavit declaring that he did not want to pursue Application No. 165/81. The Respondents filed Civil Appeals, and they were also dismissed by the Apex Court. Under the stated circumstances, the Defendants 1 to 3 filed A. No. 5183 of 2006, while the Defendants 5 and 6 filed A. No. 30 of 2007 seeking dismissal of the suit under Order VII Rule 11 read with Section. 151 of CPC The second Plaintiff filed A. No. 31/2007 to withdraw from

the suit, and the same was allowed by the learned Single Judge. The first Plaintiff filed OSA No. 23 of 2007 against the said order made in A. No. 31 of 2007 in C.S. No. 1509 of 1994. The said appeal was dismissed.

(d) The applications in A. Nos. 5183 of 2006 and 30 of 2007 referred to above were taken up for consideration by the learned Single Judge who after enquiry dismissed both of them. Hence these appeals.

4. Advancing arguments on behalf of the Appellants in OSA No. 196/2007, the learned Senior Counsel Mr. Vinod Bobde would submit that the order under challenge has been made in contravention of the provisions of Order VII Rule 11 CPC and the well established principles laid down by the Apex Court; that it is pertinent to note that the Division Bench has held that the first Plaintiff will not be prejudiced by the withdrawal of the second Plaintiff since he can continue the suit C.S. No. 1509/94 and the suit has nothing to do with Section. 92 Code of Civil Procedure; that the Apex Court has held that subsequent events have to be taken into consideration and if the Court is satisfied that in view of subsequent events, the suit has become ineffective or infructuous, the Court is bound to dismiss the same by exercising the powers under Section. 151 CPC read with Order 7 Rule 11 Code of Civil Procedure; that both the declaration and the consequential relief prayed for in the present suit are barred by law; that the observation of the learned Single Judge that the second Respondent's withdrawal from C.S. No. 1509 of 1994 cannot be treated as automatic withdrawal of A. No. 165/81 is unsustainable in law; that admittedly A. No. 165 of 1981 had been dismissed long back and hence there was no need for the second Plaintiff for getting an order for withdrawal in A. No. 165/81; that it is pertinent to point out that the order made in A. No. 165/81 was only a consequential order; that the Plaintiff has not challenged the main order made in A. No. 4738/82; that under the circumstances, he is not entitled to the reliefs as he has no cause of action at all; that the principles of resjudicata or constructive resjudicata are not applicable to a proceeding under Order 7 Rule 11 Code of Civil Procedure; that if a suit is barred by law, the mere fact that the Defendant had not raised that ground will not confer the jurisdiction on the Court to entertain and try the suit; that under the circumstances, the order of the learned Single Judge has got to be set aside and the plaint be rejected.

5. The learned Counsel Mr. Murari appearing for the Appellants in OSA No. 195/2007 adopted the above arguments.

6. The learned Senior Counsel Mr. C. Harikrishnan appearing for the first Respondent, while sustaining the order under challenge, has put forth the very same contentions which were raised before the learned Single Judge.

7. The Court paid its anxious consideration on the submissions made. Two main contentions were raised by the Appellants before the learned Single Judge and equally here also that the second Plaintiff has withdrawn from the suit and declared that he was not willing to pursue A. No. 165/81, and hence the relief

prayed in the present suit would become ineffective; that the Plaintiffs have sought for a declaration that the orders made by all Courts dismissing A. No. 165/81 was vitiated by fraud and liable to be set aside, and it was to be restored; that the said relief cannot be sought for since the order of dismissal in A. No. 165 of 1981 was only a consequential order; that the Plaintiffs have not sought for setting aside the main order made in A. No. 4738/82, and hence the suit was to be rejected. On the contrary, the first Respondent mainly relied on the judgment of a Division Bench of this Court made in OSA No. 23 of 2007 whereby the order in A. No. 31/2007 an application made by the second Plaintiff to withdraw from CS No. 1509/94 was challenged. Paragraph 9 of the order of the Division Bench reads as follows:

9. In the present case the co-Plaintiff that is the 7th Respondent has not given his consent and therefore, the only question is whether the grant of permission would prejudice him in the sense that without the co-Plaintiff he would not be in a position to continue with the suit. Mr. Seshadri submitted that in the earlier round of litigation which went upto the Supreme Court, the Respondents had raised a plea that since the 2nd Plaintiff had withdrawn himself from the suit, the consequences would be that even if the suit is decreed, the first Plaintiff alone would be left to pursue Application No. 165 of 1981 and since a single person cannot maintain an application for leave u/s 92 of Code of Civil Procedure, present suit had become infructuous and therefore liable to be dismissed. Mr. Seshadri submitted that this contention was not pressed before the Supreme Court by the Respondents but they have now filed Application No. 518 of 2006 re-agitating the same contention before the learned Single Judge. In our opinion, such a contention is totally unfounded in law. C.S. No. 1509 of 1994 is based on a cause of action of fraud allegedly played by the first Respondent. This is not a matter to be considered in this suit what would happen later if fraud is found to be established. The suit has nothing to do with Section 92 Code of Civil Procedure. The Court is only concerned with the fraud allegedly played by the first Respondent and obviously the first Plaintiff is entitled to proceed with the said suit C.S. No. 1509 of 1994, even after withdrawal of the 2nd Plaintiff from the suit.

8. Pointing to the above, the learned Senior Counsel for the first Respondent would submit that the Division Bench has observed that the first Plaintiff was entitled to proceed with the suit in C.S. No. 1509/94 even after the withdrawal of the second Plaintiff from the suit.

9. It is not in controversy that the suit was originally filed by two Plaintiffs out of whom the second Plaintiff filed A. No. 31/2007 to withdraw from the suit. The order by the learned Single Judge allowing that application was affirmed by the Division Bench. But, it is pertinent to note that the Division Bench has held that despite the withdrawal by the second Plaintiff, the first Plaintiff was entitled to proceed with the said suit. The Division Bench has also pointed out that the suit had nothing to do with Section. 92 of Code of Civil Procedure. Hence there

cannot be any doubt that the first Plaintiff can prosecute the suit. But, this Court is afraid whether the relief of declaration that the order of dismissal passed in A. No. 165/81 and all other subsequent orders were vitiated by fraud, without jurisdiction, nonest in law and void and the consequential relief to set aside the orders made in A. No. 165/81 and also restoration of A. No. 165/81 along with the suit could be sought for in the absence of any steps taken by the first Plaintiff to set aside the main order made in A. No. 4738/82. At this juncture, it remains to be stated that pending A. No. 165/81, seeking leave to file the suit, the Plaintiffs were directed to file the original documents and the Respondents were permitted to inspect the same. Though the said application No. 3124/82 was dismissed, the same was allowed by the Division Bench in OSA No. 160/82 permitting inspection of originals. Admittedly, some documents were produced at the time of the cross-examination of the first Plaintiff. Complaining that those documents were not originals but spurious, the Respondents filed A. No. 4738/82 under Order XI Rule 21 CPC to dismiss A. No. 165/81 for non-compliance with the order for inspection. It is pertinent to point out that the said A. No. 4738/82 was allowed and A. No. 165/81 was consequentially dismissed on 11.2.1983. The order made in A. No. 165/81 and A. No. 4738/82 reads as follows:

For all these reasons, Application No. 4738 of 1982 is allowed. Consequentially, Application No. 165 of 1981 is dismissed.

10. It is pertinent to point out that the applicants in A. No. 165 of 1981 preferred appeals there from in OSA Nos. 105 and 106/83 which were dismissed by the Division Bench. The SLP preferred before the Supreme Court in SLP Nos. 3362 and 3363 of 1987 were also dismissed. Thereafter, the present suit C.S. No. 1509 of 1994 was filed. The Plaintiffs therein have sought for a declaration that the order of dismissal made in A. No. 165/81 and all other orders passed there from by the appellate forums were vitiated by fraud and without jurisdiction, and they have also sought for restoration of the application. But, they have not taken any steps to set aside the main order made in A. No. 4738 of 1982 and subsequently affirmed by the Division Bench and the Supreme Court. As rightly pointed out by the learned Senior Counsel for the Appellants, without setting aside the main order in A. No. 4738/82, the first Respondent cannot file or maintain a suit for setting aside the consequential order in A. No. 165/81. Hence though not the first ground that the second Plaintiff has withdrawn from the suit is available to the Appellants, on the second ground that the consequential relief of setting aside the order of dismissal in A. No. 165/81 cannot be asked for or granted without setting aside the main order in A. No. 4738/92, the order of the learned Single Judge is liable to be set aside.

11. The learned Single Judge has found that the principle of resjudicata has no application to the present factual position. The Plaintiffs were not entitled to challenge the consequential order of dismissal without seeking to set aside the main relief granted in favour of the Defendants. In view of this legal impediment, the first Respondent cannot maintain the suit. The order of the learned Single

Judge has got to be set aside.

12. In the result, these original side appeals are allowed setting aside the order of the learned Single Judge and Application Nos. 5183 of 2006 and 30 of 2007 are allowed. The parties shall bear their own costs. Consequently, connected MPs are closed.