

(2010) 09 MAD CK 0218

In the Madras High Court

Case No : CRP. NPD. No. 474 of 2010 and M.P. No. 1 of 2010

Selvi

APPELLANT

Vs

Rajamani

RESPONDENT

Date of Decision : 22-09-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Constitution of India, 1950 — Article 226

Citation : (2010) 09 MAD CK 0218

Hon'ble Judges : V. Periya Karupppiah, J

Bench : Single Bench

Advocate : R. Selvakumar, for the Appellant; T. Murugamanickam, for the Respondent

Final Decision : Dismissed

Judgement

V. Periya Karupppiah, J.—This civil revision petition has been filed against the order of dismissal passed in the application filed by the 2nd defendant to set aside the ex-parte decree passed against her on 14.12.1990.

2. Heard Mr. R. Selvakumar, learned Counsel for the petitioner and Mr. T. Murugamanickam, learned Counsel for the Respondent.

3. Learned Counsel for the petitioner would submit in his argument that the lower court had erroneously dismissed the application as barred by limitation, since the period of limitation to set aside the ex-parte decree is 30 days from the date of knowledge of the ex-parte decree. He would further submit in his argument that the Respondent/plaintiff had filed a suit against the petitioner/2nd defendant as if she was a major person on the date of filing of the suit. But actually the petitioner/2nd defendant was born on 04.12.1974 and on the date of suit she was only 16 years old, she was not impleaded as represented through next friend and guardian the 1st defendant in the said suit and the factum of saying the petitioner/2nd defendant as major on the date of the suit was a fraudulent act on the part of the Respondent/plaintiff and thereby, he has

committed fraud against the court and the decree passed against the petitioner 2nd defendant on 14.12.1990 was also against a minor disabled person. He would further submit in his argument that the provisions Order 32 Rule 3 CPC were not complied with and on that aspect also, the lower court ought to have set aside the decree passed against the petitioner/2nd defendant, since no decree can be passed against the minor.

4. He would further submit in his argument that the birth certificate of the minor was produced and it would show that the date of birth of the petitioner was 04.12.1974 and on that score itself, the lower court ought to have set aside the ex-parte decree. He would draw the attention of the court to a judgment of Hon'ble Apex court reported in A.V. Papayya Sastry and Others Vs. Government of A.P. and Others, for the principle that the judgment and decree obtained by applying fraud upon the court has to be treated as non-est and nullity and it can be challenged in any court at any time (i.e.) in appeal revision, writ or even in collateral proceedings. He would further rely upon a judgment of this Court made in C.R.P.D. Nos. 1807 and 1808 of 2005 in between M.V. Sachidanandam v. Prakash Kumar and Ors. for the principle that the High Court can exercise its jurisdiction under Article 227 of Constitution sparingly and in appropriate cases, and it is not to be exercised as if it is an appellate jurisdiction as if it gave unfettered and unrestricted power to the High Court to do whatever it liked. He would further draw the attention of the court as far as this case is concerned it is a huge fraud played upon the court to say the minor person as a major person and therefore, the exercise of jurisdiction under Article 227 is certainly warranted. He would also cite judgments of various High Courts that the court can exercise its jurisdiction when fraud has been committed by the other party to obtain any order in his favour to the detriment of the other person. He would further submit in his argument that the lower court has not considered the submission of the petitioner that she was minor and the decree is not bound on the minor had come forward to disallow the claim that limitation is applicable and on that plea of limitation it has dismissed the application. So therefore, he would request the court to interfere with the orders passed by the lower court and to set aside the same and thus the revision may be allowed.

5. Learned Counsel for the Respondent would submit in his argument that the petitioner/2nd defendant was actually a major person attained the age of majority and was 19 years at the time of filing the suit and the production of birth certificate without the name of the petitioner would not identify the petitioner/2nd defendant was only aged 16 years at the time of filing of the suit and the petitioner did not adduce any oral evidence for proving the said birth extract. He would further submit in his argument that the younger daughter of the 1st defendant mother would have been produced for the purpose of showing that the petitioner was only 16 years and therefore, the birth extract requires separate oral evidence and on that basis it cannot be decided that the petitioner/2nd defendant was a minor at the time of filing the suit. He would further submit in his argument that the order passed by the lower court was

under Order 9 Rule 13 CPC in rejecting the said application. Therefore, appeal will lie against the said order under the provisions of Order 43 Rule 1(d) Code of Civil Procedure. He would further submit in his argument that the petitioner instead of filing the appeal has come forward to question the same by the way of revision and the filing of revision itself is not sustainable. He would also draw the attention of the court to a judgment of Hon''ble Apex court reported in Punjab National Bank Vs. O.C. Krishnan and Others, to the principle that when appeal is provided in the Act the only recourse to the proceedings under Articles 226 and 227 of the Constitution is expressly barred. He would again cite a judgment of this Court reported in The Director of School Education, The Collector and The Chief Educational Officer Vs. G. Venkatesan, . Therefore, he would request the court that the revision has to be dismissed as not maintainable and suitable directions may be issued in the facts and circumstances of the case.

6. I have given anxious thoughts to the arguments advanced on either side.

7. The admitted facts would be that a suit was filed in O.S. No. 57 of 1990 by the Respondent against one Kaliammal and the petitioner herein for declaration and injunction. The said suit was decreed ex-parte on 14.12.1990. According to the petitioner/2nd defendant she was minor and her date of birth was 04.12.1974. In support of her case a birth extract has been produced as her date of birth was 04.12.1974. The contention raised by the learned Counsel for the Respondent would be that the said birth extract was not referring to the name of the petitioner and it requires proof and therefore, the court cannot take it granted for that it is belonging to the petitioner/2nd defendant. However, it has been submitted that the lower court has rejected the application against the plea of petitioner/2nd defendant that the application is barred by law of limitation, since the petitioner did not approach the court within a period of three years on her attaining majority on 04.12.1992. It was also found by the lower court that the application should have been filed within three years from the said date of attaining her majority. Apart from that the lower court had found that the petitioner/2nd defendant having come to court to file the application to set aside the ex-parte decree had completed 30 days from the date of knowledge was not supported by any document. Therefore, we could see that the lower court has agreed with the petitioner that he was born on 04.12.1974 and the only contention raised was it was barred by limitation. Therefore, it has rejected the claim of the petitioner. However, according to the contention of the learned Counsel for the Respondent that revision will not lie under Article 227 of the Constitution of India, in view of the judgment of Hon''ble Apex court reported in Punjab National Bank Vs. O.C. Krishnan and Others, The relevant passage would be as follows:

6. ...The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is hierarchy of appeal provided in the Act, namely, filing of an appeal u/s 20 and this fast track procedure cannot be allowed to be derailed either by taking

recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available judicial prudence demands that the court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the Respondent to take recourse to the appeal mechanism provided by the Act.

We have to see whether there is any hierarchy of appeal provided for the order passed by the lower court. According to Order 43 Rule 1(d) CPC We could see that the appeal is provided against the order of rejection filed under Order 9 Rule 13 CPC to set aside ex-parte decree. The relevant provisions extracted hereunder would also show the same.

Order 43, Rule 1(d), Code of Civil Procedure. Order 43 deals with appeals from orders. Rule 1 of Order 43, CPC reads as under:

1. Appeals, from orders - An appeal shall lie, from the following orders under the provisions of Section 104, namely:

....

(d) an order under Rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte;

Therefore, the revision filed by the petitioner against the rejection order in the application to set aside the ex-parte decree is not maintainable and under Order 43 Rule 1 CPC it has to be appealed before the appropriate appellate forum. However, considering the facts and circumstances of the case and in the peculiar circumstances of the case the propriety of passing of the orders of the lower court has been questioned, this Court is inclined to direct the Registry to return the revision for being presented before the appellate forum for getting necessary reliefs.

8. The Registry is directed to take xerox copies of the said papers and to keep them in records and the said return of the revision papers should be effected by the Registry within one week from the date of preparation of the order and the petitioner is entitled to represent the said returned revision papers as proper presentation before the appropriate forum within one month time from the date of said return.

9. With the aforesaid observation, the revision petition is disposed of. If the appeal is presented before the appropriate forum by the petitioner as stated above, the same is directed to be taken on file of the appropriate forum and it shall dispose of the said appeal without being influenced by the findings of this Court on facts. Connected miscellaneous petition is closed. However, there will be no order as to costs.