

(2016) 03 MAD CK 0028

In the Madras High Court

Case No : C.R.P. (PD) No. 3768 of 2011 and M.P. No. 1 of 2011

T. Rajaraman

APPELLANT

Vs

M.P. Nethaji and others

RESPONDENT

Date of Decision : 02-03-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 151

Citation : (2016) 2 Civil LJ 813 : (2016) 2 MadWN(Civil) 19 : (2016) 3 MLJ 5

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

Bench : Single Bench

Advocate : Mr. S.T. Deiveegarajan for Mr. C.D. Sugumar, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Mr. P.R. Shivakumar, J. - Though respondents No. 1, 4 and 41 have chosen to enter appearance through counsel, the counsel for respondents No. 4 and 41 are absent. The counsel for the 1st respondent alone is present. Respondents No. 2, 3 and 5 to 40 were served with notice and their names have been printed in the cause list, still they have not chosen to enter appearance either in-person or through counsel. Notice to the respondents No. 42 to 48 has been dispensed with by order dated 01.02.2016.

2. The arguments advanced by Mr. T. Murugamanickam, learned counsel for the petitioner and by Mr. S.T. Deiveegarajan for Mr. C.D. Sugumar, learned counsel for the 1st respondent are heard.

3. O.S. No. 1074 of 1982 came to be filed by Kanniammal and eight others against Karima Beebee, Asha Beebee, Maimoon Beebee and "Kalki" Anantha Narayanan arraying them as defendants 1 to 4 seeking a declaration of their title in respect of the suit property, namely, 45 cents of land comprised in survey No. 53/2 in Koyambedu Village, the then Saidapet Taluk and for a permanent injunction restraining the defendants from trespassing into the suit property. The

defendants 1 to 3 did enter appearance by engaging counsel and the 4th defendant remained ex parte. The defendants 1 to 3, who initially entered appearance also remained ex parte and an ex parte trial came to be conducted, which resulted in the passing of an ex parte decree as prayed for in the plaint. The said decree came to be passed on 31.03.1983. Thereafter, none of the defendants therein chose to file any application to set aside the ex parte decree.

4. After a period of 19 years, one M.P. Nethaji, who is the 1st respondent in the present revision filed an application I.A. No. 2445 of 2003 under Order 9, Rule 13 of C.P.C. to set aside the ex parte decree dated 31.03.1983. During the pendency of the application, the 8th respondent therein/8th plaintiff by name, Thulasi Pillai died. Similarly, the 1st plaintiff-Kanniammal and the 2nd plaintiff-Devendran also died and their legal representatives were impleaded in the said application as respondents 14 to 16. The 16th respondent is the petitioner in the revision. The 3rd defendant Maimoon Beebee also died and her legal representatives were impleaded as respondents 17 to 25. The 9th respondent in the above said application alone filed a counter and contested the application. Others remained ex parte. After hearing both sides, the learned trial Judge dismissed the said application by order dated 25.07.2007. The said order was challenged by the 1st respondent herein, who was the petitioner in the above said I.A. filed under Order 9, Rule 13 of C.P.C. in an appeal before the Sub Court, Poonamallee in C.M.A. No. 19 of 2009. The learned Subordinate Judge, Poonamallee allowed the said C.M.A., set aside the ex parte decree dated 31.03.1983 passed in O.S. No. 1074 of 1982 and directed transfer of O.S. No. 1074 of 1982 to the City Civil Court, Chennai to be tried along with other suits filed by various other persons, including the persons who claim to have derived title to the suit property either from the plaintiffs or from the defendants. As against the said judgment and decree of the Subordinate Judge, Poonamallee dated 24.06.2010 made in C.M.A. No. 19 of 2009, the present Civil Revision Petition has been filed under Article 227 of the Constitution of India.

5. The admitted facts are that Kanniammal and eight others filed the above said suit O.S. No. 1704 of 1982 on the file of the District Munsif Court, Poonamallee for declaration of their title in respect of the suit property and for a permanent injunction against Karima Beebee, Asha Beebee, Maimoon Beebee and "Kalki" Anantha Narayanan. Though defendants Nos. 1 to 3 entered appearance, they left the suit undefended. The 4th defendant remained ex parte through out. Accordingly, an ex parte trial was conducted and an ex parte decree as prayed for was passed by the trial Court on 31.03.1983. None of the four defendants, nor their assignees, chose to file any application before the expiry of 19 years and 9 months from the date of passing of the ex parte decree. Only on 03.01.2003, the 1st respondent herein, by name M.P. Nethaji, chose to file I.A. No. 2445 of 2003 under Order 9, Rule 13 of C.P.C. to set aside the above said ex parte decree. He did not file it as a legal representative of any of the defendants, who passed away in the interregnum. On the other hand, he filed the said application in his individual capacity and sought an order setting aside the ex

parte decree dated 31.03.1983 on the premise that the counsel engaged by the defendants 1 to 3 betrayed them paving way for passing of the ex parte decree. He claimed that one Vijayakumari had got an agreement of sale in respect of the suit property from the defendants 1 to 3 and from the said Vijayakumari, he got the rights under the agreements assigned to him. The date of agreement allegedly executed by the defendants 1 to 3 in favour of Vijayakumari is furnished as 29.04.1998 and the date of assigning of her right under the agreement in favour of the 1st respondent herein is given as 07.11.2001. The defendants 1 to 3, who suffered an ex parte decree did not approach the trial Court with an application to set aside the ex parte decree showing cause for their absence. On the other hand, the petitioner, claiming to be an assignee of an agreement holder which agreement came into existence some 15 years after the passing of the ex parte decree, has chosen to file the application under Order 9, Rule 13 of C.P.C. without even seeking leave of the Court to file such an application. No application to condone the delay in seeking an order setting aside the ex parte order also came to be filed. The maintainability of the said application and the locus standi of the 1st respondent to file such a petition were questioned by the revision petitioner herein, who had been impleaded in the said petition after the death of his father Thulasi Pillai-8th defendant as his legal representative.

6. The learned trial Judge, after hearing both sides and on considering the rival submissions made on both sides, held that the 1st respondent herein/petitioner in I.A. No. 2445 of 2003 was having no locus standi and dismissed the said application by order dated 25.07.2007. When the same was challenged before the lower appellate Judge, namely, the Subordinate Judge, Poonamallee in C.M.A. No. 19 of 2009 by the 1st respondent herein, the learned Subordinate Judge chose to hold that though the 1st respondent herein was not a party to the suit and he was not a judgment debtor to seek an order setting aside the ex parte decree, he would treat the petition as one filed under Section 151 of C.P.C. invoking the inherent powers of the civil Court and thus, the learned Subordinate Judge came to allow the C.M.A. and set aside the ex parte decree dated 31.03.1983. Not stopping with that, the learned Subordinate Judge proceeded further to incorporate a direction in the decree that the suit O.S. No. 1074 of 1982 should be removed from the file of the trial Court, namely, the District Munsif Court, Poonamallee to the City Civil Court, Chennai, wherein a number of cases regarding the same property instituted by either the parties to the suit concerned in this revision or parties claiming through them were pending.

7. It is the contention of the learned counsel for the petitioner that the learned Subordinate Judge, Poonamallee usurped jurisdiction to himself which is not available to him and even exceeded the scope of the proceedings before him in passing an order directing the transfer of the case to the City Civil Court, Chennai and that hence, the decree of the Subordinate Judge dated 24.06.2010 made in C.M.A. No. 19 of 2009 should be set aside by the exercise of the power of superintendence of this Court under Article 227 of the Constitution of India.

8. On the contrary, learned counsel for the 1st respondent would submit that a fraud was committed by the Advocate who entered appearance for the defendants 1 to 3 and the learned Subordinate Judge took into consideration the said aspect and also the fact that several suits were pending on the file of the City Civil Court, Chennai regarding the very same property and chose to rightly exercise the inherent power of the Civil Court under Section 151 of C.P.C. to set aside the decree and to transfer the suit to the City Civil Court, Chennai for being tried along with the other suits filed in respect of the very same property by various persons. It is the contention of the learned counsel for the 1st respondent that a fraud committed should not be allowed to be perpetuated.

9. The further contention of the learned counsel for the 1st respondent is that though the application under Order 9, Rule 13 of C.P.C. was filed originally in his individual capacity, when the matter was pending before the Subordinate Judge in the appeal in C.M.A. No. 19 of 2009, he was permitted to act as agent holding the Power of Attorney of the 2nd defendant [Asha Beebee] and the legal representatives of the 3rd defendant [Maimoon Beebee] and hence, the irregularity with which, the petition came to be filed got cured.

10. This Court paid its anxious consideration to the above said rival contentions made on both sides. Upon such consideration, this Court does not find any substance in the contention raised by the learned counsel for the 1st respondent and on the other hand, the contentions raised by the learned counsel for the petitioner in the revision cannot be rejected as unfounded or untenable.

11. The first and foremost point in support of the above conclusion is that, the 1st respondent herein/petitioner in I.A. No. 2445 of 2003 being a third party to the suit, could not have file a petition under Order 9, Rule 13 of C.P.C. without seeking the leave of the Court. The second point in favour of the above said conclusion is that, an ex parte decree passed 19 years and 9 months earlier was sought to be set aside by filing a petition, without even filing an application to condone the delay in preferring such an application under Order 9, Rule 13 of C.P.C. The third point is, though the 1st respondent herein/petitioner in I.A. No. 2445 of 2003 was permitted to act as the agent of the 2nd defendant [Ahsa Beebee] and the legal representatives of the 3rd defendant [Maimoon Beebee] in C.M.A. No. 19 of 2009 before the lower appellate Court on his production of the Power of Attorney obtained from them, that will not convert the application filed by him to be one filed by the original defendants or any of the original defendants from whom, he got the Power of Attorney. The original defendants were also arrayed as respondents in the application I.A. No. 2445 of 2003. The fact that during the pendency of the appeal, the 1st respondent herein was permitted to represent some of the respondents, as he had obtained General Power of Attorney from them during the pendency of the appeal, will not change the character of the application as one filed by a third party to the suit and make it an application filed by the defendants or some of the defendants in the suit. Allowing the petition to set aside the ex parte decree after a lapse of nearly 20

years will be against the conscience of the Court and it may even amount to a mockery of justice, unless the delay is properly explained with acceptable reasons.

12. It is the contention of the 1st respondent that one Vijayakumari had got an agreement in respect of the suit property from the defendants 1 to 3 in 1998 i.e., after 15 years from the date of passing of the ex parte decree. The agreement holder would have derived only a right to seek conveyance of the rights available to the vendor under the agreement. When the vendor under the agreement themselves suffer a decree, there shall be no question of agreement holder filing a petition to set aside the ex parte decree on the basis of an agreement entered into after the passing of the decree in this case after 15 years from the date of the decree. In this case, the 1st respondent who filed the application under Order 9, Rule 13 of C.P.C. is not even the agreement holder and he claims to be an assignee of the right of the purchaser under the agreement. The agreement was dated 29.04.1998. The assignment was said to have been obtained on 07.11.2001. Even after the assignment, the petitioner caused a further delay and filed the application only on 03.01.2003. The narration of the above said facts will show that the petitioner has done nothing than purchasing the litigation and filed the application to set aside the ex parte decree, without having any locus standi, without getting the permission of the Court to file the petition under Order 9, Rule 13 of C.P.C. as a third party and without seeking condonation of the delay in filing the application to set aside the ex parte decree.

13. The learned trial Judge, on proper appreciation of facts and proper application of the principles of law, correctly held the 1st respondent herein to be not entitled to seek an order setting aside the ex parte decree dated 31.03.1983. Such a well considered order was unfortunately interfered with by the learned Subordinate Judge [lower appellate Judge] in the Civil Miscellaneous Appeal filed before the Sub Court, Poonamallee as C.M.A. No. 19 of 2009. It is pertinent to note that unable to pass an order under Order 9, Rule 13 of C.P.C., the learned Subordinate Judge seems to have chosen to refer to the inherent power contemplated under Section 151 of C.P.C. not only to pass an order setting aside the ex parte decree dated 31.03.1983, but also to direct the transfer of the suit to City Civil Court, Chennai. It is trite that inherent power of the Civil Court cannot be invoked when there is a specific provision for the grant of a relief. In addition, the judgment of the lower appellate Court made in C.M.A. No. 19 of 2009, not only shows the improper understanding of the scope of Order 9, Rule 13 of C.P.C. and Section 151 of C.P.C. but also shows judicial indiscipline making a mockery of justice. It is a glaring example of the lower appellate Court exercising jurisdiction not conferred on it, which is correctable under the power of superintendence available to this Court under Article 227 of the Constitution of India. Hence, this Court has no hesitation in holding that the judgment and decree of the Subordinate Judge, Poonamallee dated 24.06.2010 made in C.M.A. No. 19 of 2009 to be interfered with and set aside and the order of the trial Court dated 25.07.2007 made in I.A. No. 2445 of 2003 should be restored.

In the result, the civil revision petition is allowed. The decree of the learned Subordinate Judge dated 24.06.2010 made in C.M.A. No. 19/2009 is set aside. The order of the trial court dated 25.07.2007 dismissing I.A. No. 2445/2003 in O.S. No. 1074/1982 on the file of the trial court shall stand restored and confirmed. However, there shall be no order as to cost. Consequently, the connected miscellaneous petition is closed.