

CASE NO.:
Appeal (civil) 5107 of 2000

PETITIONER:
Kandapazha Nadar & Ors

RESPONDENT:
Chitraganiammal & Ors

DATE OF JUDGMENT: 16/04/2007

BENCH:
Dr. ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
J U D G M E N T

Dr. ARIJIT PASAYAT, J.

Challenge in this Appeal is to the judgment rendered by a learned Single Judge of the Madras High Court allowing the second appeal filed by the respondents under Section 100 of the Code of Civil Procedure, 1908 (in short the 'Code'). Respondents are the legal representatives of the original plaintiff.

According to the plaintiff, the suit properties originally belonged to one Chelliah Nadar, he had purchased the suit properties under sale deed Ex.A1 dated 26.2.1973, the defendants 1 to 3 fraudulently created a conveyance deed in their favour the defendants had earlier instituted O.S. No. 298 of 1973 on the file of the District Munsif Court, Srivaikuntam, the defendants obtained orders of injunction and managed to enter into the suit properties; the defendants have no right whatsoever, the suit O. S. No. 298 of 1973 was dismissed after contest, in appeal, the first appellate Court decreed the suit in favour of the plaintiffs in the said suit, present plaintiff preferred Second Appeal, No. 8 of 1977, pending the said Second Appeal, said suit was permitted to be withdrawn i.e. suit O.S. No.298 of 1973 but without liberty to file a fresh suit on the same cause of action, the defendants have no right in the suit property and the defendants who have no right are in enjoyment of the suit properties since 11.6.1973.

It was the further case of the plaintiffs that the defendants have cut and carried away the Odai trees worth Rs.1500/- the defendants have been tapping toddy from 42 palmyra trees since 1973 standing on the suit properties; the defendants have also cut and carried away two palmyra trees worth Rs. 200/-, the defendants have been cultivating ground nut and derived income of Rs. 1000/-, the palmyra trees would fetch an income of Rs. 400/- per annum; the defendants 1 and 3 are liable to pay Rs. 5100/- towards past mense profits and the plaintiffs are entitled for recovery of possession besides past and future mense profits from the defendants.

The defendants 1 and 3 filed a written statement inter alia pleading that the suit properties originally belonged to Chelliah Naoar and his brother; the defendants have purchased the properties from Chelliah Nadar on 8.10.1971,

the plaintiff herein attempted to interfere with the defendants' possession, the plaintiff had not purchased the suit property from Chelliah Nadar, on the dismissal of the said suit the defendants herein preferred A.S.No.51 of 1975 which was allowed and decreed; the Second Appeal preferred by the plaintiff herein was pending, pending the Second Appeal, the defendants herein withdrew the suit itself as they have not proved execution of the sale deed by Chelliah Nadar, the plaintiff has no right to institute this suit, the plaintiff is not entitled to the suit property, the plaintiff is not entitled to any income or value of the trees or income from palmyra trees and that the suit is liable to be dismissed.

After contest, the trial Court held that the plaintiff in the present suit is entitled to the suit property and the plaintiff is entitled to recover possession, the defendants 1 and 3 are liable to pay Rs. 2,760/- towards past mense profits and the plaintiff is entitled to future mense profits to be ascertained under Order 20 Rule 12 of the Code.

The first appellate court held that the defendant Nos. 4 to 5 have not been impleaded as parties to the first appeal. According to the plaintiff he had purchased the suit property from Chelliah Nadar under Exhibit A1 on 26.2.1973. The contesting defendants also purchased the suit property from brothers of Chelliah Nadar under Exhibit B-7 on 8.10.1971 and claimed to be in possession of the property. In the earlier suit O.S. No. 298 of 1973 the orders passed have great relevance and reads as follows :

"After some lengthy arguments, Mr. K. Sarvabhauman learned counsel for the respondents prayed for leave to withdraw the suit. Mr. Ganapathi Subramaniam, learned counsel for the appellant states that leave could be granted provided he is not given liberty to file a fresh suit. Recording the statement I grant leave to withdraw the suit making it clear that the plaintiffs-Respondents will have no liberty to file a fresh suit. Accordingly the suit will stand dismissed. No costs."

The High Court observed that in terms of Order XXIII Rule 1 (4)(b) when a party to the suit withdraws the suit without permission to institute fresh suit, the parties shall be precluded from instituting the fresh suit in respect of such subject matter or such part of the claim. The High Court observed that the earlier suit was dismissed as the defendant had withdrawn the earlier suit at the second appellate stage without securing necessary permission to institute a fresh suit. The High Court therefore, held that the general principles of res judicata get attracted and the defendant's claim is barred in view of the orders passed in the earlier suit between the same parties. It is to be noted that the first appellate court had observed that the withdrawal debarred the plaintiffs from filing a subsequent suit but it did not affect the defence of the defendants.

Learned counsel for the appellants has referred to several decisions to contend that fresh suit is not barred and Order XXIII Rule 1 (4) has no application to the facts of the cases. There is no appearance on behalf of the respondent in spite of notice.

In order to appreciate contention of learned counsel for the appellant, it would be appropriate to quote Order XXIII, Rule 1(4) the same read as follows:

"1 (4)Where the plaintiff \026
(a) abandons any suit or part of claim under sub-rule (1), or
(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3).
he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim."

It would also be relevant to take note of Order IX Rule 9 and Order XXII Rule 10 of the Code which read as follows:

"Order IX, Rule 9 \026 Decree against plaintiff by default bars fresh suit \026 (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit."

Order XXII Rule 10 \026 (1) Procedure in case of assignment before final order in suit \026 (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or developed.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule(1)."

The original suit was one for declaration of title and injunction. Undisputedly the withdrawal was permitted but no liberty to file fresh suit was granted. The purpose of incorporating of Order XXIII Rule 1 is to avoid multiplicity of litigation. In the earlier suit the respondent-defendant claimed to be the owner. The provisions contained in Order IX Rule 9 Order XXII Rule 10 relate to different concepts. It is the subject matter which is the relevant aspect. Plaintiff has to prove his case. Order II Rule 2 also is relevant, the same reads as follows:

"Order II Rule 2" Suit to include the whole claim: (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim- where a plaintiff omits to sue in respect of, or

intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of one portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs
\026 A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

Order II Rule 2 relates to the "relief which can be granted" while Order XXIII Rule 1 refers to the "subject matter". The grant of leave is not a matter of a right. Different subject matters are relatable to provisions contained in Order XXIII Rule 1. In both the present and the earlier suit the subject matter is essentially the same.

By the impugned judgment it has been held that since the petitioners herein had withdrawn Suit No.298 of 1973 and since no liberty was given to the petitioners to institute a fresh suit, the petitioners were precluded from raising the plea in defence that sale deed executed by Chelliah Nadar in favour of Thangaraj Nadar dated 26.2.1973 was not true and valid. In this connection, the Madras High Court placed reliance on Order XXIII Rule 1(4) of Code.

The question before us is : what is the effect of order passed by the High Court in Second Appeal No.8 of 1977 filed by Thangaraj Nadar, in the first round of litigation. That order is dated 27.7.78. Under that order, the Madras High Court granted leave to withdraw the suit filed by the petitioners herein bearing Suit No.298 of 1973, making it clear that the petitioners herein (plaintiffs in earlier suit) were not given liberty to file a fresh suit. Does it mean that petitioners-defendants were estopped from raising the defence regarding validity of the conveyance in their favour by Chelliah Nadar dated 8.10.71.

In the case of (Rani) Kulandai Pandichi and another v. Indran Ramaswami Pandia Thevan (AIR 1928 Madras 416), it has been held as follows:

"Permission to withdraw a suit decides no matters in controversy and does not confer any rights on a party and the fact that the person withdrawing is precluded from bringing a fresh suit on the same cause of action cannot be said to have that effect. It has been held that an order permitting the withdrawal of a suit or appeal is not a decree within the meaning of the Civil Procedure Code. We need only refer to Patlogi v. Gam \026 [1891] 15 Bom. 370, Jogodindra Nath v. Sarat Sundari Debi - [1891] 18 Cal. 322 and Abdul Hussain v. Kasi Sabu - [1900] 27 Cal. 362"

(emphasis supplied)

In the case of Saraswati Bala Samanta and others v. Surabala Dassi and others (AIR 1957 Calcutta 57), it has been held vide para 3 as follows:

"(3) The order recording the withdrawal

of the suit is not a decree. There was no question therefore, of drawing the order as a decree. The order recording the withdrawal can however be formally drawn up under R.187 Part I, Chapter 1 of the Civil Rules and Orders, Vol.1, inasmuch as the order directed payment of costs by the plaintiff to the defendant. We, therefore, treat the so called decree as an order."

(emphasis supplied)

In the case of *Devassi v. Anthoni* (AIR 1969 Kerala 78), it has been held vide para 1 as follows:

"(1). None of the conditions in Sub-section (1) of Section 100 of the Code is here satisfied. Indeed, the dismissal of the appellant defendant's appeal to the court below can be supported on the short ground that that appeal did not lie. This is a case where the plaintiff withdrew his suit under Sub-rule (1) of Rule 1 of Order XXIII -- he was competent to do that and required nobody's permission since he was the sole plaintiff, the defendant, as we shall presently see being in no sense a plaintiff -- and the so-called dismissal of the suit as withdrawn by the trial Court was not really a dismissal but a mere recording of the fact of withdrawal. It determined none of the matters in controversy in the suit -- there was no claim by the defendant to be determined -- and is not a decree as defined by Section 2 (2) of the Code. It stands on the same footing as a dismissal under Rule 8 of Order IX which, because the word, "dismissal" implying a determination on the merits is used by the Rule, is expressly excluded from the definition in Section 2 (2) by Clause (b) of the exclusions therein. It is the provision in Sub-rule (3) of Rule 1 of Order XXIII (like that in Rule 9 of Order IX) and not any principle of *res judicata* that precludes the plaintiff in such a case from bringing a fresh suit in respect of the same matter. It follows that there being no decree no appeal lay under Section 96 of the Code. Reference may be made in this connection to *Kulandai v. Ramaswami*, AIR 1928 Mad 416 at p. 418, *Saraswati Bala v. Surabala Dassi*, AIR 1957 Cal 57 and *Raisa Sultana Begam v. Abdul Qadir*, AIR 1966 All 318 at p. 320."

(emphasis supplied)

In the case of *Nathji and another v. Languria and another* (AIR 1925 Allahabad 272), it has been held that where in the case of an application to withdraw a suit in terms of Order 23 Rule 1(2) C.P.C., the Court allows the suit to be withdrawn but refuses permission to bring a fresh suit, the court's order is erroneous. It was held that if the trial court saw no reason for allowing the withdrawal in terms of Order 23 Rule 1(2), the trial court should have refused the application seeking liberty to file a new suit and it should have proceeded with the suit on merits.

In view of the above judgments, the position in law is clear that when the court allows the suit to be withdrawn without liberty to file a fresh suit, without any adjudication, such order allowing withdrawal cannot constitute a decree and it cannot debar the petitioners herein from taking the defence

in the second round of litigation as held in the impugned judgment. The above judgments indicate that if the plaintiff withdraws the suit, the order of the court allowing such withdrawal does not constitute a decree under Section 2(2) of Code. That in any event, it will not preclude the petitioners herein (defendants in second round) from raising the plea that the sale deed executed by Chelliah Nadar on 26.2.73 in favour of Thangaraj Nadar was not true and valid. Thus, the civil appeal needs to be allowed.

JUDIS