

Marimuthu Vs. Raja

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Court : Chennai Madurai

Decided On : Aug-08-2016

Judge : K. Kalyanasundaram

Appeal No. : C.R.P(PD)(MD)No. 2527 of 2015 & MP(MD)No. 1 of 2015

Appellant : Marimuthu

Respondent : Raja

Judgement :

(Prayer: Civil Revision Petition is filed under Section 115 of the Civil Procedure Code, against the order, dated 18.08.2015 made in CMA No.8 of 2015 on the file of the VI Additional District and Sessions Court, Madurai, reversing the order, dated 17.04.2015 made in I.A.No. 85 of 2015 in A.S.No.83 of 2014 on the file of the I Additional Sub Court, Madurai Camp at Melur.)

1. This revision is directed against the order of the 6th Additional District and Sessions Judge, Madurai, passed in CMA No.8 of 2015, dated 18.08.2015, reversing the order of the First Additional Subordinate Judge, Madurai, passed in I.A.No.85 of 2015 in A.S.No.83 of 2011, dated 17.04.2015.

2. The respondent herein as plaintiff, filed a suit in O.S.No.69 of 2013 against the petitioner herein/defendant before the District Munsif, Melur, for permanent injunction restraining the defendant, his men and agent from in anyway disturbing his peaceful possession and enjoyment of the suit property, except under due

process of law.

3. The case of the plaintiff is that the defendant is the absolute owner of the property bearing Door No.2/509, Thalai Street, Gomathipuram 6th Street, Melamadai, Madurai District and he paid Rs. 4,00,000/- as per mortgage deed (Othi), dated 10.05.2010 to enjoy the property for a period of two years and in the month of February 2012, when the plaintiff approached the defendant to get back the 'Othi' amount, in order to vacate the property, the defendant expressed his inability to pay the mortgage amount and he requested the plaintiff to continue the 'Othi' for one more year. While so, on 10.06.2012, the defendant attempted to dispossess the plaintiff from the suit property and also lodged a false complaint on 15.06.2012 before the Karuppayurani Police Station. Hence, the suit.

4. According to the defendant, on expiry of the Othi period, the defendant was ready to return the mortgage amount and in fact, he had taken a demand draft for Rs.4,00,000/- drawn on Karur Vysya Bank, Madurai Branch in favour of the plaintiff, but it was refused by him. Further, the plaintiff threatened the defendant with dire consequences, which necessitated the defendant to file a criminal complaint in Crime No.453 of 2012 before the Karuppayurani Police Station and thereafter, the suit was filed with a mala-fide intention.

5. During cross examination, the plaintiff categorically admitted that he is ready to vacate the suit premises, if the Othi amount of Rs. 4,00,000/- is repaid to him. The learned District Munsif, based on the admission made by the plaintiff and also considering the stand taken by the defendant, disposed of the suit on 01.04.2014 directing the defendant to deposit Rs.4,00,000/- within a period of one month and the plaintiff to vacate the suit premises within a period of two months therefrom.

6. Feeling aggrieved by the judgment and decree, the plaintiff preferred an appeal in A.S.No.83 of 2014 before the Subordinate Judge, Melur. The appeal was listed for arguments on 12.09.2014. However, on the request made by the appellant, the case was subsequently adjourned to the following dates 07.10.2014, 17.10.2014, 28.10.2014, 07.11.2014, 12.11.2014, 18.11.2014, 21.11.2014, 26.11.2014 and 02.12.2014. Ultimately, the appeal was dismissed on 19.12.2014. The appellant, on the last day of limitation i.e., on 19.01.2015 filed a petition in I.A.No.85 of 2015

to set aside the judgment, dated 19.12.2014.

7. In the affidavit filed in support of the petition, it was averred that he was suffering from jaundice for a period of three months, for which he was taking native treatment and he was also bedridden, hence, he was not able to contact his counsel in time. The defendant resisted the petition refuting the allegations made in the affidavit and also stated that despite ample opportunity provided to the plaintiff, he did not appear before the court and the application was filed with a mala fide intention to prolong the litigation.

8. The learned Subordinate Judge dismissed the application. Aggrieved by the order, the plaintiff preferred an appeal in CMA No.8 of 2015 before the VI Additional District and Sessions Judge, Madurai. The learned appellate Judge allowed the appeal. Challenging the order, the present revision is filed.

9. Mr.T.K.Gopalan, learned counsel appearing for the petitioner/defendant would submit that the only grievance of the plaintiff was non-refund of the mortgage amount of Rs.4,00,000/-, after the expiry of the lease period and that the plaintiff, in his evidence, has categorically admitted that if the mortgage amount was returned, he was ready to hand over the suit property to the defendant. The trial court, solely based on the pleadings and admission of the plaintiff and to render substantial justice to both parties, issued a direction to the defendant to deposit the mortgage amount of Rs. 4,00,000/-. Accordingly, the defendant had also deposited the said amount, so, there was no necessity at all for the plaintiff to prefer the appeal and even the appellate court adjourned the appeal for more than 9 hearings on the request of the appellant, eventually, it was dismissed on 19.12.2014.

10. It is further submitted that the plaintiff instead of withdrawing the mortgage amount from the court and handing over possession, chose to file another application to set aside the decree passed by the appellate court with a mala fide intention and caused mental agony to the defendant; that the plaintiff has not produced any material to prove the alleged illness; that the presence of the parties before the appellate court was not at all necessary and the counsel could have very well argued the case, if the intention was not otherwise and that the plaintiff

has taken the property on lease for a period of two years, i.e., from 10.05.2010 for his accommodation to take treatment at Appollo Hospital, which is situated near the suit property and as per the mortgage deed, he has to get back the mortgage amount and hand over the possession on 10.05.2012, however, he has been squatting on the property for more than six years, causing undue hardship to the defendant, who is a Professor.

11. Per contra, learned counsel appearing for the respondent/plaintiff would submit that at the instance of the defendant, the plaintiff was falsely implicated in a criminal case with an intention to take forcible possession; that the defendant did not make any counter claim and the admissions made by the plaintiff during his cross examination are totally irrelevant to decide the issue involved in the suit and the decree granted by the trial court is beyond the scope of the suit; that the appellate court, having satisfied with the sufficient cause for his non- appearance before the appellate court, allowed the appeal and there is no illegality in the impugned order. The learned counsel has relied upon the following decisions in support of his contention:-

01. (2007)3 MLJ 839(SC) in the case of Sarwan Singh vs. Kishan Singh (D) thro' LRs. And others;

02. (2014)5 SCC 723 in the case of Harbans Pershad Jaiswal vs. Urmila Devi Jaiswal.

03. (2012)8 SCC 745 in the case of Ghanshyam Dass Gupta vs. Makhan Lal.

12.Mr.T.K.Gopalan, learned counsel for the petitioner, in reply, would contend that admissions made by the plaintiff are very much relevant and they cannot be brushed aside as suggested by the respondent; that the petitioner/defendant is working as a Professor in a Private Engineering College and the trial court as well as the appellate court to put an end to the litigation, passed the decree; that there is no illegality in the decree of the trial Court; that when the defendant has satisfied the decree by depositing the advance amount of Rs.4,00,000/-, the plaintiff ought not to have ventured to file the appeal and that the respondent has not shown sufficient cause to set aside the judgment and decree of the appellate court.

13. Heard the rival submissions and perused the materials placed before this court.

14. In the first judgment referred by the learned counsel for the respondent, the Hon'ble Apex Court has observed that the application filed to restore the appeal is maintainable and it cannot be dismissed merely because the appeal has been decided on merits. It is held as follows:-

6. It is to be noted that in the application for restoration the reasons for non appearance at the time when the matter was taken up had been indicated. It was noted that the matter was fixed for filing of the vakalatnama of the respondents. There was unintentional absence and the reason for the same was indicated. The High Court has not found the reason indicated to be in any manner incorrect or untrue. Merely because the appeal has been dismissed on merits that could not have been an ground to refuse restoration of the appeal.

7. As rightly contended by the learned counsel for the appellant the reason for non appearance when the matter was taken up had been indicated. There is no dispute that the factual scenario as projected by the appellant was the correct one. Mere fact that the appeal was dismissed on merits could not have been a ground to refuse restoration. Accordingly, we set aside the impugned order of the High Court and direct restoration of the Second Appeal.

15. In the second cited case, the Hon'ble Supreme Court has held that the appellate court was not empowered to dismiss the appeal on merits, where the appellant remained absent or left un-represented on the day fixed for the hearing of the appeal.

16. And in the third decision, the Hon'ble Apex Court has held as follows:-

10. Where the appeal is dismissed in default under Rule 17, remedy is provided to the appellant under Rule 19 for readmission of the appeal on moving an application and showing that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing. Likewise, Rule 21 gives an opportunity to the respondent to move similar application for rehearing of the

appeal by demonstrating sufficient cause for non-appearance, if the appeal was heard in his absence and ex parte decree passed.

17. In the case on hand, it is not in dispute that the plaintiff is the mortgagee and the defendant is the owner of the suit property. It is also not in dispute that the plaintiff was inducted, based on the mortgage deed, dated 10.05.2010 for a period of two years. It has been alleged in the plaint that the defendant was not returning the mortgage amount of Rs.4,00,000/- as per the deed, dated 10.05.2010, though he was ready to vacate the suit premises in the month of May 2012 itself.

18. It is to be seen that in the written statement, the defendant has specifically stated that the defendant was ready to return the mortgage amount and in fact, he had already taken a demand draft for Rs.4,00,000/- in the name of the plaintiff. Admittedly, in the cross examination, the plaintiff has vividly admitted that he is ready to hand over the possession to the defendant on receipt of the mortgage amount of Rs.4,00,000/-. It is to be noted that except returning of the mortgage amount, no other issue is involved in the suit. The trial court, with a view to give a quietus to the litigation has directed the defendant to deposit the amount. In such a fact situation, this court is unable to understand the necessity, nor appreciate of preferring the appeal itself.

19. Further, it is the case of the petitioner/defendant that the defendant is an Engineer and he is working as a Professor in a private Engineering College. However, the respondent/plaintiff has not given sufficient reason for his non appearance before the appellate court for more than nine hearings, nor produced any material in support of his case that he was suffering from jaundice. The learned Subordinate Judge, Melur, in my considered view, has rightly dismissed the application I.A.No.85 of 2015, since the respondent/plaintiff has not shown sufficient cause to set aside the ex-parte judgment.

20. It is true that in the decision referred in para 10, the Hon'ble Supreme Court has held that the appellant can be given an opportunity of rehearing the appeal, by demonstrating sufficient cause for his nonappearance. But in the instant case, the conduct of the respondent in filing the appeal A.S.No.83 of 2014 and leaving it to be decided exparte and thereafter, filing application I.A.No.85 of 2015 for

rehearing, on the last day of the limitation would show that the reason given by the respondent is not true and the respondent is abusing the process of law. Hence, the judgments relied upon by the respondent would not come to his aid.

21. At the risk of repetition, this court intends to point out that the respondent/plaintiff has not claimed any right over the property. The pleadings and the evidence of PW1 would amply prove that his only grievance is non-repayment of the mortgage amount of Rs. 4,00,000/- for handing over possession to the mortgagor, apart from seeking refund, the respondent cannot claim any right after the expiry of the term. The contention of the plaintiff that there was no counter claim and the appeal was dismissed contrary to Order 41 Rule 19 CPC are too hyper-technical defences, that cannot be entertained, while substantial justice being done to the parties. The primary function of the court is to adjudicate the dispute between the parties and to advance the substantial justice. When the defendant is entitled for recovery of possession on refund of the mortgage amount, he need not be driven to file another suit for recovery of possession, wasting precious time of the court, especially when the Courts in India are already floated with cases and the pendency exceeds two crores.

22. In the case on hand, the defendant neither claims set off, nor set up counter claim against the claim of the plaintiff and on the other hand, he submits to the decree. So, this court is of the opinion that in cases, where the defendant is not disputing the claim of the plaintiff, there had been no occasion to set up a counter claim. Therefore, I do not find any force in the contention of the learned counsel for the respondent.

23. Rule 6 Order XII CPC runs thus;-

Order 12 Rule 6 of the Code of Civil Procedure reads as under:-

Judgment on admissions.-

(1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the court may at any stage of the suit, either on the application of an party or of its own motion and without waiting for the

determination of any other question between the parties, make such Order or give such judgment as It may think fit, having regard to such admissions. (2) Whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced. 9. Plain reading of Order 12 Rule 6 CPC makes it abundantly clear that it is open to the court to pass a judgment on admissions in the pleadings or otherwise. The said provision clearly indicates that it is open to the court to pronounce judgment on statement made by the parties and documents on record can be taken note of dehors the pleadings. Admission may be made either specific or constructively. If the court is satisfied that the admission made by a party is unambiguous, a decree can straightaway be passed without taking recourse to trial.

24. Sections 17 and 18 of the Indian Evidence Act refers to admission, which reads thus:-

17. Admission defined.- An admission is a statement [oral or documentary or contained in electronic form], which suggests any interference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

18. Admission by party to proceeding or his agent.- Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions.

By suitor in representative character.- Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

Statements made by-

(1) party interested in subject-matter.- persons who have any proprietary or pecuniary interest in the subject-matter of the proceedings, and who make the statement in their character of persons so interested, or

(2) person from whom interest derived.- persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, are admissions, if they are made during the continuance of the interest of the persons making the statements.

25. A conjoint reading of the above provisions would reveal that admissions in the form of statement made by a party to the proceedings or by his agent are admissions and based on the admissions, the court is required to pronounce judgment and a decree shall be drawn in accordance with the judgment.

26. It is appropriate to refer the judgment reported in 2006(3) CTC 175 [Jet Ply Wood Private Ltd. vs. Madhukar Nowlakha]. In paragraph 7, the Apex Court has observed as follows:-

7. There is no doubt in our minds that in the absence of a specific provision in the Code of Civil Procedure providing for the filing of an application for recalling of an order permitting withdrawal of a suit, the provisions of Section 151 of the Civil Procedure Code can be resorted to in the interest of justice. The principle is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the Court can come to its aid to act *ex debito justitiae* for doing real and substantial justice between the parties. This Court had occasion to observe in the case of **Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal**, AIR 1962 SC 527, as follows:

It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them.

27. Keeping in mind, the peculiar facts of this case, the trial court in order to meet the ends of justice, has issued suitable directions, while disposing of the suit. The decision of the Hon'ble Supreme court referred in the above paragraph supports the view taken by the learned trial Judge. Therefore, looking from any angle, the judgment and decree of the trial court passed in O.S.No.69 of 2013 cannot be found fault.

28. It is well settled that the procedures provided under the Code of the Civil Procedure are hand maids of justice, equity and common sense and the procedures provided for adjudication of the right of the parties should not be used in such a way so as to defeat the very right of the parties. It should be exercised in such a manner that the ends of justice are advanced and the rights of the parties are not defeated. This court is conscious of the fact that the Hon'ble Supreme court in the decisions relied upon by the learned counsel appearing for the respondent observed that when the appellant was absent, the Appellate court ought to have dismissed the appeal for non-prosecution and not on merits. Although, the respondent has a right of appeal under Section 96 of the Code of the Civil Procedure, in my opinion, the appeal itself could not be maintained as it was against his very own admission in the suit, which was filed with a mala fide intention and by abusing the process of law. In view of my finding supra, I am unable to accept the contentions of the learned counsel for the respondent.

29. In such view of the matter, the order passed by the Appellate court in CMA No.8 of 2015 suffers from illegality and the same is liable to be set aside. In the result, the revision is **allowed** and the impugned order, dated 18.08.2015 is set aside. The judgment and decree passed in O.S.No.69 of 2013 by the learned District Munsif, Melur is restored. No costs. Consequently, connected Miscellaneous Petition is closed.

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