

Ahamed Vs. Rukmaniammal

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Court : Chennai

Decided On : Dec-19-1980

Reported in : AIR1981Mad205

Judge : Nainar Sundaram, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 21, Rules 100, 101 and 103

Appeal No. : Second Appeal No. 2282 of 1977

Appellant : Ahamed

Respondent : Rukmaniammal

Advocate for Def. : R. Srinivasan, Adv.

Advocate for Pet/Ap. : K. Chandramouli, Adv.

Judgement :

1. The first defendant in O. S. No. 1484 of 1974, on the file of the District Munsif, Tiruchirapalli, is the appellant in this second appeal. The first respondent is the Plaintiff and the second respondent is the second defendant in that suit. It is unnecessary to refer to the facts, which have given rise to the litigation, in detail. The Plaintiff wanted a declaration of her title and recovery of possession from the first defendant on the basis of a deed dated 19th July 1954, the original of which has been marked as Ex. B-1. That deed was executed by the father of the Plaintiff,

Thandavaraya Pillai. The very same Thandavaraya Pillai, under Ex. B-9 dated 24th September 1966, conveyed the Property to the first defendant. There was an earlier Proceeding for eviction instituted by the first defendant against Thandavaraya Pillai before the Rent Controller, Tiruchirapalli. and pursuant to the orders obtained therein, possession has been obtained by the first defendant. However the plaintiff took proceedings under Order 21, Rules 100 and 101, C. P. Code. The said Proceedings terminated on a joint endorsement. I will have occasion to refer to it subsequently while dealing with the second point mooted out for consideration.

2. The first Court dismissed the suit of the plaintiff. However, on appeal, the plaintiff succeeded. Hence the second appeal by the first defendant. Two questions have been formulated for consideration at the time of admission of this second appeal and they run as follows -

1. On a true construction of Ex. B-1, whether the plaintiff gets any title to the property; and

2. Whether the suit is barred by limitation

3. I have been taken through the recitals in, Ex. B-1. The very preface to the deed characterises it as a settlement. There is no ambiguity- that the ultimate beneficiary is the plaintiff. From a reading of the deed,, it is not possible to spell out that the settlor Thandavaraya Pillai reserved any right for himself . Under the deed the settlor has completely divested himself of all his interest to and in favour of the beneficiary only.. If this is. so, the said Thandavaraya Pillai was not competent to execute Ex. B-9, in favour of the first defendant. What was- contended by the first defendant in the Courts below was that the recitals in the, deed indicate that there was no intention, on the part of the settlor to transfer any right in presenti, but the intention was to transfer the rights, only after the lifetime of Thandavaraya Pillai. No such construction is possible in view of the express, recitals in the deed. Rightly, the lower appellate Court held that the plaintiff has got title to the suit property on the basis EX, B-1.

4. Coming to the second question, as to whether the suit filed by the plaintiff is barred the limitation, it will depend upon the construction of the order that came to be passed in the proceedings under Order 21, Rules 100 and 101, C. P. Code. The certified copy of the concerned petitioner and the orders passed there on had been marked as Ex- A-2 in the case. There was a joint endorsement made by both the parties on 4th March 1968, which read as follows -

'Since both parties to the dispute feel that there is a bona fide dispute about title they agree to have the matter agitated and adjudicated in a regular suit to be filed by the petitioner. Hence this application is not pressed and may be dismissed without costs.'

On the basis of the said joint endorsement. the following order was Passed on the same day i.e., 4th March 1968:

'A joint endorsement is made and recorded. Petition is dismissed. No costs.'

Mr. K. Chandramouli, learned counsel for the appellant, would state that the said order passed would come within the mischief of the the expressions 'against whom an order is made' occur ring in Rule 103 of Order 21, Civil P. C., and the suit not having been filed within one year from the date of the said order is barred by limitation. The question is as to whether the order passed as per Ex. A-2 on the joint endorsement would amount to an order against the Plaintiff. The learned counsel would refer to the dictum of the Full Bench of this Court in Cannanore Bank Ltd. v. Madhavi, : AIR1942 Mad41 where the Full Bench dealt with a case arising under Order 21, Rule 63, C. P. Code, in which the claim petition objecting to an attachment was simply 'not Dressed and dismissed' and a subsequent suit for declaration was filed. The Full Bench points out that where the claimant says to the Court that he does not press the petition and consents to an order of dismissal, it is an adverse order. At the same time, the Full Bench points out that it the person objecting, to the attachment does not ask for his claim to be investigated and - the order on the petition is merely that it be recorded, it cannot be said that this is an order 'against' him. Again, the Full Bench points out that if the petitioner had in fact asked to be allowed to withdraw the petition and the Court had acquiesced in the course. It might very well be that the order would not be an

adverse order within the meaning of the rule. Towards the end of the judgment the Full Bench further observe s as follows -

'If the petition is a petition which falls within Rule 58 and the petitioner has not sought permission to withdraw it without prejudice to his rights it b obviously an order which is against him.'

If there has been a reservation with regard to the right claimed and agitated and such rights or claims are not given up by the party or rejected by the Court, then the order that terminates such proceedings, though worded as one of dismissal, would not amount to an order against the Party. The observations of the Full Bench support this view of mine. The Procedure under Rule 100 of Order 21, C. P. Code. is only optional. and the applicant can always withdraw his application, making appropriate reservation to resort to the remedy under the general law of filing a title suit. This is what has happened in the present suit. There was no investigation into or satisfaction reached by the Court that the claim was futile and was liable to be rejected. In the present case, the order of dismissal is the result of a joint endorsement. Both the parties consciously agreed to have the matter agitated and adjudicated in a regular suit. There was no abandonment of rights or claims and the joint endorsement clearly reveals the intention of the party to pursue further the rights claimed. In the said circumstances, it is not possible to apply the final ratio of the Full Bench referred to above, to the facts of the Present case and hold that the order passed an 4th March 1968 is an order against the plaintiff. and hence she must file the suit . under Order 21, Rule 103, C. P. Code, within one year from the date of the order. Rightly this point has been found against the first defendant by the lower appellate Court.

5. For all the above reasons, the second appeal fails and the same is dismissed. But, there will be no order as to costs.

6. Appeal dismissed.