SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Ramana Goundan and ors. Vs. Vellappa Goundan and ors.

Ramana Goundan and ors. Vs. Vellappa Goundan and ors.

SooperKanoon Citation : sooperkanoon.com/821663

Court : Chennai

Decided On : Mar-09-1926

Reported in : 97Ind.Cas.989

Judge : Charles Gordon Spencer, J.

Appellant : Ramana Goundan and ors.

Respondent : Vellappa Goundan and ors.

Judgement :

Charles Gordon Spencer, J.

1. Second appeal by defendants against the decree of the Court of the Second Additional Subordinate Judge, Coimbatore, in A.S. No. 11 of 1922 (A.S. No. 44 of 1922 on the file of the District Court). The facts giving rise to .this second appeal are these. The defendants instituted a suit against the plaintiffs on foot of a hypothecation bond, and obtained a preliminary decree for Rs. 1,530-2-8on 26th July, 1918. The plaintiffs applied to have the decree set aside and it was set aside with the consent of the defendants on the plaintiffs depositing into Court the full decree amount inclusive of costs. The suit was r-heard and a revised preliminary decree was passed on 15th March 1919. Against this decree the plaintiffs appealed and the appeal was dismissed on 20th October, 1919. Thereupon the defendants applied to have a final decree passed and this was done on 25th November, 1919. In pursuance of this decree the mortgaged properties were sold

on 8th March, 1920, and realised a sum of Rs. 1,010. The amount due under the final decree was Rs. 1,634-3-4 with subsequent interest and costs and giving credit for Rs. 1,010, the defendants applied for a personal decree against the plaintiffs for the balance and attached the amount that had been deposited in Court when the first preliminary decree was set aside. The plaintiffs received notice of this application on 12th June, 1920, and instituted the suit from which this second appeal arises on 12th July, 1920, for a declaration that the final decree and all subsequent execution proceedings were null and void and not binding on them. The allegations on which this relief was sought are to be found in paras. 10, 11 and 12 of the plaint. They are to the effect 'that they (plaintiffs) were kept in the dark about the proceedings relating to the passing of the final decree, that the present defendants so contrived that no notice was personally served on them in those proceedings, that the mortgaged properties which were worth not less than Rs. 3,500 were sold for a shockingly low price of Rs. 1,010, that there was no publication at all of the sale proclamation in the village, that the valuation given in the sale proclamation as also the upset price fixed were too low; and that the decree amount having been already deposited in Court, there was no necessity at all for further proceedings by the defendants and that the conduct of the defendants in applying for a final decree for the entire amount behind the back of the plaintiffs and ignoring the Court deposit, was highly improper and fraudulent.' The defendants traversed all the allegations in the plaint and also contended that the suit was not sustainable and that the remedy of the plaintiffs, if any, was under Order XXI, Rule 90, C.P.C., as also under Order IX, Rule 13.

2. No oral evidence was adduced before the District Munsif, and on the documentary evidence placed before him he came to the conclusion that no separate suit lay for the relief claimed and that the defendants were not bound to give credit for the amount which had been deposited when the first preliminary decree' was set aside. On appeal the learned Subordinate Judge held that the defendants were bound to give credit for the amount in deposit, that they have failed to do so, and that their conduct in getting a final decree passed for the entire sum due was fraudulent; and relying upon a decision in Hatem Ali Khundkar v. Abdul Gaffur Khan 8 C.W.N. 102 he reversed the decree of the first Court and passed a decree for the plaintiffs.

3. It was contended before me that this finding was wrong and the question to be considered, therefore, is, whether the defend; ants were bound to give credit for the sum of Rs. '1,530-2-8 which was deposited in Court by the plaintiffs on 4th September, 1918, and whether they were entitled only to have a final decree passed for the balance.

4. The C.P.C. provides for payment into Court before decree and after decree and the provisions relating to payment into Court before decree are contained in Order XXIV. Order XXI, Rule 1 provides for payment into Court after decree. In the present case the amount of Rs. 1,530-2-8 was not paid into Court under either of these provisions and the payment was made under Order IX, Rule 13. It was contended that inasmuch as the payment was made and the ex parte decree was set aside with the consent of the defendants it must be taken that they consented to the amount going in discharge of any decree that would ultimately be passed in the suit. This contention appears to me to be untenable, because, had there been any such understanding the revised preliminary decree ought only to have been passed for Rs. 1,634 minus Rs. 1,530-2-8 and not for Rs. 1,634. The plaintiffs appealed against the revised preliminary decree, and no contention to this effect was taken in the grounds of appeal. The revised preliminary decree having been for the sum of Rs. 1,634 and this decree having been confirmed in appeal, the defendants applied under Order XXXIV, Rule 5, C.P.C., for having a final decree for sale passed. This rule enacts that if the amount declared to be due under the preliminary decree was not paid into Court, the Court was bound to pass a final desree for sale, The ruling in Hatem Ali Khundkar v. Abdul Gaffur Khan 8 C.W.N. 102 has no application, because, in that case the money was actually paid into the hands of the decree-holder outside the Court and having received the money it was incumbent upon him when applying for the final decree to give credit for the amount he had received. There was no such payment in the present case, and, as observed in Singa Raja v. Pethu Raja : (1918)35MLJ579 , Order XXXIV, Rule 5, C.P.C. recognised only one method of payment into Court under the preliminary decree and no such payment having been made, the Court was bound on the application of the decree-holder to pass a final decree for sale.

5. It was urged that the defendants were bound to have brought to the notice of the Court when the final decree was passed, that there was in deposit Rs. 1,530 and odd; but I fail to see how any such legal duty was cast on them. It may be stated that it was equally open to the plaintiffs after the appeal had been dismissed, to apply to the Court to have the amount they had deposited appropriated towards the sum decreed under the revised preliminary decree. In any event it does not appear to me that the conduct of the defendants amounted to a legal fraud. In my experience when money is deposited under Order IX, Rule 13 and the ex parte decree is set aside, the decree which is passed after a fresh trial is always for the full amount claimed and not for the full amount claimed less the amount deposited. It is only when payment is made under Order XXIV that a decree is passed after giving credit for the amount deposited. In the case of deposits under Order IX, Rule 13 what is done is to add a note to the decree to the effect that it is open to the plaintiff to draw the amount in deposit and that he is to execute the decree only for the balance.

6. For all these reasons, it appears to me that the finding of the learned Subordinate Judge cannot be supported. This view of mine is not by itself sufficient to dispose of the appeal because, the other allegations made in paras. 10 and 11 of the plaint to the effect that the defendants fraudulently contrived to keep the plaintiffs in the dark with regard to the proceeding leading to the passing of the final decree and that they have caused false endorsement of service to be made on the summons, were not gone into by the Court of first instance. The acts referred to in paras. 10 and 11 of the plaint may amount to legal fraud and in that case a separate suit to set aside the final decree would lie.

7. I, therefore, call for a finding from the lower Appellate Court on the following issue 'Are the allegations made in paras. 10 and 11 of the plaint true and were the defendants guilty of fraud, and, if so, was the final decree and the sale that followed vitiated by fraud?' The finding will be submitted in six weeks from the date on which the records are received in the lower Appellate Court, and the lower Appellate Court will receive such evidence as is adduced by the parties. Ten days for objections after the receipt of finding from the lower Appellate Court.

8. In pursuance of the order contained in the above judgment, the Principal Subordinate Judge of Coimbatore, submitted the following

9. This case has been remanded for a finding on the following issue:

Are the allegations made in paras. 10 and 11 of the plaint true and were the defendants guilty of fraud, and if so, was the final decree and sale that followed vitiated by fraud?

* * * * *

10. No case of fraud has been made out, and the issue is decided against the plaintiffs. There is no evidence that fraud of any kind was committed in any of the proceedings connected with the final decree or the execution proceedings.

11. An attempt has been made to suggest that there is another Vellappa Goundan in the village who owns the adjoining land and who is also the son of Thevanna Goundan and who is known as Moola Thottan Thevanna Goundan. The suggestion looks as if the proclamation was affixed to his land or that his signature was obtained and no attempt has been made to produce and file those papers and show that any fraud was actually committed. First plaintiff is a signatory, and if really his suggestion is true, it is capable of specific proof. Thus, the allegation that the sale notice has been returned with a false endorsement of personal service and that first plaintiff's signature is a forgery is not attempted to be substantiated by plaintiff.

12. This second appeal coming on for final hearing after the return of the finding of the Principal Subordinate Judge, Coimbatore, upon the issue referred by this Court for trial, the Court delivered the following

13. I accept the finding of the Subordinate Judge that there was no proof of fraud in obtaining the final decree and in the subsequent proceeding.

14. The second appeal is allowed and the decree of the District Munsif is restored with costs of the appellants, payable by the first respondent personally and out of the estate of the second respondent in this Court and in the lower Appellate Court

including the costs of the remand.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com