Supreme Court of India
Saroja vs Chinnusamy (Dead) By L.Rs And Anr on 24 August, 2007
Author: T Chatterjee
Bench: Tarun Chatterjee, P.K.Balasubramanyan

CASE NO.:
Appeal (civil) 3907 of 2007

PETITIONER:
Saroja

RESPONDENT:
Chinnusamy (Dead) by L.Rs and Anr

DATE OF JUDGMENT: 24/08/2007

BENCH:
TARUN CHATTERJEE & P.K.BALASUBRAMANYAN

JUDGMENT:

J U D G M E N T CIVIL APPEAL NO 3907 OF 2007 (Arising out of SLP (C) No. 18570 of 2005) TARUN CHATTERJEE, J.

1. Leave granted.

2. This appeal by grant of special leave is preferred by the appellant against the judgment and decree of the High Court of Judicature at Madras in Second Appeal No. 840 of 1994 whereby the High Court had dismissed the second appeal and affirmed the judgment of the first appellate court which in its turn had set aside the judgment and decree of the trial court decreeing the suit of the appellant.

3. The core question which needs to be decided in this appeal is whether the High Court was justified in holding that the ex parte decree passed in favour of Saroja and her minor children Suganthamani and Ramesh (Saroja being Respondent No.3 in this appeal) would operate as res judicata in the subsequently filed suit at the instance of the appellant against the respondents, and out of which the present appeal arises.

4. Before dealing with the facts of the present case and before examining the merits of the question raised before us, as noted hereinabove, let us first consider the general principles of res judicata which have been incorporated in Section 11 of the Code of Civil Procedure [for short "CPC"], which reads as follows: "11. Res judicata. - No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

We have carefully examined the provisions under Section 11 of the CPC. After a careful reading of the provisions under Section 11 of the CPC, it is discernible that in order to constitute res judicata, the following conditions must be satisfied

(i) There must be two suits - one former suit and the other subsequent suit;

(ii) The Court which decided the former suit must be competent to try the subsequent suit;

(iii) The matter directly and substantially in issue must be the same either actually or constructively in both the suits.

(iv) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the former suit;

(v) The parties to the suits or the parties under whom they or any of them claim must be the same in both the suits;

(vi) The parties in both the suits must have litigated under the same title.

We shall come back to these conditions later.

5. Let us now narrate the facts leading to the filing of this appeal. Suit No.233 of 1989 [for short the former suit] was filed on 19th April, 1989 by Saroja, respondent No. 3 herein and her minor children namely Suganthamani and Ramesh against her husband Kuppusamy and his tenant in the District Munsif Court, Mettur for declaration of title and permanent injunction in respect of the property measuring 0.78.0 hectare situated in S.No. 56/5A, Marakottai Karavalli village, District Salem, in the State of Tamil Nadu (hereinafter referred to as the 'suit property'). The case that was made out by respondent No. 3 and her minor children in the aforesaid suit was that the suit property having a 5 H.P. motor pump set and a tiled house bearing D.No. 3/95 had fallen to the share of respondent No. 3 and her minor son by an oral partition in 1985. While the former suit was pending, Kuppusamy, the defendant in that suit and husband of the respondent No. 3 herein, sold the suit property to Saroja, the appellant herein by a registered sale deed dated 13th June, 1990 for a consideration of Rs. 1,00,000/-. On 9th July, 1990, the Appellant filed a suit being O.S. No. 493/1990 [for short 'the subsequent suit'] in the District Munsif Court, Mettur for declaration of title and permanent injunction alleging inter alia that she was the absolute owner in possession of the suit property which was purchased by her from Kuppusamy by a registered deed of sale dated 13th June, 1990 and that she had been in continuous possession of the suit property from the date of her purchase and the Patta, Chitta and Adangal also stood in her name. Respondent No. 3 filed her written statement denying the material allegations made in the plaint and alleging that the suit property had fallen to her share along with her minor son by an oral partition which, however, was denied by the appellant. On 24th February, 1992, an ex parte decree was passed in the former suit in favour of respondent No. 3 and her minor children. On 10th November, 1993, the subsequent suit filed by the appellant was also decreed. An appeal preferred against this decision by respondent No. 3 was allowed by the First Appellate Court thereby dismissing the suit of the appellant. The High

Court in second appeal confirmed the judgment of the First Appellate Court and thereby dismissed the second appeal. It is against this decision of the High Court that this appeal on grant of special leave has been filed.

6. In the suit filed against Kuppusamy by respondent No.3 and others, no appearance was caused by Kuppusamy, although service of notice was effected on him. When the suit filed by respondent No.3 was pending and the suit filed by the appellant was also pending before the District Munsif, Mettur, an application was made at the instance of respondent No. 3 to dispose of both the suits analogously which was opposed by the appellant. The prayer for analogous hearing of the suits was rejected by the Court. When both the suits were proceeding separately, an ex parte decree, as noted herein above, was passed in the former suit filed against Kuppusamy on 24th February, 1992 in which the right, title and interest in respect of the suit property was declared in favour of respondent No. 3 and her minor children. It may be stated herein that no step was taken by the appellant to implead herself in the suit filed by respondent No. 3 and her minor children against Kuppusamy, although the appellant had purchased the suit property from Kuppusamy. It may be further stated that no step was taken by Kuppusamy, the vendor of the appellant or by the appellant to set aside the ex parte decree. That is to say, the ex parte decree passed in the former suit had attained finality.

7. Keeping the aforesaid facts in our mind, let us now proceed to deal with the question of res judicata as raised in this appeal. In our view, the ex parte decree passed in the former suit during the pendency of the subsequent suit of the appellant operates as res judicata in the subsequent suit. It may be reiterated that the appellant had alleged to have acquired title to the suit property by purchase from Kuppusamy who had lost his title, even if there be any, by the ex parte decree passed in the former suit.

8. The learned counsel for the appellant argued that the ex parte decree passed in the former suit could not operate as res judicata because in order to constitute res judicata within the meaning of Section 11 of the CPC, the conditions as noted herein earlier have to be satisfied, which on the admitted facts of this case, were not satisfied. The learned counsel for the appellant, however, submitted that on the admitted facts of this case as noted herein earlier, at least Conditions (iv), (v) and (vi) as quoted herein earlier could not be said to have been satisfied. This submission of the learned counsel for the appellant was hotly contested by the learned counsel for the respondents. He argued that all the conditions to constitute res judicata, as quoted herein earlier, have been satisfied and therefore the ex parte decree passed in the former suit would operate as res judicata in the subsequent suit filed by the appellant. Having examined the contentions raised by the learned counsel for the parties and having considered the admitted facts of the present case and other materials on record, we are unable to agree with the submission of the learned counsel for the appellant. In our view, the ex parte decree passed in Suit No.233 of 1989 would operate as res judicata in the subsequently filed suit of the appellant as all the conditions indicated herein earlier were duly satisfied in the present case. So far as the conditions namely (i),

(ii) and (iii) are concerned, no dispute can be raised or was raised by the parties before us as the said conditions have been fully satisfied in the facts of this case.

9. Let us, therefore, deal with Condition No. (iv) first which says, "the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the former suit". Learned counsel for the appellant sought to argue that since the former suit was decided ex parte, it could not be said that it was finally heard and decided by the court and therefore, Condition (iv) was not satisfied and the principle of res judicata could not be applied and accordingly the ex parte decree in the former suit would not operate as res judicata in the subsequent suit. We are unable to agree with this contention of the learned counsel for the appellant. In this case, admittedly, summons was duly served upon Kuppusamy and inspite of such service of summons, Kuppusamy thought it fit not to appear or to contest the suit filed against him. Once an ex parte decree is passed against Kuppusamy, in our view, the same should be taken as a final decision after hearing. It is well settled that an ex parte decree is binding as a decree passed after contest on the person against whom such an ex parte decree has been passed. It is equally well settled that an ex parte decree would be so treated unless the party challenging the ex parte decree satisfies the court that such an ex parte decree has been obtained by fraud. Such being the position, we are unable to hold that Condition No. (iv) was not satisfied and accordingly it cannot be held that the principle of res judicata would not apply in the present case. In the present case, admittedly, the appellant in her plaint had not made any case of fraud or collusion either against Kuppusamy or against the respondents herein. It is true that when the subsequent suit was filed, the ex parte decree in the former suit had not been passed and, admittedly it was passed during the pendency of the subsequent suit. But then it was open to the appellant to file an amendment of the plaint in the subsequent suit by introducing a case of fraud or collusion and by challenging the ex parte decree on the ground of fraud also although the ex parte decree was passed during the pendency of the subsequent suit. This, however, was not done by her. Therefore, in our view, since the appellant could not make out a case of fraud or collusion challenging the transaction by which she had purchased the suit property from Kuppusamy in the manner indicated above or, since, even the ex parte decree was also not challenged on the ground that Kuppusamy and respondent No. 3 colluded amongst themselves and out of such collusion, Kuppusamy during the pendency of the former suit sold out the suit property to the appellant, it is not open to the court to hold that the said ex parte decree would not operate as res judicata on the ground that the transaction between Kuppusamy and the appellant in respect of the suit property was a fraudulent one. In this connection, reference can be made to a decision of Madras High Court in the case of Arukkani Ammal Vs. Guruswamy [The Law Weekly Vol.100 (1987) 707] which was also relied on by the first appellate court. The Madras High Court in that decision observed as follows :-

"It is also difficult to appreciate the view taken by the District Munsif that ex parte decree cannot be considered to be 'full decree on merits'. A decree which is passed ex parte is as good and effective as a decree passed after contest. Before the ex parte decree is passed, the court has to hold that the averments in the plaint and the claim in the suit have been proved. It is, therefore, difficult to endorse the observation made by the Principal District Munsif that such a decree cannot be considered to be a decree passed on merits. It is undoubtedly a decree which is passed without contest; but it is only after the merits of the claim of the plaintiff have been proved to the satisfaction of the trial court, that an occasion to pass an ex parte decree can arise." (Emphasis supplied).

We are in full agreement with this view of the Madras High Court holding that a decree which is passed ex parte is as good and effective as a decree passed after contest. A similar view has also been expressed by a Division Bench of the Allahabad High Court in the case of Bramhanand Rai Vs. Dy. Director of Consolidation, Ghazipur [AIR 1987 All 100]. However, the learned counsel for the appellant relying on a decision of the Madras High Court, namely, A.S.Mani (deceased) by L.Rs. Thirunavukkarasu & Ors. Vs. M/s.Udipi Hari Niwas represented by Partners & Ors. [1996 (1) Madras Law Journal 171] invited us to hold that the principle of res judicata would not apply as the former suit was decided ex parte. This decision, in our view, is distinguishable on facts. In that decision, the observation that the ex parte decree shall not operate as res judicata was made on the basis that the earlier petition which was filed for eviction against the tenants was dismissed only on technical grounds, and after keeping this fact in mind only, the Madras High Court held that the ex parte decree would not operate as res judicata inasmuch as the petition was not heard and finally decided as contemplated in Section 11 of the CPC. Therefore, in our view, since condition No. (iv), as noted herein before, was satisfied, we hold that the principles of res judicata would be applicable in the present case as held by the First Appellate Court and also affirmed by the High Court.

10. Now let us deal with Condition No. (v) which says, "the parties to the suits or the parties under whom they or any of them claim must be the same in both the suits". It is true that the appellant was not a party to the suit filed by respondent No. 3 and others against Kuppusamy from whom the appellant had purchased the property by a registered deed of sale. In the present case, the appellant was litigating on the basis of the title acquired by her from Kuppusamy against whom the ex parte decree was passed in the former suit. Therefore, it would not be difficult for us to hold that the appellant, who although was not a party to the former suit, claimed through Kuppusamy in the suit subsequently filed by her. In the case of Ishwardas Vs. The State of Madhya Pradesh & Ors. [AIR 1979 SC 551], this Court held that in order to sustain the plea of res judicata, it is not necessary that all the parties to the two litigations must be common. All that is necessary is that the issue should be between the same parties or between parties under whom they or any of them claim". (Emphasis supplied). Therefore, Condition (v) is also satisfied.

11. Lastly, we deal with Condition No. (vi) which says, "the parties in both the suits must have litigated under the same title". We have to enquire whether the parties in the subsequent suit were litigating under the same title for the purpose of determining whether the ex parte decree passed in the former suit would operate as res judicata in the subsequent suit filed by the appellant. In our view, this condition is also fully satisfied. In this connection, we may rely on a decision of this Court in the case of Aanaimuthu Thevar (Dead) by LrsVs. Alagammal & Ors. [JT 2005 (6) SC 333]. In that case the former suit was jointly filed by one Muthuswami as owner and mortgagor with the mortgagee in respect of the suit property. The subsequent suit was filed by the appellant in that appeal who had purchased the suit property from Muthuswami. It was held by this Court that the appellant in that appeal was litigating under the same title which Muthuswami had in the suit property. In the background of such facts, this Court held that since the issue of title of the suit property was directly and substantially involved in the former suit, the suit filed by the appellant in that appeal shall operate as res judicata, or at least, the suit was hit by the principle of constructive res judicata. This being the position and in view of our discussions made hereinabove, we hold that by virtue of the ex parte decree passed in the former suit, the subsequent suit filed by the appellant

is hit by res judicata.

12. No other point was raised by the counsel for the parties. The applicability of the doctrine of lis pendens was also not agitated by the counsel for the appellant before the High Court. Accordingly we need not go into the question regarding the applicability of the doctrine of lis pendens in the present case.

13. For the reasons aforesaid, we do not find any merit in this appeal. The appeal is thus dismissed. There will be no order as to costs.