

Nisar Ahamed Vs S. Leela

Court: Madras High Court

Date of Decision: Oct. 30, 2015

Acts Referred: Civil Procedure Code, 1908 (CPC) - Order 23 Rule 1, Order 23 Rule 3, Order 6 Rule 17, Order 7 Rule 14(3), 11

Citation: (2016) 1 CTC 39 : (2015) 5 LW 774 : (2015) 8 MLJ 525

Hon'ble Judges: D. Hari Paranthaman, J.

Bench: Single Bench

Advocate: Veera Raghavan, Senior Counsel for Mamta Pandey, for the Appellant; B. Bijay, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

D. Hari Paranthaman, J.

The revision petitioner is the defendant in O.S. No. 809 of 2007 on the file of the learned Principal District

Munsif, Alandur. The respondent herein is the plaintiff therein. The respondent filed the suit for permanent injunction restraining the revision

petitioner herein from interfering with her peaceful possession and enjoyment of suit schedule "A" and "B" properties. The respondent filed proof

affidavit as P.W. 1 in the said suit on 6.1.2015. While so, on 23.1.2015, she filed an application in I.A. No. 113 of 2015 to receive the document

dated 23.10.2010, which is an information received from the Secretary to Government, by condoning the delay.

2. According to the respondent, she found that the date of document was erroneously mentioned in I.A. No. 113 of 2015 as 23.10.2010 instead

of 23.4.2010. Hence, she filed I.A. No. 373 of 2015 in I.A. No. 113 of 2015 in O.S. No. 809 of 2007 to amend the date of document as

24.3.2010 in I.A. No. 113 of 2015. In fact, the application in I.A. No. 373 of 2015 to amend the date as stated above was allowed by the Trial

Court on 16.6.2015 permitting the respondent herein to carry out the amendment from 23.10.2010 to 23.4.2010. While so, the respondent found

that the document dated 23.4.2010 was not received from the Secretary to Government, but it was received from the Under Secretary to

Government cum Public Information Officer. Hence, she was advised to make an endorsement to dismiss I.A. No. 113 of 2015 as not pressed.

Accordingly, an endorsement was made and I.A. No. 113 of 2015 was dismissed as not pressed on 19.6.2015.

3. Thereafter, the respondent filed another application in I.A. No. 639 of 2015 to receive the document dated 23.4.2010 received from the Under

Secretary to Government cum Public Information Officer, by condoning the delay.

4. The revision petitioner herein filed counter statement opposing the same raising so many issues that are canvassed before this Court.

5. The Trial Court allowed I.A. No. 639 of 2015 in O.S. No. 809 of 2007 on 13.7.2015.

6. The revision petition is as against the aforesaid order dated 13.7.2015.

7. I have heard the submissions made by the learned Senior Counsel appearing for the revision petitioner and the learned counsel appearing for the

respondent.

8. Learned Senior Counsel appearing for the revision petitioner reiterated the submissions that were made before the Trial Court. Further, he has

submitted that the Trial Court committed grave error in allowing the application in I.A. No. 639 of 2015 as it is barred by res judicata in view of

filing of similar application, which was earlier dismissed as not pressed.

9. Learned Senior Counsel has also submitted that the action of the respondent amounts to committing fraud on the Court. Further, he has

submitted that in view of the order passed in Crl. O.P. No. 11672 of 2010, the Trial Court ought to have rejected the application to receive the

document by condoning the delay. In support of his contention, he relied on the following judgments:--

(i) Chander Kanta Bansal Vs. Rajinder Singh Anand, .

(ii) Union of India (UOI) Vs. Pramod Gupta (D) by L.Rs. and Others, .

(iii) Chaman Lal Saraf Vs. State of Haryana, .

(iv) Junior Telecom Officers Forum and others Vs. Union of India and others, .

(v) Byram Pestonji Gariwala Vs. Union Bank of India and others, .

10. On the other hand, learned counsel appearing for the respondent submitted that the application in I.A. No. 113 of 2015 was not decided on

merits and it was dismissed only as not pressed and hence, filing of another application in I.A. No. 639 of 2015 for the same relief is not barred by

res judicata. According to him, it is a different matter if the earlier application was dismissed on merits and disregarding the same, the respondent

filed another application in I.A. No. 639 of 2015 for the same relief. In this regard, learned counsel appearing for the respondent relied on the

judgment of Division Bench of this Court reported in M/s. Olympic Cards Limited Vs. Standard Chartered Bank, Small Medium Enterprises

Banking Consumer Banking, and the order of the single Judge of this Court reported in Mangayarakarasi Ammal and 2 others Vs. Nagammal and

2 others, .

11. I have considered the submissions made by either side.

12. In my view, the Trial Court gave cogent reasons for allowing the application in I.A. No. 639 of 2015. In para 9 of the said order, the Trial

Court considered the issue relating to res judicata. The Trial Court also considered the judgment of Bombay High Court in the case of Miguel

Caetano Francisco Afonso alias Miguel Afonso and Another Vs. Ana Anunciacao Fernandes alias Annie Coelho and Others, . It is useful to

extract para 9 of the order of the Trial Court and the same is extracted hereunder:--

9. Firstly, the respondent has strongly objected to this petition stating that the same is barred by res judicata as already similar petition of such

nature was dismissed by this court as not pressed. Rebutting the contentions of the respondent, the petitioner placed strong reliance on a decision

of the Hon"ble Bombay High Court in a case reported in Miguel Caetano Francisco Afonso alias Miguel Afonso and Another Vs. Ana

Anunciacao Fernandes alias Annie Coelho and Others, , wherein while decided an application under Or.7 rule 14(3) of CPC, the Hon"ble High

Court has held:

Civil P.C. (5 of 1908), O. 7, R. 14(3) -Production of documents - Leave of Court -Refusal to grant leave on ground of res judicata as earlier

application for production of documents was rejected - Rejection of earlier application was on ground that it was vague and casual - Order

rejecting earlier application would not operate as res judicata in making subsequent application.

In the instant case also the previous application was not dismissed on merits but only as not pressed. Therefore, mis application cannot be said to

be barred by res judicata.

12.A. The submission made by the learned Senior Counsel regarding the alleged commission of fraud by the respondent in filing I.A. No. 639 of

2015 and the reliance placed by him on the order of this Court in Crl. O.P. No. 11672 of 2010 has no substance.

13. I am in agreement with the aforesaid reasoning of the Trial Court. It is a different matter if the earlier application in I.A. No. 113 of 2015 was

dismissed on merits and thereafter, the respondent sought to file another application for the same relief. However, in this connection, learned Senior

Counsel appearing for the revision petitioner sought to rely on the judgment of the Hon"ble Apex Court reported in Chander Kanta Bansal Vs.

Rajinder Singh Anand, . In my considered view, the said judgment has no application to the facts of the present case at all. That case arose under

Order 6 Rule 17 C.P.C. seeking to amend the pleadings. In the facts and circumstances of that case, it was held that belated amendment appeared

to be an afterthought. It was also held that due diligent as prescribed in proviso to Rule 17 was not satisfied. But, in the present case, the

application in I.A. No. 639 of 2015 has been filed under Order 7 Rule 14(3) C.P.C. Hence, I am unable to understand as to how the said

judgment is helpful to the case of the revision petitioner.

14. The next case relied on by the learned Senior Counsel appearing for the revision petitioner is reported in Chaman Lal Saraf Vs. State of

Haryana, . In that case, the Hon"ble Apex Court has dealt with the abuse of process of Court about the filing of vexatious litigation. It was held

that in the case of vexatious litigations, the Court could deny the relief. In that case, the Hon"ble Apex Court found that the applicant was trying to

circumvent process of court by approaching the court in the guise of different reasons and attempting to get himself reinstated or avail retiral

benefits contrary to order of Supreme Court.

15. Here again, I am unable to understand as to how that case would have any applicability to the issue that arises for consideration in this case.

16. The next judgment relied on by the learned Senior Counsel appearing for the revision petitioner is reported in Junior Telecom Officers Forum

and others Vs. Union of India and others, . In that case, it was held that the issue directly and substantially involved, was decided in the earlier

Special Leave Petition and hence, the same could not be re-agitated again by another forum in the case of service matters. Earlier, it was filed by

employees union and the matter attained finality and thereafter, the matter was again re-agitated by another forum. In that context, it was held so by

the Hon"ble Apex Court.

17. In this case, the issue was not decided earlier in I.A. No. 113 of 2015 and the same was simply dismissed as not pressed. Hence, here again, I

am of the view that the said judgment of the Hon"ble Apex Court has no application to this case.

18. The last judgment relied on by the learned Senior Counsel appearing for the revision petitioner is reported in Byram Pestonji Gariwala Vs.

Union Bank of India and others, . That case arose under Order 23 Rule 3 C.P.C. The Hon"ble Apex Court held that the compromise decree

signed by counsel and not by parties in person, is binding, executable and operates as res judicata. Further, the Hon"ble Apex Court held that the

counsel has authorisation to enter into compromise. Here again, I am not able to understand as to how the said judgment is applicable to the

present case. Hence, I have no hesitation to reject the submissions made by the learned Senior Counsel appearing for the revision petitioner.

19. On the other hand, the judgment of the Bombay High Court in the case of Miguel Caetano Francisco Afonso alias Miguel Afonso and Another

Vs. Ana Anunciacao Fernandes alias Annie Coelho and Others, is squarely applicable to the facts of the present case.

20. Further, in the judgment relied on by learned counsel appearing for the respondent reported in Mangayarakarasi Ammal and 2 others Vs.

Nagammal and 2 others, , it was held that the second application for the same relief is maintainable, if the issue was not decided finally and

conclusively in the earlier application. In my view, the said judgment squarely applies to the present issue.

21. Likewise, the judgment of the Division Bench of this Court reported in M/s. Olympic Cards Limited Vs. Standard Chartered Bank, Small

Medium Enterprises Banking Consumer Banking, is also squarely applicable to the facts of the present case. In para 13 of the said judgment, the

Division Bench has held that"" the order passed by the Trial Court granting withdrawal of suit without liberty would not operate as res judicata."" It is

useful to extract the following passage from para 13 of the said judgment and the same is extracted hereunder:--

The Order passed by the trial Court granting withdrawal of suit without liberty would not operate as res judicata. The doctrine of res judicata is

based on the principle of conclusiveness of judgment and finality of litigation. Section 11 of C.P. C and Rule (1) of Order XXIII operates in two

different spheres. To attract the doctrine of res judicata, there must be two suits, one former and the other subsequent, the Court which decided

the earlier suit must be competent to take up the later suit, the matter directly and substantially in issue must be the same either actually or

constructively in both the suits, the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided in the

earlier suit by the Court, the parties to the suit or the parties under whom they or any of them claim must be the same in both the former and

subsequent suit and the parties in both the suits must have litigated under the same title. In case, these mandatory conditions are satisfied, the

subsequent suit would be barred under Section 11 of C.P.C. The abandonment of suit as provided under Rule (1) of Order XXIII does not

involve any such adjudication on merits. This rule is essentially based on public policy that a fresh suit on the basis of the very same cause of action

should not be permitted at a later point of time, unless leave was taken for such institution.

This provision therefore can be invoked only in case there was a valid proceedings which was abandoned midstream without obtaining consent

from the Court. The bar is against the institution of a fresh round of litigation on the basis of the very same cause of action. Since the provision bars

a later litigation on account of a former litigation on the very same point, the Court, before axing the subsequent suit, must be convinced that a suit

was instituted earlier and it was taken on file by the Court and inspite of the readiness of the Court and the defendant to decide the suit on merits,

the plaintiff has withdrawn the proceedings without liberty.

22. For all the reasons stated above, I am of the opinion that the revision petitioner has not made out any case warranting this Court to interfere

with the order of the Trial Court. In the result, the order of the learned Principal District Munsif, Alandur dated 13.7.2015 made in I.A. No. 639 of

2015 in O.S. No. 809 of 2007 is confirmed and the civil revision petition is dismissed. No costs. Consequently, connected miscellaneous petition

is closed. However, taking into account the fact that the suit is of the year 2007, a direction is issued to the learned Principal District Munsif,

Alandur, to dispose of the suit in O.S. No. 809 of 2007, on merits and in accordance with law, within a period of six months from the date of

receipt of a copy of this order.