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SAROJA

v.

CHINNUSAMY (DEAD) BY LRS. AND ANR.

AUGUST 24, 2007

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[TARUN CHATTERJEE AND P.K. BALASUBRAMANYAN, JJ.]

*Code of Civil Procedure, 1908:*

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*s.11—Res judicata—Property dispute—Respondent No.3 filed suit against her husband, 'K', for declaration of title—No appearance caused by 'K'—While suit still pending, 'K' sold property to Appellant—Appellant did not implead herself in suit filed by Respondent No.3—Instead filed suit against Respondent No.3 for declaration of title in respect of same property—Former suit decreed **ex-parte** in favour of Respondent No.3 during pendency of subsequent suit filed by Appellant—'K' did not take step to set aside the **ex-parte** decree which attained finality—Effect of—Held: By virtue of the **ex-parte** decree passed in the former suit, subsequent suit filed by Appellant is hit by **Res judicata**, as all six conditions indicated in s.11 for constituting **res judicata** are duly satisfied.*

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In 1989, Respondent No.3 filed a suit against her husband, 'K', for declaration of title in respect of a property, claiming title in terms of an oral partition made in 1985. No appearance was caused by 'K', although service of notice was effected on him. While the suit was still pending, 'K' sold the property to Appellant in 1990. Appellant did not take any step to implead herself in the suit filed by Respondent No.3 against 'K'. Instead, in 1990 itself,

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Appellant filed a suit against Respondent No.3, for declaration of title in respect of the very same property claiming absolute ownership and possession. In 1992, the former suit was decreed *ex-parte* in favour of Respondent No.3 during pendency of the subsequent suit filed by Appellant. 'K' did not take any step to set aside the *ex-parte* decree. The *ex-parte* decree passed in the

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former suit attained finality. In 1993, the subsequent suit filed by Appellant was also decreed. Respondent No.3 filed appeal against the decree in the subsequent suit which was allowed by the First Appellate Court. High Court confirmed the judgment of the First Appellate Court holding that the *ex-parte* decree passed in favour of Respondent No.3 in the former suit operated as *res*

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*judicata* in the subsequent suit filed by Appellant. Hence the present appeal. A

**Dismissing the appeal, the Court**

**HELD: 1.** The general principles of *res judicata* have been incorporated in Section 11, CPC. After a careful reading of the provisions under Section 11, CPC, it is discernible that in order to constitute *res judicata*, the following conditions must be satisfied: B

- (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; C
- (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; D
- (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. [Para 4] [307-F; 308-B, C, D, E] E

2.1. The *ex parte* decree passed in the former suit would operate as *res judicata* in the subsequently filed suit of the appellant as all the six conditions indicated in Section 11, CPC for constituting *res judicata* were duly satisfied.

[Para 8] [310-D, E] F

2.2. So far as the conditions namely (i), (ii) and (iii) are concerned, no dispute can be raised or was raised by the parties as the said conditions have been fully satisfied in the facts of this case. [Para 8] [310-E]

2.3. With regard to condition no. (iv), admittedly, summons was duly served upon 'K', the husband of Respondent No.3, and inspite of such service of summons, 'K' thought it fit not to appear or to contest the suit filed against him. Once an *ex parte* decree is passed against 'K', 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* H

A 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, Condition No. (iv) was satisfied and accordingly it cannot be held that the principle of *res judicata* would not apply. Admittedly, the appellant in her plaint had not made any case of fraud or collusion either against 'K' or against the respondents. 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, 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 'K' in the manner indicated above or, since, even the *ex parte* decree was also not challenged on the ground that 'K' and respondent No. 3 colluded amongst themselves and out of such collusion, 'K' 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 'K' and the appellant in respect of the suit property was a fraudulent one. [Para 9] [310-G; 311-A, B, C, D, E]

2.4. Appellant was litigating on the basis of the title acquired by her from 'K' against whom the *ex parte* decree was passed in the former suit. Appellant, although was not a party to the former suit, claimed through 'K' in the suit subsequently filed by her. 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. Therefore, Condition (v) is also satisfied. [Para 10] [312-G; 313-A]

2.5. Condition No. (vi) is also fully satisfied. [Para 11] [313-B]

*Arukkani Ammal v. Guruswamy* The Law Weekly Vol.100 (1987) 707 and *Bramhanand Rai v. Dy. Director of Consolidation, Ghazipur* AIR [1987] All 100, approved.

*A.S. Mani (deceased) by L.Rs. Thirunavukkarasu & Ors. v. M/s. Udipi Hari Niwas represented by Partners and Ors.*, (1996) 1 Madras Law Journal 171, distinguished.

*Ishwardas v. The State of Madhya Pradesh & Ors.* AIR (1979) SC 551 A  
and *Aanaimuthu Thevar (Dead) by Lrs v. Alagammal & Ors.*, JT (2005) 6 SC  
333, relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3907 of 2007.

From the final Judgment and Order dated 4.3.2005 of the High Court of B  
Judicature at Madras in Second Appeal No. 840 of 1994.

R. Nedumaran and K.S. Mahadevan for the Appellant.

V. Prabhakar, V. Subramani and Revathy Raghavan for the Respondents.

The Judgement of the Court was delivered by C

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 D  
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 D  
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. F

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: G

"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 H

A 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 -

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

F 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

G 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

H property to Saroja, the appellants 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

A 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.

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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.

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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 in spite of such service of summons, Kuppusamy thought it fit not to

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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 v. 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



A 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."*

B (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 v. 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. v. 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.

F 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 v. 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 Lrs v. 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.

B.B.B.

Appeal dismissed.