



S.A.(MD)No.366 of 2009

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 01.08.2024

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.(MD)No.366 of 2009

and

M.P.(MD)No.2 of 2009

- 1.Chidambaram
- 2.Kondu Reddiar
- 3.Ramasamy Reddiar (Died)
- 4.Gomathiammal
- 5.Perumalakal
- 6.Sivagamiammal

Lakshmanaperumal (Died)

(Lakshmanaperumal died on 25.10.2008 during
the pendency of A.S.No.59/2006)

- 7.L.Mariammal
- 8.Varadaraja Perumal
- 9.Sivasankar
- 10.Kandasamy

*(Appellants 9 and 10 are declared as majors
and discharged the guardianship of their mother
vide Court order dated 19.08.2019 made in
C.M.P.(MD)Nos.2965 & 2966/2019)*



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11.Kondal Samy

12.Chinnathai

... Appellants

(Appellants 11 and 12 are brought on record as LR's of the deceased 3rd appellant as per order dated 11.08.2015 made in M.P.(MD)Nos.1 to 3 of 2014)

Vs

Kannan (Died)

2.Sridevi

3.Arunraj Kumar

4.Rajalakshmi

... Respondents

(Respondents 2 to 4 are brought on record as LR's of the deceased sole respondent vide Court order dated 18.08.2023 made in C.M.P.(MD)Nos.6452 & 6453 of 2023)

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree passed in A.S.No.59 of 2006 dated 26.11.2008 on the file of the Sub-Court, Kovilpatti reversing the judgment and decree passed in O.S.No.208 of 2003 dated 24.04.2006 on the file of the District Munsif Court, Kovilpatti.

For Appellants

: Mr.S.Meenakshisundaram
for Mr.D.Nallathambi

For Respondents

: Mrs.P.Rajalakshmi for
Mr.K.Govindarajan for R2 and R4
Mr.R.Murali for R3



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JUDGMENT

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The defendants 1, 2 , 4, 5 and the legal heirs of the third defendant are the appellants. The respondent herein filed a suit seeking declaration of title and recovery of possession in respect of the encroached portion of the suit property. The plaintiff also sought for injunction in respect of the remaining portions. The defendants filed counter claim seeking declaration that suit items 1, 2, 3 (4 and 6) and 5 belonged to the defendants 3, 4, 2, 1 and 5 respectively and for consequential injunction. The suit was dismissed by the trial Court and the counter claim preferred by the defendants was decreed as prayed for. Aggrieved by the same, the plaintiff preferred an appeal before the first appellate Court and the first appellate Court allowed the appeal and granted decree for recovery of possession. Aggrieved by the same, the defendants have come by way of this Second Appeal.

2. According to the respondent/plaintiff, the suit property is ancestral property belonged to the forefathers of the plaintiff. The suit property was enjoyed by the plaintiff's father Ramasamy Reddiar with patta in his name. After death of plaintiff's father, he succeeded to the suit property and patta was also transferred to his name. Thus, the



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plaintiff has been enjoying the same, by paying tax to the Government.

Since the plaintiff went out of the suit village, in connection with his work, the suit property is lying waste without any crop. The defendants were permitted by the plaintiff to store hay sticks in the suit property. After plaintiff returned to his native place, permission granted to the defendants was cancelled and the plaintiff has been enjoying the same. The defendants made an attempt to encroach the suit property and hence, the present suit was laid initially seeking injunction. Pending suit, the defendants trespassed into the suit property and started collecting hay sticks and also laid stones in the suit property. Therefore, the plaint was amended seeking declaration of title and recovery of possession.

3. The defendants filed a written statement admitting the title and possession of plaintiff's father Ramasamy Reddiar. However, the averments in the plaint as if plaintiff succeeded to the suit property after death of his father and he has been in possession and enjoyment of the same were specifically denied. The averments regarding permission granted to the defendants and its subsequent cancellation were also denied. It was claimed by the defendants that the plaintiff's father Ramasamy Reddiar wanted to sell the suit property to meet the family



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necessity and approached one Chennappa Reddiar of Nagampatti to sell the suit property. The said Chennapa Reddiar contacted the defendants 1 to 4 and father in law of 5th defendant Kumarasamy Reddiar and clinched the deal for purchase of the suit property by the defendants at the rate of Rs.150/- per cent. The defendants claimed that the plaintiff orally sold the property to the defendants as per consideration mentioned above. In support of the oral sale, a document was executed in a stamp paper with a value of Rs.2.50 paise. The plaintiff agreed to execute the sale deed in respect of separate portions of the suit property sold to each of the defendants. The defendants also filed a plan along with the written statement depicting separate portions sold to the defendants 1 to 5 with common pathway on the Southern side. After purchase, the defendants approached the Village Administrative Officer and had put up boundary stone in respect of the portions purchased by each of them. The defendants also claimed that they had been in possession and enjoyment of the portions of the suit property purchased by them for more than 12 years and hence, entitled to prescriptive title. Thus, by denying the title as well as the possession of the plaintiff over the suit property and also claiming adverse possession, the defendants sought for dismissal of the suit. They also filed a counter claim seeking declaration and injunction



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in respect of suit property by dividing the same as items 1, 2, 3 (4 and 6) and item 5, described in the schedule of the counter claim in favour of defendants 3, 4, 2, 1 and 5 respectively.

4. The defendants also filed additional written statement subsequent to the amendment of the plaint prayer by the plaintiff seeking inclusion of prayer for declaration and possession. In the additional written statement, the defendants denied the title of the plaintiff and disputed the maintainability of the suit against the defendants.

5. The plaintiff filed a reply statement denying the oral sale pleaded by the defendants and the various averments contained in the written statement.

6. Before the trial Court, the plaintiff was examined as P.W.1 and 2 other witnesses were examined as P.W.2 and P.W.3. On behalf of the plaintiffs, 13 documents were marked as Ex.A1 to Ex.A13. The defendants 1 to 5 were examined as D.W.1 to D.W.5 and two other witnesses were examined as D.W.6 and D.W.7. On behalf of the defendants, 7 documents were marked as Ex.B1 to Ex.B7. The Advocate Commissioner's report and plan were marked as Ex.C1 and Ex.C2.



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7. The trial Court, on appreciation of oral and documentary evidence available on record, came to the conclusion that the plaintiff was not entitled to any relief and dismissed the suit. However, the trial Court decreed the counter claim by granting declaration of title and injunction in favour of the defendants. Aggrieved by the same, the plaintiff preferred an appeal in A.S.No.59 of 2006 on the file of the Sub Court, Kovilpatti. The first appellate Court allowed the appeal and set aside the judgment and decree passed by the trial Court. The first appellate Court, after setting aside the decree in favour of the defendants in the counter claim, granted decree in favour of the plaintiff by directing the defendants to hand over the possession of the suit property to the plaintiff. Aggrieved by the same, the defendants 1, 2, 4 and 5 and the legal representatives of the third defendant preferred this Second Appeal.

8. At the time of admission, this Court formulated the following substantial questions of law by an order dated 12.06.2009:

“A) Whether the lower appellate Court is correct in entertaining the appeal in A.S.No.59 of 2006 and allowing the



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same when the respondent/plaintiff did not question the decree portion of the counter claim of the appellants/defendants in O.S.No.208 of 2003 and thus the appeal before the lower appellate Court is hit by Resjudicata?

B) Whether the finding of the lower appellate Court that the denial of title ought to have been brought to the knowledge of the owner in spite of the open, continuous, uninterrupted, long possession of the occupier is incorrect and hence warrant inference?

C) Whether the judgment and decree of the lower appellate Court is liable to be set aside since it is against a dead person namely the 6th respondent in A.S.No.59 of 2006?

D) When the judgment and decree of the lower appellate Court is against the law that the plaintiff has to succeed only by proving his case and not on the basis of the weakness of the defence case?

E) Whether this Hon'ble Court has to interfere with the judgment of the lower appellate Court since the lower appellate Court has failed to give reasons how the trial Court was wrong while reversing the judgment of the trial Court?"

9. The learned counsel for the appellants mainly submitted that the plaintiff filed the first appeal only by questioning the dismissal of the suit and they have not questioned the decree granted by the trail Court allowing the counter claim of the defendants. Therefore, the declaration



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and injunction granted in favour of the defendants, by allowing the counter claim, had attained finality and the same would operate as *res judicata* against the appeal filed by the plaintiff, questioning the dismissal of the suit, as the issues involved in the suit and counter claim are one and the same. In support of the said contention, the learned counsel by referring to the valuation column of the first appeal grounds submitted that Court fee on the first appeal was paid only on the suit valuation and no separate Court fee was paid by valuing the counter claim. The learned counsel also submitted that the memorandum of grounds of first appeal contains only the schedule of the property as mentioned in the plaint and schedule of the property as described in the counter claim was not at all included in the memorandum. Therefore, in nutshell, it is the specific contention of the learned counsel for the appellants that subject matter of the counter claim was not at all subject matter of the appeal before the first appellate Court and hence, the decree passed in favour of the defendants in the counter claim will bar the first appeal filed against the dismissal of the suit as per doctrine of *res judicata*.

10. The learned counsel further submitted that 6th respondent in the



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first appeal viz., Lakshmana Perumal died on 25.10.2008 even prior to the hearing of the first appeal. The appeal was disposed of on merits without impleading his legal representatives. In such circumstances, the first appellate Court decree is a nullity as against the deceased 6th respondent in the first appeal. The learned counsel further submitted that the plaintiff has to win the case based on his own strength and he cannot rely on the weakness of the defendants and the said rudimentary principle was not followed by the first appellate Court. In support of his contention, the learned counsel relied on the following judgments:

1. ***M/s.DMY Creation SDN.BHD Vs. M/s.Lyca Production Private Limited*** reported in **2024:MHC:891**;
2. ***Girija Vs. Rajan*** reported in **2015 SCC OnLine Ker 3799**; and
3. Unreported judgment of High Court of Himachal Pradesh in Regular Second Appeal No.57 of 2017.

11. Per contra, the learned counsel appearing for the respondents submitted that in the memorandum of grounds of first appeal, the plaintiff challenged the correctness of the decree granted by the trial Court allowing the counter claim and therefore, the first appeal was filed



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challenging the dismissal of the suit as well as decree in the counter claim. The learned counsel further submitted that the question of *res judicata* raised by the appellants was not raised before the first appellate Court and both the parties advanced arguments on the correctness of the decree passed in the suit as well as in the counter claim before the first appellate Court. Therefore, it is not open to the appellants to raise the question of *res judicata* for the first time in the Second Appeal. As far as the point raised by the learned counsel for the appellants regarding death of 6th respondent in the first appeal is concerned, the learned counsel for the respondents submitted that the fact of death of 6th respondent was not at all brought to the notice of the respondent (appellant before the first appellate Court) and hence, the arguments in first appeal was advanced by both the parties without knowledge of the death of 6th respondent in first appeal.

Answer to substantial question of law (A):

12. A perusal of all the original records would suggest that the trial Court has not given any separate number for the counter claim filed by



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the defendants. The subject matter of the suit and the subject matter of the counter claim are one and the same. However, the defendants claimed that they purchased different portions of the suit property. The portions purchased by the defendants are shown in the plan annexed with the written statement. Therefore, it is not in dispute that the subject matter of the suit as well as counter claim are one and the same. The defendants are admitting the title of the plaintiff's father over the suit property. However, the defendants claimed that the plaintiff's father orally sold the suit properties to the defendants by dividing the same into 5 different portions. In the light of the averments contained in the plaint and written statement, it is clear that the issues arising for consideration in the suit and counter claim are inextricably linked with each other. In fact, the trial Court formulated the following common issues in the suit as well as counter claim:

“6. வழக்குரை மற்றும் எதிர்கோரிக்கை ஆகியவற்றை
பரிசீலனை செய்து, வழக்கின் தீர்விற்காக கீழ்க்கண்ட
எழுவினாக்கள் வனையப்பட்டன:

1.தாவா சொத்தில் வாதியின் அனுபவத்தை
பிரதிவாதிகளோ, அவர்தம் ஆட்களோ, இடைஞ்சல் செய்யக்
கூடாது என்கிற நிரந்தர உறுத்துக்கட்டளை பரிகாரம்
கிடைக்கக்கூடியதா?

2.தபசில் சொத்துக்கள் பிரதிவாதிகளுக்கு
பாத்தியப்பட்டதா?



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3.பிரதிவாதிகள் கோரும் நிரந்தர உறுத்துக்கட்டளை
பரிகாரம் கிடைக்கக்கூடியதா?

4.பிரதிவாதி கோரும் இழப்பீடு தொகை கிடைக்கக்
கூடியதா?

5.பிற பரிகாரம் என்ன?

கூடுதல் எழுவினாக்கள்:

1.தபசில் நிலம் வாதிக்கு பாத்தியப்பட்டது என்கிற
விளம்புகை பரிகாரம் வாதிக்கு கிடைக்கத்தக்கதா?

2.தபசில் நிலத்தில் பிரதிவாதி ஆக்கிரமித்து
வைக்கோல் படப்பு மற்றும் இதர ஆக்கிரமிப்புகள்
செய்துள்ளாரா?

3.தபசில் நிலத்தில் ஆக்கிரமிப்புகளை அகற்றி
காலிசுவாதீனம் ஒப்படைக்க கோரும் பரிகாரம் வாதிக்கு
கிடைக்கத்தக்கதா?"

13. A perusal of the original records would suggest that the trial Court dismissed the suit and decreed the counter claim. However, a single decree was drafted by the trial Court by mentioning the suit number alone without mentioning the counter claim as well as rank of the parties in the counter claim in the preamble portion. However, in the valuation column, the valuation of the suit and counter claim were separately given. Likewise in the schedule of property column also the suit schedule property and counter claim schedule properties were separately described. The composite decree drafted by the trial Court



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reads as follows:

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“1.வாதிyின் வழக்கு தள்ளுபடி செய்யப்படுகிறது.

2.பிரதிவாதிகளின் எதிர்கோரிக்கை அனுமதிக்கப்பட்டு, எதிர்கோரிக்கையில் கண்ட 1வது அயிட்டம் 3ம் பிரதிவாதிக்கும், 2வது அயிட்டம் 4ம் பிரதிவாதிக்கும், 3வது அயிட்டம் 2ம் பிரதிவாதிக்கும், 4, 6வது அயிட்டம் 1ம் பிரதிவாதிக்கும், 5வது அயிட்டம் 5ம் பிரதிவாதிக்கும் பாத்தியப்பட்டது என விளம்புகை செய்யப்படுகிறது. அதில் வாதியோ, அவரது வகையாட்களோ, எவ்வித இடையூறும் செய்யக்கூடாதென நிரந்தர உறுத்துக்கட்டளைப் பரிகாரம் வழங்கப்படுகிறது.

3.செலவுத்தொகையைப் பொறுத்து ஆணையில்லை.

வாதிyின் செலவு ரூ.1246/-

பிரதிவாதிyின் செலவு ரூ.2347/-”

14. In the valuation slip appended with the decree only the suit claim was valued and the details of the Court fee paid on suit valuation alone mentioned. The value of the counter claim and the details of Court fee paid in the counter claim was not included in the valuation slip. Since a composite decree was prepared by the trial Court in respect of the suit as well as the counter claim by mentioning the suit number alone, the plaintiff preferred only one appeal by mentioning the original suit number alone in the preamble portion of the memorandum of first appeal. However, a perusal of the grounds of appeal would suggest that the plaintiff challenged the decree passed in the counter claim also in the



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first appeal. Grounds No.2, 3, 4, 10, 11, 12 and 13 in the memorandum of grounds of first appeal would suggest that the plaintiff seriously challenged the correctness of the decree passed in the counter claim. Therefore, the submission made by the learned counsel for the appellants that the decree in the counter claim was not subject matter of the appeal before the first appellate Court is not acceptable to this Court, in the light of the various grounds raised by the plaintiff in the memorandum of grounds of first appeal.

15. The learned counsel for the appellants by referring to the valuation column in the memorandum of first appeal submitted that the plaintiff only valued the suit claim and the value of the counter claim has not been included in the valuation column of the first appeal and therefore, failure to include the value of the counter claim and failure to pay Court fees thereon would disentitle the appellants from claiming that the first appeal was filed against the counter claim also. As mentioned earlier, the trial Court prepared a composite decree for suit as well as counter claim and in the valuation slip, only the suit value was mentioned and the value of the counter claim was not mentioned. Therefore, there is every reason to believe that the plaintiff as well as the appeal examiner



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who scrutinized the appeal papers were carried away by the valuation slip appended with the original decree. If the appeal is not properly valued, the subject matter of the appeal has to be decided based on the body of the appeal viz., the grounds of challenge. The scope and subject matter of the appeal cannot be decided solely based on the valuation column alone. If memorandum of appeal is not properly valued and sufficient Court fee is not paid, it is the duty of the Court to point out the same and return the memorandum. In the case on hand, though in the grounds of appeal, the plaintiff challenged the decree passed in the counter claim, failed to include the value of the counter claim in the valuation column of the first appeal and pay sufficient Court fee. The office of the first appellate Court also failed to note the improper valuation of the appeal and numbered the first appeal. It is also seen from the records and discussion of the first appellate Court in its judgment, both the counsel for the plaintiff and the defendants advanced their arguments on the merits of the suit claim as well counter claim, treating the appeal as the one against dismissal of the suit and allowing of the counter claim. It is pertinent to note that points for determination 7 and 8 framed by the first appellate Court relating to merits of the counter claim and the same are extracted below:



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“7. பிரதிவாதிகள் வாதியின் தகப்பனாரிடமிருந்து பெற்றதாகச் சொல்லும் கிரையத்தின் அடிப்படையில் தாவாச் சொத்துக்கு உரிமை பாத்தியம் பெற்றிருக்கிறார்களா?

8.பிரதிவாதிகளுக்கு எதிர்கோருரிமையில் அவர்கள் கோருவது போல தாவாச் சொத்து அவர்களுக்கே பாத்தியப்பட்டது என்ற வகையில் விளம்புகைப் பரிகாரமும், அதனை வாதி தடை செய்யக்கூடாது என்ற வகைக்கு நிரந்தர உறுத்துக்கட்டளைப் பரிகாரமும் வழங்கியுள்ள கீழமை நீதிமன்றத்தின் தீர்ப்பு மற்றும் தீர்ப்பாணை நிலைநிற்கத்தக்கதா?”

16. Therefore, it is very well clear that both the parties and their respective counsels very well understood the scope of the appeal and advanced their arguments on the suit claim as well as counter claim. Before the first appellate Court, the appellant herein/defendants had not raised any objection based on doctrine of *res judicata* on the ground that the plaintiff failed to challenge the decree passed in counter claim. The failure of the appellants to raise that point and their active participation in the appeal treating the same as one filed against the counter claim also would amount to waiver of their rights to raise the question of *res judicata*. Whether the objection as to *res judicata* can be waived will be discussed by this Court in the following paragraphs.



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17. The learned counsel for the appellants by relying on the judgments referred above submitted that there is a need to file a separate appeal against the decree in the counter claim. In ***M/s.DMY Creation SDN.BHD Vs. M/s.Lyca Production Private Limited*** reported in **2024:MHC:891**, while considering the necessity for filing separate appeal, a Division Bench of this Court observed as follows:

“11.12. In the light of the aforesaid decisions, it can be easily concluded that counter claim is in the nature of a cross-suit for all purposes, having a cause of action that can be independently enforced and necessary court-fee has to be paid on the relief sought for, both in the suit stage as well as in the appellate stage separately. When the suit and counter claim are disposed of by a common judgment, separate appeals have to be filed by the parties and failure to file appeal on the common judgment passed either as against the suit or the counter claim would result in attaining finality and the doctrine of res judicata would apply.”

18. In ***The Idol of Sri Renganathaswamy Vs. J.Sriram and Ors*** reported in **2023-2-Lw577**, while considering the similar question, this Court held that single appeal against unified decreed passed in suit as well as counter claim was very well maintainable without separate appeal. The relevant observations reads as follows:



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“28.5. From the combined reading of the above provisions, it is clear that one appeal is maintainable for more than one reason that the suit as well as counter claim commonly adjudicated upon preparing of common issues and unified judgment was delivered and the operative portion of the said unified judgment culminated to the consolidated decree with respect to the relief both in suit as well as the counter claim, the judgment referred by the learned counsel for the respondents reported in 2015 (3) SCC 624 also emphasised the above principle impliedly. In the said case, tenant filed the suit for injunction claiming absolute right over the property and the temple authority also filed the suit for recovery of possession. Both suits were tried together. The temple suit was decreed and tenant suit was dismissed. The tenant did not prefer any appeal against the dismissal of his suit for injunction and only preferred the appeal against the decree granted in favour of the temple. In the said circumstances, the Hon'ble Supreme Court in **Sri Gangai Vinayagar Temple v. Meenakshi Ammal**, reported in 2015 (3) SCC 624 held as follows:

“27. Procedural norms, technicalities and procedural law evolve after years of empirical experience, and to ignore them or give them short shrift inevitably defeats justice. Where a common judgment has been delivered in cases in which consolidation orders have specifically been passed, we think it irresistible that the filing of a single appeal leads to the entire dispute becoming sub judice once again. Consolidation orders are passed by virtue of the bestowal of



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inherent powers on the courts by Section 151 CPC, as clarified by this Court in *Chitivalasa Jute Mills v. Jaypee Rewa Cement* [(2004) 3 SCC 85]. In the instance of suits in which common issues have been framed and a common trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments. While so opining we do not intend to whittle down the principle that the appeals are not expected to be filed against every inconvenient or disagreeable or unpropitious or unfavourable finding or observation contained in a judgment, but that this can be done by way of cross-objections if the occasion arises. The decree not assailed thereupon metamorphoses into the character of a “former suit”. If this is not to be so viewed, it would be possible to set at naught a decree passed in Suit A by only challenging the decree in Suit B. Law considers it an anathema to allow a party to achieve a result indirectly when it has deliberately or negligently failed to directly initiate proceedings towards this purpose. Laws of procedure have picturesquely been referred to as handmaidens to justice, but this does not mean that they can be wantonly ignored because, if so done, a miscarriage of justice inevitably and inexorably ensues. The statutory law and the processual law are two sides of the judicial drachma, each being the obverse of the other. In the case in hand, had the tenant diligently filed an appeal against the decree at least in respect of OS No. 5 of 1978, the legal conundrum that has manifested itself and exhausted so much judicial time, would not have arisen at all.”

28.6. So the mandate of the precedent cited supra demands that if number of decrees are passed arising out of

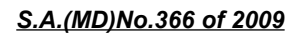


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common judgment where the number of suits were commonly adjudicated, the judgment debtor legally required to be file separate appeal against their disallowed portion. But, in the present case, there was no such situation arise. Suit as well as counter claim are decided in the unified proceedings and the operative portion of the judgment culminated into single consolidated decree and hence, the appeal is maintainable. In result, the common finding which was based for granting decree as well as dismissal of the suit is subject matter of the present appeal and hence, there is no question of application of the principle of res judicata.

28.7. So, the submission of the counsel that the present appeal is not maintainable, is not accepted and also the plea of res judicata is also not accepted and hence, the Question No.7 is answered negatively.”

19. Therefore, it is clear that where a single decree is drafted for suit claim as well as counter claim, a single appeal challenging the unified decree is very well maintainable and there is no need for the aggrieved party to file two separate appeals against decree in suit and counter claim. However, the appellant has to value the appeal in respect of suit claim as well as counter claim and pay proper Court fee on both the claims. As mentioned earlier, had the defect in the valuation been pointed out by the office of the first appellate Court, the appellants therein would have got an opportunity to cure the defect with regard to



20. It is also interesting to note that the appellants, who challenged judgment and decree passed by the first appellate Court, granting the suit for recovery of possession as claimed in the suit and dismissing the counter claim also failed to value the second appeal properly. The appellants herein also valued the second appeal as per the suit claim and paid the Court fee only for the suit claim. They failed to include the value of the counter claim in the second appeal valuation column and pay the Court fee on the counter claim. Therefore, the objection raised by the learned counsel for the appellants on the ground of *res judicata* is a double edged sword. If it is used to dismiss the first appeal on the ground of *res judicata*, on the very same ground, the Second Appeal would also be dismissed. If the valuation in the memorandum of appeal is considered as the sole criterion for deciding the subject matter of the second appeal, there is a danger of coming to the conclusion that the



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appellants herein failed to value the counter claim and affix proper Court fee thereon and hence, Second Appeal is confined to suit claim alone.

Therefore, the hyper technical objection raised by the learned counsel for the appellants is not acceptable to this Court.

21. Let us move on to decide whether the appellant is prevented by doctrine of waiver from raising the plea of *res judicata*. *Res judicata* is a principle developed based on rule of estoppel and the same has been developed to prevent multiplicity of proceedings and to give a quietus to the issues which have been already adjudicated upon. The rule of *res judicata* can be waived by the conduct of the parties.

22. In *V.Rajeshwari Vs. T.C.Saravanabava* reported in (2004) 1 SCC 551 equivalent to MANU/SC/1057/2003, the Hon'ble Apex Court held that the plea of *res judicata* can be treated as waived if the same was not raised at an appropriate stage in an appropriate manner. The relevant observation of the Hon'ble Apex Court reads as follows:

“14.That apart the plea, depending on the facts of a given case, is capable of being waived, if not properly raised at an appropriate stage and in an appropriate manner. The party adversely affected by the plea of res judicata may proceed on an assumption that his opponent had waived the



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*plea by his failure to raise the same. Reference may be had to **Pritam Kaur w/o S. Mukand Singh Vs. State of Pepsu and Ors.** - MANU/PH/0506/1962 (Full Bench) and **Rajani Kumar Mitra & Ors. Vs. Ajmaddin Bhuiya** – MANU/WB/0245/1928 : AIR 1929 Calcutta 163, and we find ourselves in agreement with the view taken therein on this point).”*

23. In *Moturi Seshayya and Ors. Vs. Sri Rajah Venkatadri Appa Row Bahadur* reported in (1916) 31 MLJ 219 equivalent to **MANU/TN/0118/1916**, a Division Bench of this Court held that the plea of *res judicata* is not the one which affects the jurisdiction of the Court and hence, a party is at liberty to waive it. The relevant observation of the Division Bench reads as follows:

“1. It must be remembered that the plea of res judicata is one which does not affect the jurisdiction of the Court, but is a plea in bar of a trial of a suit or an issue, as the case may be, which a party is at liberty to waive. It is quite easy to conceive of cases in which the parties to a former adjudication dissatisfied with it bring the matter again before the Courts without raising the plea of res judicata. Suppose in this case the tenants deliberately omitted to plead the adjudication of 1893 with a view, if possible, of getting the Court to hold that the rate of rent payable by them was less than what was found to be the rate in the previous suits. If after having invited a decision on the merits, would they now



be at liberty to go behind the last adjudication and ask for a re-trial of the issue, because the fresh finding was even, worse than the first against them. We certainly think not; and on principle it is impossible to make a distinction between a case where the plea is omitted to be taken by accident or mistake and where it is omitted to be taken by design. The only test, therefore, is whether as a matter of fact there has been an express decision on' a material issue, whatever maybe the materials on which that adjudication was arrived at. This is the view taken in two cases decided by the High Court of Allahabad in **Mallu Mal v. Jhamman Lall (1904) 1 A.L.J. 416** and **Dambar Singh v. Munwar Ali Khan (1915) 13 A.L.J. 764**.

2. It is contended for the appellant that this case invites the application of the maxim of competing estoppels or that estoppel against estoppel sets the matter at large. The exact meaning of that maxim or its scope is difficult of ascertainment, and in the recent case of **Poulton v. Adjustable Cover and Boiler Block Co. (1908) 2. Ch. 430 Parker, J.** as he then was, doubted the existence of any such doctrine. There may be cases where a person who pleads an estoppel may be prevented from pleading it by reason of his own representation or conduct, (see **Simm v. Anglo-American Telegraph Co. (1879) 5 Q.B.D. 188** and in that sense an estoppel against estoppel may be said to set the matter at large. We are not aware of any instance where the maxim was applied to a case of what is called estoppel by record, except a dictum of Lord Selborne in **The Queen v. Hutchings (1881) 6. Q.B.D. 300**. It must be remembered that though former adjudications are



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classified under the category of estoppels by English text-writers, the basis of the doctrine is different from true estoppel.”

24. In *Rajani Kumar Mitra and Ors. Vs. Ajmaddin Bhuiya* reported in *AIR 1929 Cal 163 equivalent to MANU/WB/0245/1928*, a Division Bench of Calcutta High Court following the above referred Division Bench judgment of this Court held that the plea of *res judicata* is capable of being waived by the parties. The relevant observation reads as follows:

*“3.....As has been observed by the learned Judges of the Madras High Court in **Seshayya v. Venhatadri Appa Row***

***MANU/TN/0118/1916 : (1916) 31 MLJ 219** the effect of not pleading the previous decree in answer to the plaintiff's claim in a suit stands on the same footing as if the defence was raised by the defendant and disallowed by the Court. It cannot be placed on a higher footing on any reasoning based upon common sense or law. The bar of *res judicata* is one which does not affect the jurisdiction of the Court but is a plea in bar which a party is at liberty to waive. If a party does not put forward his plea of *res judicata* in a suit he must be taken to have waived it or it must be taken to be a matter which ought to have been made a ground of attack and deemed to have been a matter directly and substantially in issue in the suit under Expl. (4), Section 11, Civil P.C. The party omitting to*



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plead res judicata intentionally invites the Court to decide the case on the merits and having failed to secure a decision in his favour he should not be allowed to go behind the last adjudication and ask for the trial of an issue which he could have raised at the previous trial.”

25. In *Pritam Kaur Vs. State of Pepsu and Ors.* reported in *AIR 1963 P&H 9* equivalent to *MANU/PH/0506/1962*, the Full Bench of Punjab High Court also expressed the view that the plea of *res judicata* can be waived. The relevant observation reads as follows:

“13. There is also a third ground on which the preliminary objection must fail. When the matter came up for decision before Khosla C. J. and myself on 13-9-1960, the objection as to res judicata was raised and in spite of it the matter as to the reconsideration of the vires of the Act was referred to the Full Bench with the observation that Chopra J. proceeded to decide the question after he had held that the decision on the same was not necessary. If that decision concluded the matter as is now contended, the reference to the Full Bench would have been meaningless and in any case the question would not arise. As the opposite party did not object to this course, it must be deemed to have waived the objection. It is not disputed and indeed cannot be that objection based on the rule of res judicata can be waived. Thus on this ground also the objection I fails.”



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26. A close scrutiny of the above mentioned judgments would make it clear that the plea of *res judicata* shall be raised by the party in an appropriate stage in an appropriate manner. Otherwise his failure to raise the same would amount to waiver of his right to raise the plea of *res judicata*. The appropriate stage to raise the plea of *res judicata* means earliest opportunity to raise the plea. In the case on hand, as soon as appellants herein received notice in the first appeal should have raised the plea of *res judicata*. They failed to raise the said plea and argued the matter on the merits of the suit claim as well as counter claim. Therefore, the first appellate Court framed points for determination on the merits of the counter claim and disposed of the appeal as if it was preferred against the decree passed in the suit claim as well as counter claim. In such circumstances, it is not open to the appellants, who failed to raise the plea of *res judicata* in the first appeal stage and invited an order on merits, to turnaround and try to raise the plea in the second appellate stage. In view of the discussion made earlier, I hold that the appellants waived the plea of *res judicata* by their failure to raise the plea of *res judicata* before the first appellate Court. Therefore, the substantial question of law (A) is answered against the appellants and in favour of the respondents.



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Answer to substantial question of law (C):

27. The learned counsel for the appellants vehemently contended that the 6th respondent in the first appeal viz., Lakshmana Perumal died on 25.10.2008 before hearing of the appeal and hence, the judgment and decree passed by the first appellate Court is a nullity as against his estate. The legal representatives of deceased Lakshmana Perumal have filed this appeal as appellants 7 to 10 along with other appellants. A perusal of the records would suggest that the appeal was taken up for hearing on 17.11.2008 and judgment was delivered on 26.11.2008. Therefore, it is clear that even before the first appeal is taken up for hearing, the 6th respondent in the first appeal Lakshmana Perumal had died. It is also seen from the records that Lakshmana Perumal was brought on record in the first appeal as legal representatives of the deceased third defendant Perumal Reddiar. The first appellate Court after recording the death of deceased third defendant Perumal Reddiar, by an order passed in I.A.No.129 of 2006, dated 10.12.2007, brought on record the respondents 6 to 8 therein as legal representatives of deceased Perumal Reddiar. 8th respondent before the first appellate Court viz., Sivakami Ammal is the



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wife of deceased Perumal Reddiar and mother of Lakshmana Perumal.

Therefore, one of the Class – I legal heir of Lakshmana Perumal viz., his mother Sivagami Ammal was already on record before the first appellate Court, when the appeal was disposed.

28. It is settled law, one legal heir is sufficient to represent the estate of the deceased. In the case on hand, the estate of the deceased Perumal Reddiar was represented by Perumalakal and Sivagamiammal respondents 7 and 8 before the first appellate Court. The estate of the deceased Lakshmana Perumal was represented by his mother Sivagamiammal, 8th respondent before the first appellate Court. Therefore, the submission made by the learned counsel for the appellants that the decree passed by the first appellate Court against the deceased 6th respondent therein Lakshmana perumal was a nullity is not acceptable to this Court in view of the fact that his estate was represented by 8th respondent therein. It is true, 8th respondent was not formally recorded as legal heir of 6th respondent. However, she was represented by her counsel, who also filed vakalat for deceased Lakshmana Perumal and actively participated in the appeal. When one of the legal heirs of deceased Lakshmana Perumal was on record, there is no abatement of



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appeal against Lakshmana Perumal's estate. Therefore, I hold that the estate of deceased Lakshmana Perumal was represented by one of his heirs viz., Sivagamiammal before the first appellate Court and hence, the judgment and decree passed by the first appellate Court cannot be held as a nullity. The question of law (C) is accordingly answered against the appellants and in favour of the respondents.

Answer to substantial questions of law B, D and E:

29. The defendants in their pleadings clearly admitted the title of plaintiff's father Ramasamy Reddiar. It was their case that Ramasamy Reddiar sold the suit property to the defendants orally and executed an agreement agreeing to execute separate sale deeds in respect of separate portions of the suit property orally sold to the defendants. The said document was marked as Ex.B6. Ex.B6 is an unregistered document and it is only an agreement to execute the sale deed in favour of defendants. Therefore, title will not pass on to the defendants under Ex.B6. The witnesses examined on behalf of the defendants clearly admitted that no registered document was executed in their favour except Ex.B6. The attestors of Ex.B6 were examined as D.W.6 and D.W.7. D.W.6 clearly admitted in his evidence that there was a police case against him in



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connection with assault of uncle of plaintiff, one Kumarasamy.

Therefore, based on the evidence of D.W.6 alone, we cannot come to a conclusion that Ex.B6 was a genuine document. The first appellate Court also noted that the evidence of other attester D.W.7 was not useful to prove due execution of Ex.B6 as he deposed that he did not see Ramasamy Reddiar signing Ex.B6.

30. Therefore, taking into consideration all these aspects, the first appellate Court came to a factual conclusion that the defendants failed to prove that Ex.B6 document was actually executed by plaintiff's father Ramasamy Reddiar. Therefore, the defendants cannot rely on Ex.B6 as a source for their possession over the suit property. The first appellate Court by relying on the evidence of defendants as D.W.1 to D.W.4 held that defendants had been approaching the plaintiff, requesting him to execute a regular sale deed in their favour, knowing fully well that Ex.B6 agreement will not confer any title to them. Therefore, it is clear, the defendants never exhibited any hostile possession denying the title of the plaintiff. If really they have been in enjoyment of the property with necessary animus to deny the title of the plaintiff, there was no necessity



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for them to approach the plaintiff and request him to execute a regular sale deed. Further, the defendants claim possession over the suit property only under Ex.B6 agreement. Therefore, at the most, their possession can only be permissive not hostile to the plaintiff. The first appellate Court on proper appreciation of the entire evidence available on record held that defendants failed to establish their hostile possession over the suit property for more than a statutory period. The said conclusion reached by the first appellate Court is not vitiated by any perversity. Therefore, the substantial questions of law B, D and E are also answered against the appellants and in favour of the respondents.

31. In view of the answer to substantial questions of law framed at the time of admission, this Second Appeal fails and the same is dismissed by confirming the judgment and decree passed by the first appellate Court. There shall be no order as to costs. However, the respondents are directed to pay a court fee of Rs.588/- payable by them on value of counter claim before the first appellate court within a period of eight weeks from the date of receipt of this judgment. Consequently, connected miscellaneous petition is closed.



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NCC : Yes / No
Index : Yes / No
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01.08.2024

To

- 1.The Sub-Court, Kovilpatti.
- 2.The District Munsif Court, Kovilpatti.
- 3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

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