

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

TUESDAY, THE 23RD DAY OF JUNE 2015/2ND ASHADHA, 1937

RSA.NO. 153 OF 2015

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AGAINST JUDGMENT IN AS 9/2011 OF ADDITIONAL DISTRICT COURT,
NORTH PARAVUR**

AGAINST THE JUDGMENT IN OS 44/2009 OF MUNSIF COURT, ALUVA

APPELLANT/APPELLANT/PLAINTIFF:

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ANGAMALY SERVICE CO-OPERATIVE BANK LTD.NO.714,
REPRESENTED BY ITS PRESENT SECRETARY LATHIKA.V.K,
AGED 57 YEARS, W/O.JAYAPRAKASH,
KOOTTUNKAL HOUSE, PARAPPURAM.P.O
KANJOOR, ERNAKULAM DISTRICT.**

BY ADV. SRI.WILSON URMESSE

RESPONDENTS/RESPONDENT/DEFENDANT:

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K.P.JOSE, AGED 61 YEARS,
S/O.K.P.POULO, KALLOOKARAN VEETTIL, ANGAMALY KARA
ANGAMALY VILLAGE, ANGAMALY.P.O, PIN-683572.**

**R1 BY ADVS.SRI.S.SREEKUMAR (SR.)
SRI.P.MARTIN JOSE
SRI.P.PRIJITH
SRI.THOMAS P.KURUVILLA**

**THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON
23-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

AS

A.HARIPRASAD, J.

R.S.A.No.153 of 2015

Dated this the 23rd day of June, 2015

J U D G M E N T

The second appeal arises in an interesting question of law as to the sustainability of the plea of res judicata raised by the respondent.

2. Heard the learned counsel for the appellant and the learned Senior counsel for the respondent.

3. Facts stated shortly are the following: Appellant is a Co-operative Bank. It filed a suit against the respondent (landlord) for recovery of advance amount paid at the time of taking a building on lease. Subsequently, the appellant vacated the premises. The respondent filed O.S.No.191 of 2006 before Munsiff's Court, Aluva, claiming arrears of rent from the appellant, Co-operative Bank. After trial the said suit was decreed. Admittedly, the decree had become final. In that suit the appellant had raised a similar claim regarding payment of advance amount to the landlord. It is also contended by the appellant in the earlier suit that they are entitled to get an adjustment of the advance amount of Rs.75,000/-

towards the rent arrears claimed by the respondent (landlord). In paragraph 19 of the judgment, the trial court considered the issue and rejected the claim of adjustment as no evidence was produced to prove the payment of advance as claimed. As mentioned earlier, this finding has become final.

4. Learned counsel for the appellant contended that this finding will not work as res judicata in the present suit claiming ₹75,000/- paid as advance to the respondent. Courts below negatived this contention finding that it is hit by res judicata. Learned Senior counsel appearing for the respondent contended that there is no legal infirmity in the finding of the courts below that the plaintiffs' claim is barred by res judicata. It is rudimentary knowledge that the principle of res judicata is a procedural provision and it bars the courts from exercising, its jurisdiction to determine the *lis* if it has attained finality. On a mere reading of Section 11 CPC, it can be seen that the courts are precluded from trying any suit or issue in which the matter directly and substantially

in issue has been directly and substantially in issue in a former suit. In order to attract the rule under Section 11 CPC it has to be further satisfied that the former suit and the present suit must be between the same parties, or between parties under whom they or any of them claim or litigating under the same title. Another ingredient required to attract the rule of res judicata is that the former suit must have been adjudicated by a court competent to try the suit. Most essential condition is that the former suit must have been heard and finally decided by the court.

5. Learned counsel for the appellant relied on two decisions of this court, viz., **Kalukurumban v. Sarojini Amma** [1997 (1) KLT 481] and **Avira Joseph v. Varghese Mathai and Others** [2010 (3) KHC 564]. In **Kalukurumban's** case the observation is that though a previous suit for injunction was dismissed on the ground of non-establishment of identity, the second suit for declaration of title and recovery of possession is not barred by res judicata. That principle has no application here, because in this suit as well as in the previous suit

the subject matter was the same viz., the advance money paid by the appellant. Since there is a definite finding in the previous suit that the appellant had not established any right to claim the advance said to be paid, that finding will certainly operate as res judicata in the subsequent suit.

6. Learned counsel's reliance on **Avira's** case is also unacceptable for the reason that the facts and the law dealt with therein are totally unconnected with this case. It is settled law that adjustment pleaded by a defendant in a suit for money is distinct from a set off in Order 8 Rule 6 CPC. The claim of adjustment can be raised by a defendant in money suit as a defence and the predominant difference between set off and adjustment is the following; set off extinguishes a debt or reduces the same and the question of set off can arise only in respect of dues which are outstanding and which had not been adjusted. A plea of adjustment or payment on the other hand is essentially one which can be taken provided the same was raised before the institution of suit and not

afterwards. In other words, when a claim of adjustment is raised by the defendant normally no adjudication is required as he puts forward such a defence by doing it all by himself. Another distinction is that in the case of set off, payment of court fee is insisted, but in the case of an adjustment prior to the suit, no court fee is required. In this case, the right to claim an adjustment had been negatived by the trial court in the first suit, which finding was not challenged in any appeal, thereby allowing to become final. Therefore, the same plea in a different form raised in a subsequent suit is certainly hit by res judicata. I find no substantial question of law arising in this appeal. The appeal is devoid of any merit. Hence, it is dismissed.

Sd/-
A.HARIPRASAD, JUDGE.

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P.A. to Judge