

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:05.06.2015

CORAM

THE HONOURABLE MS. JUSTICE R. MALA

S.A.No.1295 of 1995

Judgment reserved on 02.06.2015	Judgment pronounced on 05.06.2015
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1.Rahima Beevi (died)
(Memo recorded vide order of
Court dated 17.11.2009 in
Memo Sr.No.7098/2009)

2.Abdul Shukoor
3.Abdul Kuddus
4.Abdul Rahim (died)
5.Fathima Beevi
6.Abdul Asif

..Appellants/Plaintiffs
Respondents

(Appellant No.6 brought on record
as legal heir of the deceased 4th
appellant vide order of Court
dated 18.03.2010 made in
CMP.No.459 of 2010)

Vs

1.T.N.Balaraman
2.T.N.Gopalakrishnan (died)

..Respondents/Defendants
Respondents

Prayer: Second appeal filed under Section 100 of CPC against the judgment and decree dated 25.11.1994 in A.S.No.48 of 1994 on the file of the learned V Additional Judge, City Civil Court, Chennai, reversing the judgment and decree dated 29.08.1991 made in O.S.No.7642 of 1988 on the file of the learned XII Assistant Judge, City Civil Court, Chennai.

For Appellants : Mr.JRK.Bhavanantham for
Mr.K.Sidhar

For R1 : Mr.A.S.Narasimhan

R2 : died vide Court order dated 17.11.2009

JUDGMENT

The second appeal arises out of the judgment and decree dated 25.11.1994 in A.S.No.48 of 1994 on the file of the learned V Additional Judge, City Civil Court, Chennai, reversing the judgment and decree dated 29.08.1991 made in O.S.No.7642 of 1988 on the file of the learned XII Assistant Judge, City Civil Court, Chennai.

2.The averments made in the plaint are as follows:-

(i) The property, land and building bearing Door No.15, Old Door No.9, Shaik Mohideen Subedhar street, Perambur, Chennai-12 in S.No.2653, R.S.No.2778/6 having an extent of 3002 Sq.ft. was originally belonged to one Thiruvengadam. The said Thiruvengadam died intestate and the properties by succession devolved on his two sons viz., Narayanaswamy and Govindarajulu.

(ii)The above said property described in Schedule A was allotted to Narayanaswamy. For discharging certain debts, Narayanaswamy and his two sons, who are defendants herein had entered into an agreement with Abdul Sathar, since deceased, who is the husband of the first plaintiff and father of plaintiffs 2 to 5 for sale of said property for a total consideration of Rs.9,000/-. Since the 1st defendant refused to join in executing the deed of transfer, the said Narayanaswamy and 2nd defendant alone executed the sale deed dated 30.11.1961 in favour of Abdul Sathar and delivered vacant possession of the property covered by the sale deed to the purchaser/Abdul Sathar. For recovery of possession of two rooms in the occupation of the 1st defendant along with mesne profits, Abdul Sathar filed a suit in O.S.No.1812 of 1963 on the basis of the sale deed executed by Narayanaswamy and 2nd defendant. During pendency of that suit, Narayanaswamy died and Abdul Sathar got decree in his favour. The plaintiffs herein are only legal representatives of the said Abdul Sathar and they are in peaceful possession of the property described in A schedule. Since the defendants trespassed upon the portion in B schedule property, the plaintiffs caused a legal notice dated 08.10.1987 to the first defendant calling upon him to restore possession of that portion of the property. After that the plaintiffs filed the present suit for declaration of title over the property described in Schedule B and for recovery of possession. Thus the plaintiffs prayed for decree.

3.The gist and essence of the written statement filed by the defendants are as follows:

(i)The property bearing New Door No.15 (Old Door No.9), Shiek Mohideen Subedhar Street, Perambur, Madras-600 012 is originally belonged to one Thiruvengadam pillai, grand father of the defendants. After the death of said Thiruvengadam pillai and in pursuance of the partition deed dated 24.09.1941, A schedule property was allotted to the share of one Narayanaswamy, father of the defendants, later in the year 1962, the said Narayanaswamy and the 2nd defendant sold the above mentioned property to one Abdul Sathar without the consent of the 1st defendant. Though the said property is the ancestral property of the defendants, 1st defendant was not a party to the sale of the property as per the sale deed dated 30.11.1961.

(ii)The temple in the B schedule property is in possession of the defendants for more than 75 years. The first defendant vacated the premises under his occupation and handed over the same in 1967 to Abdul Sathar. Therefore, B schedule property was enjoyed by the defendants without any interference. The defendants also filed a suit in O.S.No.10564 of 1987 for declaration which is pending on the file of the learned IX Assistant City Civil Court, Chennai. The defendants have acquired title to the property by way of adverse possession and they are the owners. Therefore, they prayed for dismissal of the suit.

4.The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side counsel, has framed necessary issues and on perusing the oral and documentary evidence viz., P.W.1, P.W.2, D.W.1 and Exs.A1 to A5 and Exs.B1 to B15, decreed the suit. Aggrieved against the judgment and decree passed by the trial court, the first defendant preferred an appeal in A.S.No.48 of 1994 on the file of the learned V Additional Judge, City Civil Court, Chennai.

5.The learned First Appellate Court has considered the arguments advanced on either side and framed necessary point for consideration and reversed the Judgment and Decree passed by the Trial Court and allowed the appeal preferred by the first defendant. Against the Decree and Judgment passed by the first Appellate Court, the present second appeal has been preferred by the appellants/plaintiffs.

6.At the time of admission, the following substantial question of law has been framed:

" 1.Is not the First Appeal A.S.No.48 of 1994 filed only against the judgment in O.S.No.7642 of 1988, barred by the principles of constructive Res-Judicata in view of the dismissal of the connected suit O.S.No.10564 of 1987?"

7.Admittedly, appellants herein as plaintiffs filed a suit in O.S.No.7642 of 1988 for declaration of title and recovery of possession. The respondents herein as the plaintiffs filed

O.S.No.10564 of 1987 for injunction. The suit filed by the appellants herein was decreed and the suit filed by the respondents herein was dismissed. Against the decree and judgment passed in O.S.No.7642 of 1988, the first respondent herein has preferred an appeal in A.S.No.48 of 1994 and that appeal was allowed. But no appeal was preferred against the decree and judgment passed in O.S.No.10564 of 1987. The present second appeal has been preferred by the plaintiffs in O.S.No.7642 of 1988 against the decree and judgment passed in A.S.No.48 of 1994.

8.Challenging the judgment and decree passed by the first Appellate Court, learned counsel for the appellants/plaintiffs submits that the respondents herein have not preferred any appeal against the decree and judgment passed in O.S.No.10564 of 1987 and in both suits, the parties and the properties are one and the same. Since the respondents have not preferred any appeal against the decree and judgment passed in O.S.No.10564 of 1987, the judgment and decree passed in that suit became final and hence, it is hit by constructive Res-judicata. Therefore, he prayed for allowing this second appeal. To substantiate his arguments, he relied upon the following decision:

- (i) 2005 (4) CTC 20 (Aanaimuthu Thevar (dead) by legal heirs v. Alagammal and others);
- (ii) 2008 (2) CTC 824 (M.Anandan and others v. A.Dakshinamoorthy);
- (iii) 1997 (III) CTC 384 (A.S.A.Arumugam and another v. Ramalinga Nadar and another);
- (iv) 2015-1-L.W.1 (Sri Gangai Vinayagar Temple and another v. Meenakshi Ammal and others);
- (v) AIR 1966 SC 1332 (1) (Sheodan singh v. Daryao Kunwar);

9.Resisting the same, learned counsel for the respondents submits that they filed the suit in O.S.No.10564 of 1987 for bare injunction and merely because that suit was dismissed, it will not operate as res-judicata. He further submits that both the suits have been conducted simultaneously, even though common judgment has been pronounced and for the reason, he relied upon the decision of this Court reported in 2009-5-L.W.211 (Renganayagi and 5 others v. K.R.Renganathan Mudaliar). Therefore, he prayed for dismissal of the second appeal.

10.Considered the rival submissions made on both sides and perused the materials available on record.

11.Originally, the suit property is owned by one Narayanaswamy and his sons. As per Ex.B1/sale deed dated 30.11.1961, Narayanaswamy and his son Gopalakrishnan/second defendant executed the sale deed in favour of one Abdul Sathar, who is the husband of the first plaintiff and father of plaintiff's 2 to 5. Admittedly, Balaraman/first

defendant, who is the son of Narayanaswamy has not joined with them to execute the sale deed. But the first defendant is in possession of 256 sq.ft. Therefore, Abdul Sathar filed a suit in O.S.No.1812 of 1963 on the basis of the sale deed under Ex.B1 and that suit was decreed in his favour, which was evidenced by Ex.A3/copy of judgment and Ex.A4/suit register. After that, execution petition was filed by Abdul Sathar, in which, settlement has been made and possession was handed over to him and the same was evidenced by Ex.A5/compromise memo. Admittedly, Advocate Commissioner was appointed and he filed a report which was shown as C1.

12.The respondents herein have filed property tax receipts under Exs.B5 to B15 to show that they paid property tax. It is an admitted fact that in the sale deed under Ex.B1, entire property has been shown and not a portion. Furthermore, in pursuance of the sale deed under Ex.B1, possession has been handed over to Abdul Sathar.

13.According to the appellants, the respondents trespassed into the property and hence, they filed the suit for declaration of title and recovery of possession.

14.Now the only point to be decided is that whether non filing of appeal against the decree and judgment passed in O.S.No.10564 of 1987 is hit by constructive Res-judicata? Learned counsel for the respondents submits that both the suits are not tried jointly and it was simultaneously tried, hence, the judgment and decree passed in O.S.No.10564 of 1987 will not hit by constructive Res-judicata. So it is appropriate to extract Section 11 of C.P.C., which runs 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.

Explanation I.-The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.-For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.—The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree. Explanation VIII.—An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.]
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15. At this juncture, it is appropriate to consider the following decision relied upon by the learned counsel for the appellants:

(i) In AIR 1966 SC 1332 (1) (Sheodan singh v. Daryao Kunwar), where the trial Court has decided two suits having common issues on the merits and there are two appeals therefrom and one of them is dismissed on some preliminary ground, like limitation or default in printing, with the result that the trial Court's decision stands confirmed, the decision of the appeal Court will be res judicata and the appeal Court must be deemed to have heard and finally decided the matter. So it is appropriate to extract para-20, which reads as follows:

"20. A consideration of the cases cited on behalf of the appellant therefore shows that most of them are not exactly in point so far as the facts of the present case are concerned. Our conclusion on the question of res judicata raised in the present appeals is this. Where the trial court has decided two suits having common issues on the merits and there are two appeals therefrom and one of them is dismissed on some preliminary ground, like limitation or default in printing, with the result that the trial court's decision stands confirmed, the decision of the appeal court will be res judicata and the appeal court must be deemed to have heard and finally decided the matter. In such a case the result of the decision of the appeal court is to confirm the decision of the trial court given on merits, and if that is so, the decision of the appeal court will be res judicata whatever may be the reason for the dismissal. It would be a different matter, however, where the decision of the appeal court does not result in the confirmation of the decision of the trial court given on the merits, as for example, when the appeal court holds that the trial court has no jurisdiction and dismisses the appeal, even though the trial court might have dismissed the suit on the merits. In this view of the matter, the appeals must fail, for the trial court had in the present case decided all the four suits on the merits including the decision on the common issues as to title. The result of the dismissal on a preliminary ground of the two appeals arising out of suits Nos. 77 and 91 was that the decision of the trial court was confirmed with respect to the common issues as to title by the High Court. In consequence the decision on those issues became resjudicata so far as appeals Nos. 365 and 366 are concerned and s. 11 of the Code of Civil Procedure would bar the hearing of those common issues over again. It is not in dispute that if the decision on the common issues in suits Nos. 77 and 91 has become res judicata, appeals Nos. 365 and 366 must fail."

(ii) The above decision has been followed in para-19 and 21 of the Apex Court judgment reported in 2015-1-L.W.1 (Sri Gangai Vinayagar Temple and another v. Meenakshi Ammal and others) and it was held that non filing of appeal against one of the suits which was tried jointly and the same will hit by constructive res-judicata.

(iii) In 2005 (4) CTC 20 (Aanaimuthu Thevar (dead) by legal heirs v. Alagammal and others), it was held that earlier suit in O.S.No.843 of 1974 between the predecessor in title of the appellant and the respondent has been operated as res-judicata. Para-34 is extracted hereunder:

"34. We are not prepared to accept the argument advanced on behalf of the above appellant as the successor-in-title of Muthuswami that in the absence of formal deed of conveyance of the suit house by the housing society in favour of Muthuswami, the issue of title to the suit house could neither be raised nor was raised in the former suit. On the examination of case pleaded by the parties in the former suit and the judgment rendered therein we find that the plea of ownership to the suit house was substantially involved for seeking relief of permanent injunction. Undoubtedly, such plea of ownership could and ought to have been raised in the former suit. Therefore, this subsequent suit filed by the present appellant as purchaser from Muthuswami is barred by constructive res judicata and the High Court was right in holding accordingly. See the following observations of this Court in the case of Sulochana Amma v. Narayan Nair, (1994) 2 SCC 14 :-

"(It was) contended that the remedy of injunction is an equitable relief and in equity, the doctrine of res judicata cannot be extended to a decree of a court of limited pecuniary jurisdiction. We find no force in the contention. It is settled law that in a suit for injunction when title is in issue for the purpose of granting injunction, the issue directly and substantially arises in that suit between the parties. When the same issue is put in issue in a later suit based on title between the same parties or their privies in a subsequent suit the decree in the injunction suit equally operates as res judicata."

In the above decision, earlier suit filed for permanent injunction was dismissed and attained finality. Subsequent suit filed by the successor in title of plaintiff for declaration of title was hit by res judicata. So the above decision is not applicable to the facts of the present case.

(iv) In 2008 (2) CTC 824 (M. Anandan and others v. A. Dakshinamoorthy), wherein it was held that counter claim is cross suit; judgment and decree passed in suit and counter claim is common judgment and failure to file appeal against dismissal of counter claim would constitute res judicata in appeal against the decree and judgment in suit claim. Para-9 and 11 are extracted hereunder:

"9. A counter-claim is declared as a cross-suit in the above provisions of Code of Civil Procedure enabling the Trial Court to pronounce a final judgment, both in the original claim and on the counter-claim. In effect, the suit and the counter-claim is disposed of by a common judgment and if no appeal is filed against

one of the judgments, that becomes final. This finality can be taken away only in accordance with law. When a judgment or decree in a connected cross-suit is not appealed from, the principles of res judicata has to be applied.

11. In the present case, it can be concluded that as the suit claim and the counter-claim have been tried together and the findings recorded in one of them have become final, in the absence of an Appeal, the Appeal preferred against the findings recorded in the other would definitely be barred by the principle of res judicata. "

(v) In 1997 (III) CTC 384 (A.S.A. Arumugam and another v. Ramalinga Nadar and another), it was held that appeals were barred by the principles of res judicata as there was no appeal against one of the suits disposed of by a common judgment in the trial Court. Para-20 is extracted hereunder:

"20. The same principle was followed by Srinivasan, J. (as he then was), in Arumugha Nainar v. Lakshmanan Perumal (Died), 1992 (1) MLJ 457. His Lordship followed an earlier decision of the Supreme Court in M. Subramanian, v. C. Chottabhai, 1990 (1) LW 182 and held that the appeals were barred by the principles of res judicata as there was no appeal against one of the suits disposed of by a common judgment in the trial Court. The relevant portion of that judgment is as follows:

"It was laid down by the Supreme Court that the question whether there is a bar of res judicata does not depend on the existence of a right of appeal of the same nature against each of the two decisions, but on the question whether the same issue under the circumstances given in Section 11, had been heard and finally decided; It was observed that the expression "former suit", according to Ex.1 of Section 11, CPC makes it clear that, if a decision is given before institution of the proceeding which is sought to be barred by res judicata, and that decision is allowed to become final or becomes final operation of law, a bar of res judicata would emerge."

In view of the pronouncements of the Supreme Court in the above two cases, there can be no doubt that the present appeals are barred by res judicata. It is not open to the appellants herein to contest the same issues in the appeals when there is a decree against them in O.S.No.346 of 1968 which has become final and conclusive. The argument of learned counsel for the

appellants that there should be confirmation of the decree of the trial Court by an appellate court in order to constitute res judicata is without any substance."

16. Considering the Apex Court decision reported in 2015-1-L.W.1 (Sri Gangai Vinayagar Temple and another v. Meenakshi Ammal and others), it was held that having failed or neglected or concertedly avoided filing appeals against the decrees in O.S.5/78 and O.S.7/78 the cause of the Respondents/Tenants was permanently sealed and fore closed since res judicata applied against them.

17. Now it is appropriate to consider the decision relied upon by the learned counsel for the respondents reported in 2009-5-L.W.211 (Renganayagi and 5 others v. K.R.Renganathan Mudaliar), in para-7, it is held as follows:

"7. In AIR 1971 AP 179 (V.58 C 34) (K.A. Natesa Chettiar Vs. Nune Krishiah Chetty) it was held that,

"28. At least three classes of cases involving consideration of the doctrine of res judicata in such cases are conceivable. One class illustrates cases of cross suits, each suit having the same subject-matter, the same issue and the same parties though differently arraigned that is plaintiff is one suit is defendant in the other, or plaintiffs filing two suits for two reliefs involving the same question of fact, the subject-matter being the same. The second or the next class of cases are those in which the party appealing from one of the decrees involving a common issue is not competent to appeal from the other decree or decrees as he is the winning party there. In this latter class, the reliefs or subject-matters may not be identical in all of them. The third class is the one in which scopes of the suits tried together and involving a common issue are different, the parties are not identically the same and the appellant party having been a loser in the decrees not appealed from could prefer an appeal but did not do so and allowed the decrees to become final.

29. It is the first class with which we are concerned. In first named class, challenge of one decree in appeal amounts in substance though not in form to challenge of other and the adjudication in appeal covers the same subject-matter in the presence of the same parties. In such cases, if no appeal is filed from one decree, it does not operate as res judicata in the appeal filed against the other decree

as it covers the entire subject-matter involved in both the suits. That is what the Supreme Court has laid down in the above said case. It is therefore clear that when the matter in issue in two suits was the same and the finding in one suit either has been adopted in the other or a common judgment is given in both the suits and two decrees are separately prepared, an appeal against one of these decrees is not barred by res judicata on the ground that no appeal was filed against the other decree. This view was even earlier taken by Panchanda Velan V. Vaithinatha Sastrial, (1906) ILR 29 Mad 333 (FB), Ramaswamy Chetty V. Karuppan Chetty, AIR 1916 Mad 1133, and Govindayya V. Ramamurthi, AIR 1941 Mad 524."

"32. What emerges from the two decisions of the Supreme Court referred to above is that where the suits or appeals raise only common issues for decision and there has been one trial, one finding and one decision, an appeal against the decree in one suit or the appeal will not be barred by res judicata by not filing an appeal against the decree in the other suit or the appeal. But where the subject-matter of each of the two suits or the appeals is different and the decision in the two proceedings thus stated in one judgment, really amounts to two decisions and not one decision common to both the proceedings, an appeal filed against the decision in one proceeding will be barred by the rule of res judicata if no appeal is filed against the decision in the other proceedings." "

But the above decision is not applicable to the facts of the present case.

18. Considering the facts and circumstances of the case along with the above decision, I am of the considered opinion, because of non filing of appeal against the common judgment passed in O.S.No.10564 of 1987, it will operate as res judicata of the appeal against O.S.No.7642 of 1988 namely, A.S.No.48 of 1994. Under such circumstances, the first appellate Court without considering the above aspect erroneously set aside the judgment and decree passed by the trial Court. As per Ex.B1 sale deed, the appellants herein are the owners of the suit property, but the respondent is in possession of the same and hence, the appellants are entitled to recovery of possession. Therefore, the substantial question of law is answered accordingly.

19. For the foregoing reasons, the decree and judgment passed by the first appellate Court is unsustainable and illegal, hence, they are hereby set aside. Consequently, decree and judgment passed by the trial Court are hereby restored.

20. In fine,

- Second Appeal is allowed.
- The decree and judgment passed by the first appellate Court are hereby set aside.
- The decree and judgment passed by the trial Court are restored.
- Three months time is granted to the respondents/defendants to deliver the possession of the suit property to the appellants/plaintiffs.
- There is no order as to costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The V Additional Judge, City Civil Court, Chennai.

2. The XII Assistant Judge, City Civil Court, Chennai.

+ 1 cc to Mr.A.S. Narasimhan, Advocate SR.26969

+ 2 ccs to Mr.K. Sridhar, Advocate Sr.27844

S.A.No.1295 of 1995

UG(CO)

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