

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.06.2015

CORAM

THE HON'BLE MS. JUSTICE R. MALA

S.A.No.212 of 2004

|                                              |                                                |
|----------------------------------------------|------------------------------------------------|
| Date of Reserving the Judgment<br>12.06.2015 | Date of Pronouncing the Judgment<br>18.06.2015 |
|----------------------------------------------|------------------------------------------------|

1.N.Palaniappan (Died)

2.Mrs.Vasanthi  
W/o.Late N.Palaniappan

3.Sanjeevukumar  
S/o.Late N.Palaniappan

4.Sujatha  
W/o.Ramachandran

5.Mohan  
S/o.Late N.Palaniappan

... Defendants/Respondents/Appellants

(Appellants 2 to 5 are brought on record as LR's of the deceased sole appellant vide order of the Court dated 11.03.2008 made in C.M.P.No.2762 of 2007 in S.A.No.212 of 2004)

-Vs-

1.S.V.Balakrishnan (Died)

2.Tmt.Pappammal  
W/o.S.V.Balakrishnan

3.B.Vijayakumar  
W/o.S.V.Balakrishnan

... Plaintiff/Appellants/Respondents

(Respondents 2 and 3 are brought on record as LR's of the deceased sole respondent vide order of Court dated 19.03.2012 made in C.M.P.Nos.1249 to 1251 of 2010 in S.A.No.212 of 2004)

Prayer:

Second appeal filed under Section 100 of CPC against the judgment and decree dated of the learned First Additional District Judge of Erode in A.S.No.213 of 2001, dated 11.08.2003 reversing the judgment and decree of the learned First Additional District Munsif, Erode in O.S.No.250 of 1999, dated 22.06.2001.

For Appellants : Mr.A.K.Kumaraswamy

For Respondents : Mr.G.Ilangovan, for R2 and R3.

R1 Died (Steps taken)

### J U D G M E N T

The second appeal arises out of the judgment and decree dated 11.08.2003 made in A.S.No.213 of 2001 on the file of the learned First Additional District Judge of Erode, reversing the judgment and decree dated 22.06.2001 passed in O.S.No.250 of 1999 on the file of the learned First Additional District Munsif, Erode.

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

The deceased first appellant who is the defendant in the suit is none other than the brother-in-law of the deceased of the first respondent, who is the plaintiff in the suit. The plaintiff is the exclusive owner of the suit property having purchased the same for Rs.500/- under Ex.B.4/Sale deed from one Pongia Gounder in his name and in the name of his deceased wife Kannammal. The suit property was purchased as a vacant site and thereafter, the plaintiff built a tiled house spending a sum of Rs.30,000/- and he was residing there along with his wife. Since the plaintiff is a car driver and he used to go to work in the morning, he rented the house to the defendant believing that he will attend Kannammal, the wife of the plaintiff who developed cancer. After the death of Kannammal, the plaintiff came to know that the defendant had obtained some signatures of Kannammal in bond papers to wrongfully gain the suit property. When the plaintiff questioned the same, the defendant told that he is going to develop the property so that the plaintiff will get a rent of Rs.1000/- per month. The plaintiff agreed for the same and the defendant remained as a tenant. However, the defendant refused to give possession of the property stating that he had spent Rs.50,000/- towards Kannammal's medical expenses and so, she had sold half of the house to him and executed Ex.B.2/Will. Hence, the plaintiff filed the suit for delivery of possession.

3. The gist and essence of the written statement filed by the defendant is as follows:

The appellant who is the defendant in the suit filed the written statement stating that the suit property was purchased by Kannammal,

wife of the plaintiff and the sister of the defendant. The name of the plaintiff was formally included in the sale deed dated 02.07.1965. The house constructions were put up by late Kannammal alone and the plaintiff is a mere name lender and he never contributed any amount to put up construction. Further, the plaintiff deserted the deceased Kannammal in the year 1982 itself. Since Kannammal is a cancer patient, the defendant and his brother were looking after her during her life time for about six years. So she executed Ex.B.2/Will, dated 01.11.1985 with regard to her rights in the suit properties in favour of this defendant and his brother Chinnusamy. After the death of Kannammal, the suit property is in the possession and enjoyment of the defendant and his brother openly, continuously and uninterruptedly for more than 12 years against the interest of the plaintiff and with his full knowledge. It was further stated that the defendant never inducted in possession of the suit property as a tenant and there was no oral lease agreement as alleged by the plaintiff and the monthly rent of Rs.100/- is fictitious. The plaintiff had concealed the earlier suit and the appeal filed by him with regard to the same suit property. So, the judgment in the earlier proceedings would operate as res judicata. The defendant had sold the part of the suit property to the third parties and this is well known to the plaintiff. Hence, the concerned third parties are to be impleaded as a necessary party for proper adjudication. Thus, the appellant/defendant prayed for dismissal of the suit.

4. The brief facts set out in the additional written statement are as follows:

The appeal in A.S.No.4 of 1999 has been dismissed against the plaintiff and therefore, the plaintiff has not right to claim any legal rights through the said decree in the said appeal. Moreover, the present suit is based upon different cause of action and upon a different footing that the defendant is a tenant whereas in the said appeal the plaintiff has contended that the defendant is on permissive possession of the suit property. Thus, the plaintiff is legally barred from filing different suit when he himself claims right in the suit already filed by him.

5. 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, D.W.1 to D.W.3 and Exs.A.1 and A.2 and Exs.B.1 to B.31, dismissed the suit. Aggrieved against the judgment and decree passed by the trial court, the defendant preferred an appeal in A.S.No.213 of 2001 on the file of the First Additional District Judge, Erode.

6. 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. Against the Decree and Judgment passed by the

first Appellate Court, the present second appeal has been preferred by the defendant/appellant.

7. At the time of the admission, the following question of law has been framed.

"1. Whether the finding of the lower appellate Court that the present suit is not barred by the principles of "Res-Judicata" especially when the question of ownership of the suit property was decided between the same parties in the earlier suit O.S.No.39/98 on the file of the 1<sup>st</sup> Additional District Munsif Court, Erode?

2. Whether the lower appellate Court is right in rejecting the plea that notice under Section 106 of Transfer of Property Act is a mandatory for termination of tenancy, which has not been followed in the present case?

3. The lower appellate Court being the final court of fact, whether the lower appellate Court is justified in decreeing the suit without considering the oral and documentary evidence placed before it?"

8. The defendant as an appellant has preferred the present appeal challenging the judgment and decree of the first appellate Court which is the last fact finding Court. The learned counsel appearing for the appellant would submit that the respondent as a plaintiff has filed the suit in O.S.No.38 of 1998 on the file of the District Munsif Court, Erode for injunction. The said suit was dismissed as evidenced by Ex.B.4 on 25.08.1998 against which he preferred an appeal in A.S.No.4 of 1999 which was also dismissed as per Ex.A.1 on 19.03.1999. In the said judgment it was held that this respondent is the owner of the property. On the basis of the said finding, he has come forward with the suit in O.S.No.250 of 1999 for recovery of possession and for mesne profits. The Trial Court rightly dismissed the said suit, whereas the first appellate Court had held that as already the title of the property has been decided in favour of the respondent, the respondent is entitled to recovery of possession and allowed the appeal and consequently, decreed the suit as prayed for which is against law. The learned counsel would further submit that the suit property was purchased by the wife of the respondent viz., Kannammal out of her own earning. From the date of purchase, she was in possession and enjoyment of the same and she had also made construction in the property. The said Kannammal executed Ex.B.2/Will in favour of the appellant and so, the appellant derived title to the property. The said factum was not considered by the Trial Court. Furthermore, the previous suit filed by the respondent is only a simple suit for injunction wherein the title to the property cannot be decided. Merely because the title has been decided in favour of respondent by both the Courts in the previous suit in O.S.No.38/1998, it will not bind this appellant. But the first appellate Court has

failed to consider the same and allowed the appeal and consequently, decreed the suit. The learned counsel further submits that merely because the finding was against him in the previous suit, he has not filed an appeal because there is no provision for preferring an appeal in respect of the finding against him. To substantiate his argument, the learned counsel relied upon the following decisions:

1. AIR 1974 Supreme Court 1126(1), Smt.Ganga Bai v. V.Vijay Kumar and others.
2. 1995-2-L.W.793, Kuppuswami v. Krishnaveni and others.
3. (2012) 5 MLJ 27, Devendran v. Ramalinga Padayatchi and Others.

9. Resisting the same, the learned counsel appearing for the respondent would submit that the properties were purchased by the respondent in his name and in the name of his wife. Since the respondent was working as a taxi driver and he would go to work in the morning itself, his wife who was suffering from Cancer was in the care and custody of the 1<sup>st</sup> appellant/defendant. However, taking advantage of the same, after the death of the respondent's wife, the 1<sup>st</sup> appellant/defendant attempted to interfere with the respondent's possession and hence, he filed the suit for injunction. In the said suit, it was held that Ex.B.2/Will alleged to have been executed by Kannammal under which the appellant claims title to the property has not been proved. It is a judgment in rem. So, the appellant is not the owner of the property. Hence, the respondent is entitled to recovery of possession and that factum was rightly considered by the first appellate Court. Thus, the learned counsel for the appellant prayed for the dismissal of the appeal. To substantiate his contention, the learned counsel for the respondent relied upon the following decisions:

1. AIR 1999 Supreme Court 1823, Pawan Kumar Gupta v. Rochiram Nagdeo.
2. AIR 1996 Supreme Court 910, Mohan Lal through his Lrs Kachru and others v. Mira Abdul Gaffar and another.
3. 2005 (2) CTC 58, Neelavathi v. Shanmugam and another.

10. Considered the rival submissions made by both sides and perused the typed set of papers.

11. It is an admitted fact that one Kannammal is the wife of the plaintiff Balakrishnan. The property was purchased under Ex.B.4/Sale deed, dated 02.07.1965. It is true that as per Ex.B.4, the respondent herein had filed the suit for bare injunction stating that he purchased the suit property as a vacant site in his name and in the name of his wife. After purchase, the respondent had constructed two houses and was residing there along with his wife. While so, his wife died intestate and the appellant herein attempted to interfere with his possession. So, the respondent was constrained to file the suit for injunction. The 1<sup>st</sup> appellant herein/defendant filed written statement and contested the suit stating that the property was

purchased by Kannammal out of her own income and she was residing there till her death. During her life time, the said Kannammal had executed a Will and by virtue of the said Will, the 1<sup>st</sup> appellant/defendant is in possession and enjoyment of the suit property.

12. The Trial Court framed so many issues and came to the conclusion that the property was not in possession of the 1<sup>st</sup> respondent/plaintiff and further held that the Will is true and genuine. Against the said judgment and decree, the 1<sup>st</sup> respondent herein preferred an appeal. The judgment made in the appeal has been marked as Ex.A.1, wherein it was specifically held in paragraph 12 that the respondent is the owner of the property. However, the appeal was dismissed stating that even though he is the owner of the property, the property was not in his possession and enjoyment and hence, he is not entitled to the relief of injunction. So, the respondent herein was constrained to file the present suit. The learned counsel would further submit that since the suit has been dismissed, there is no chance for him to prefer an appeal against the finding of the Courts below. Hence, he ought to file the suit for declaration of title and recovery of possession and not as recovery of possession.

13. At this juncture, it is appropriate to consider the decisions relied on by both the parties.

14. The learned counsel for the appellants relied upon the following decision:

14.1. In the decision reported in AIR 1974 Supreme Court 1126(1), Smt.Ganga Bai v. V.Vijay Kumar and others, it was held that no appeal can lie against a mere finding for the simple reason that the Code does not provide for any such appeal. It is appropriate to incorporate paragraphs 16 and 17 of the said decision:

"16. Under section 96(1) of the Code of Civil Procedure, save where otherwise expressly provided by the Code or by any other law for the time being in force, an appeal lies from every decree passed by any court exercising original jurisdiction, to the court authorised to hear appeals from the decisions of such court. Section 100 provides for a second appeal to the High Court from an appellate decree passed by a court subordinate to the High Court. Section 104(1) provides for appeals against orders of the kind therein mentioned and ordains that save as otherwise expressly provided by the Code or by any law for the time being in force an appeal shall lie "from no other orders". Clause (i) of this section provides for an appeal against "any orders made under Rules from which an appeal is expressly allowed by rules". 'Order 43, Rule 1 of the Code, which by reason of clause (i) of section 104(1) forms

a part of that section, provides for appeals against orders passed under various rules referred to in clauses (a) to (w) thereof, Finally, section 105(1) of the Code lays down that save as otherwise expressly provided, no appeal shall lie from any order made by a court in exercise of its original or appellate jurisdiction.

17. These provisions show that under the Code of Civil Procedure, an appeal lies only as against a decree or as against an order passed under, rules from which an appeal is expressly allowed by Order 43, Rule 1. No appeal can lie against a mere finding for the simple reason that the Code does not provide for any such appeal. It must follow that First Appeal No. 72 of 1959 filed by defendants 2 and 3 was not maintainable as it was directed against a mere finding recorded by the trial court."

14.2. In the decision reported in 1995-2-L.W.793, Kuppuswami v. Krishnaveni and others, it was held that if the plaintiff's suit is wholly dismissed, even an issue decided against the defendant cannot operate as *res judicata* against him in a subsequent suit. It is appropriate to incorporate the relevant portion in paragraph 2 of the said decision:

"2.... The rule is that if the plaintiff's suit is wholly dismissed, even an issue decided against the defendant cannot operate as *res judicata* against the defendant him in a subsequent suit, for the defendant cannot appeal from a finding on any such issue, the decree being wholly in his favour."

14.3. In the decision reported in (2012) 5 MLJ 27, Devendran v. Ramalinga Padayatchi and Others, the suit for injunction filed by the plaintiff is dismissed by the Trial Court and thereafter allowed in an appeal and the title of the 1<sup>st</sup> respondent/plaintiff is questioned by the defendant in the second appeal, it was held therein that the plaintiff should have only filed the suit for partition or for any other appropriate relief. It is appropriate to incorporate paragraph 35 of the said decision:

"35. Generally, in a simple suit for injunction which relates to possession only the question of title will not be a substantial and direct issue for determination. It is well settled principle in law that the relief of injunction as prayed for in the suit by a litigant is to be decided by finding out as to who is in possession as on day of filing of the suit. One cannot ignore an important fact that a finding on title is not to be recorded in an injunction suit, unless there are essential and necessary pleadings and also appropriate issue relating to title (either

specifically or impliedly). Even if there are necessary plea and issue, if the subject matter relates to Question of Fact and Law and pertaining to title, a Court of law will relegate the litigants to file a comprehensive suit for declaration of title instead of deciding the issue in a suit for bare injunction."

But the above citation is not applicable to the facts of the present case because the document has already been filed and he is a party to the proceedings and title has also been declared. In such circumstances, he ought to have filed an appeal.

15. The learned counsel for the respondents relied upon the following decision:

15.1. In the decision reported in AIR 1999 Supreme Court 1823, Pawan Kumar Gupta v. Rochiram Nagdeo, it was held that once the title to the suit property has been decided in a suit and it was not challenged by way of an appeal and if it is the substantial issue in another suit between the same parties, then the suit is hit by res judicata. It is appropriate to incorporate the relevant portion in the said decision:

"Thus the sound legal position is this: If dismissal of the prior suit was on a ground affecting the maintainability of the suit any finding in the judgment adverse to the defendant would not operate as res judicata in a subsequent suit. But if dismissal of the suit was on account of extinguishment of the cause of action or any other similar cause a decision made in the suit on a vital issue involved therein would operate as res judicata in a subsequent suit between the same parties. It is for the defendant in such a suit to choose whether the judgment should be appealed against or not. If he does not choose to file the appeal he cannot thereby avert the bar of res judicata in the subsequent suit.

In this case the position is still stronger for the appellant. Dismissal of the first suit was only on account of what the respondent did during the pendency of the suit i.e. depositing the arrears of rent claimed by the appellant. The court permitted the plaintiff to withdraw that amount under deposit for satisfying his claim. Such a degree cannot be equated with a case where the suit was dismissed as not maintainable because any adverse finding in such a suit would only be obiter dicta. The finding made in OS 75-A/90 that appellant was the real owner of the building as per Ext. P.11-sale deed became final. If the respondent disputed that finding he should have filed an appeal in challenge of it.

We therefore agree with the plea of the appellant that there is bar of res judicata in re-agitating on the issue regarding appellant's title to the building."

15.2. In the decision reported in AIR 1996 Supreme Court 910, Mohan Lal through his Lrs Kachru and others v. Mira Abdul Gaffar and another, it was held that when a party is in possession of suit land pursuant to an agreement of sale, then he cannot claim title by adverse possession. Thus, the party cannot approbate and reprobate. It is appropriate to incorporate paragraph 4 of the said decision:

"4. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., upto completing the period of his title by prescription nec vi nec clam nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."

15.3. In the decision reported in 2005 (2) CTC 58, Neelavathi v. Shanmugam and another, it was held that the plaintiff relying upon a document of title cannot claim title by adverse possession or prescriptive title. It is appropriate to incorporate paragraph 7 of the said decision:

"7. Again, when plaintiff had relied upon a particular document of title, namely, Ex.A-1 gift deed, in order to claim right and title to suit property, she cannot claim it by adverse possession, because when once she claims title upon a particular document, then whatever right plaintiff claims would be flowing if at all under that document, in which case there is no element of adverse nature of possession in order to make out a case of prescription by title. Thus, the substantial question of law is answered against the appellant/plaintiff and I find no reason to allow this second appeal."

16. In the instant case, the title had already been declared in respect of the same property on the basis of the document filed before the Trial Court. Furthermore, the Will alleged to have been executed by Kannammal, the deceased wife of the plaintiff has been disbelieved by the first appellate Court. Thus, the judgment in respect of the Will is concerned, it is a judgment in rem. So, it

will bind all, once it was decided that it had attained finality. Thus, once the Will goes, the appellant has got no right over the property. So, the husband of Kannammal, who is the respondent herein has inherited the  $\frac{1}{2}$  share of the property, since the sale deed stands in the name of both the respondent and his wife Kannammal. In the previous proceedings it was held that the respondent is the owner of the property, however the said suit was dismissed because he has not proved his possession. That factum was rightly considered by the first appellate Court. The substantial question of law 1 is answered accordingly.

17. Further, there is no landlord tenant relationship and so there is no need to issue any notice under Section 106 of the Transfer of Property Act for termination of the tenancy. Hence, I am of the view that the appellant has claimed title only under the Ex.B.2/Will, dated 01.11.1985. Since the Will has not been proved, the appellant cannot claim any right over the property. The substantial question of law 2 is answered accordingly.

18. Further, the first appellate Court has considered the oral and documentary evidence in proper perspective and came to the correct conclusion that the first respondent herein is entitled to recovery of possession and mesne profits. Thus, the third substantial question of law is answered accordingly.

19. In view of the answers given to the substantial question of law 1 to 3, I am of the considered view that the first appellate Court has considered all the oral and documentary evidence and came to the correct conclusion that the title of the first respondent herein has been declared in the previous suit and that the Ex.B.2/Will is not true and genuine. The judgment in respect of the Will is concerned, it is the judgment in rem. So, the first respondent herein who is the owner of  $\frac{1}{2}$  share in the suit property would also succeed in deriving the title to another  $\frac{1}{2}$  share belonging to his wife who died intestate. Since the property is in possession of the appellants, the respondent is entitled to recovery of possession and for mesne profits. Thus, the judgment of the first appellate Court does not warrant interference by this Court and it is hereby confirmed.

20. In fine,

- (a) The Second Appeal is dismissed. No costs.
- (b) The judgment and decree passed by the first appellate Court is hereby confirmed.
- (c) The time granted for delivery is two months.

Sd/-

Assistant Registrar

True Copy

Sub Assistant Registrar

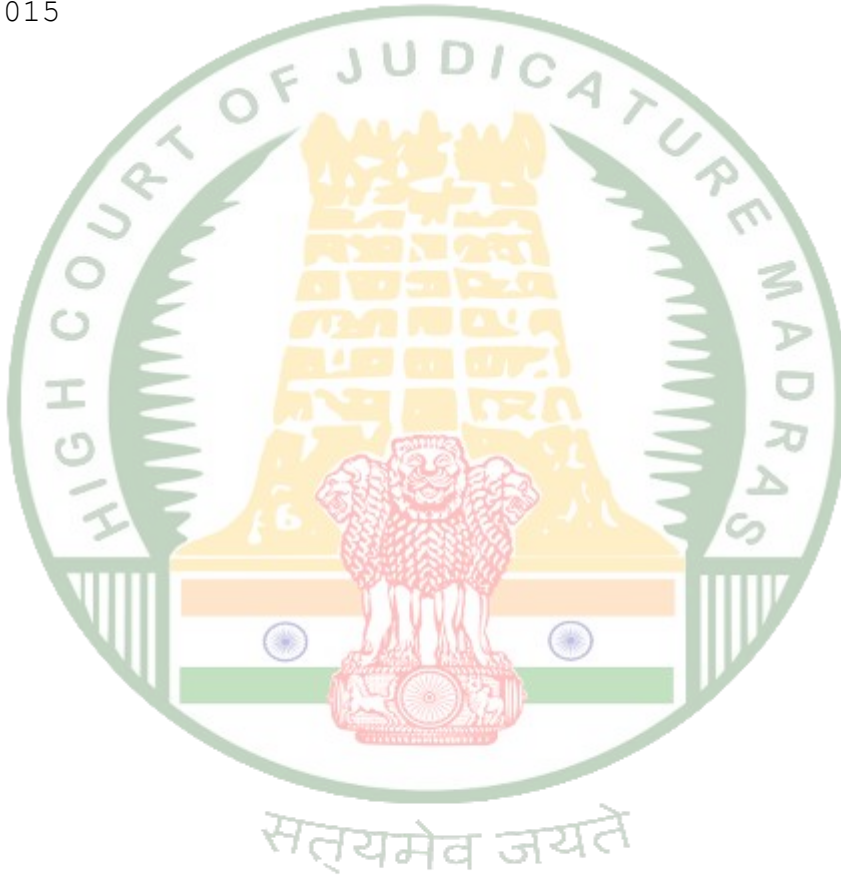
To

- 1.The First Additional District Munsif, Erode.
- 2.The First Additional District Judge, Erode.
- 3.The Record Keeper, V.R.Section, High Court, Chennai.

1 cc to Mr..A.K.Kumaraswamy , Advocate Sr.No.29852

S.A.No.212 of 2004

sai(co)  
pmk.10.7.2015



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