

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:08.07.2015

CORAM

THE HONOURABLE MS. JUSTICE R. MALA

S.A.No.2306 of 2004
and C.M.P.No.109 of 2011

Judgment reserved on 01.07.2015	Judgment pronounced on 08.07.2015
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Sivaprakasam

..Appellant/defendant

Vs

Venkatesan

.. Respondent/Plaintiff

(sole respondent declared as major and his friend Baskaran discharged from guardianship vide order of this Court dated 03.06.2015 in CMP.No. 218 of 2015 in SA.No.2306 of 2004)

Prayer: Second appeal filed under Section 100 of CPC against the judgment and decree dated 26.03.2004 in A.S.No.153 of 2003 on the file of the Principal Sub-Court, Mayiladuthurai, confirming the judgment and decree dated 10.03.2003 in O.S.No.207 of 1999 on the file of the Principal District Munsif Court, Mayiladuthurai.

For Appellant : Mr.A.Muthukumar

For Respondent : Mr.S.Sounthar

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JUDGMENT

The second appeal arises out of the judgment and decree dated 26.03.2004 in A.S.No.153 of 2003 on the file of the Principal Sub-Court, Mayiladuthurai, confirming the judgment and decree dated 10.03.2003 in O.S.No.207 of 1999 on the file of the Principal District Munsif Court, Mayiladuthurai.

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

(i)The defendant is running a flour mill in the building owned by the plaintiff situated in 'A' schedule property by paying Rs.300/- per month as per the agreement dated 04.10.1994. The plaintiff has filed a suit in O.S.No.171 of 1998 on the file of the District Munsif Court, Mayiladuthurai for a direction to the defendant to pay a sum of Rs.10,500/- towards rent from 01.02.1995 to 31.12.1997 and that suit is pending. After filing that suit, the defendant has paid part payment and then the defendant defaulted in his payment from 01.01.1998. Moreover, the defendant constructed a mill by encroaching upon the land of the plaintiff in A schedule property without obtaining permission from the Commissioner, Kuthalam and the same is 'B' schedule property.

(ii)Further, the plaintiff filed a suit in O.S.No.915 of 1995 for declaration that the defendant is not entitled to obtain license from the Commissioner, Kuthalam to run the business in the 'B' schedule property and to restrain the Commissioner, Kuthalam to give license to the defendant and that suit was dismissed on 27.01.1998, against which, the plaintiff has filed A.S.No.56 of 1998 and the same was allowed on 22.09.1998.

(iii)A hut put up by the defendant on the southern side of 'A' schedule property is mentioned as 'C' schedule property. A hut, tank, toilet and motor put up by the defendant on the northern side of 'A' schedule property is mentioned as 'D' schedule property.

(iv)Since the defendant encroached upon the properties of the plaintiff, the plaintiff constrained to file the suit for the following reliefs:

(a)direction to the defendant to hand over 'A' schedule property to the plaintiff;

(b)direction to the defendant to hand over 'B' to 'D' schedule properties to the plaintiff after removing the hut, tank and motor put up by the defendant;

(c) direction to the defendant to pay the rent as mentioned in the plaint;

(d)direction to the defendant to pay the compensation to the plaintiff from the date of filing the plaint to the date of realisation;

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

(i)The defendant is the tenant of the ground site belonging to the plaintiff. But the entire property which is now under the occupation of the defendant was given on lease to the defendant. The defendant could not have established his mill in 'A' schedule property alone. On the north of plaintiff's property, there is a vaikal poramboke. That poramboke property was annexed by the defendant. As per the lease arrangement, the defendant has obtained electric service connection at huge costs. The defendant never encroached any of the properties of the plaintiff. If the mill and machineries are to be removed, huge loss would be caused to the

defendant. In the interest of justice, the plaintiff has to be directed to convey the ground site at a reasonable price. The damages claimed by the plaintiff is excessive and without any basis. Therefore, he 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, D.W.1 and Exs.A1 to A4, decreed the suit. Aggrieved against the judgment and decree passed by the trial court, the defendant preferred an appeal in A.S.No.153 of 2003 on the file of the Principal Sub-Court, Mayiladuthurai.

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

6.At the time of admission, the following substantial questions of law have been framed:

"(1)When the plaintiff had allowed the defendant to put up superstructures in the suit properties whether the lower appellate Court erred in law in holding that the defendant is not entitled to invoke the doctrine of acquiescence?

(2)When the plaintiff's case is that 'B' to 'D' schedule properties were not let out to the defendant and in the absence of any proof for his title to the same, whether lower appellate Court erred in law in decreeing the suit in entirety?

(3)Whether the principles of Resjudicata would apply in view of the judgment rendered by our High Court under Ex.A2?"

7.Challenging the concurrent findings of both the Courts below, learned counsel for the appellant/defendant submits that the plaintiff/respondent has not proved that 'B' to 'D' schedule properties are belonging to him. Once title to the property is denied by the appellant/defendant, the respondent/plaintiff has to prove his title, but to prove the same, no documentary evidence was let in by him. He further submits that 'A' schedule property is belonging to the plaintiff/respondent and as per the lease agreement between them, lease amount has been paid by the appellant/defendant. 'B, C and D' schedule properties are situated on western, southern and northern side of 'A' schedule property, the appellant/defendant had made construction in the Poramboke land. P.W.1, the father of the respondent/plaintiff, who is an V.A.O., admitted the fact that there was a Government Poramboke land. But that factum was not considered by the trial Court.

8.Learned counsel for the defendant/appellant further submits that the respondent/plaintiff has filed a suit in O.S.No.915 of 1995,

which was dismissed, against which, he has preferred an appeal in A.S.No.56 of 1998. As per Ex.A1, A.S.No.56 of 1998 was allowed, against which, the defendant has preferred S.A.No.225 of 2001, wherein the judgment and decree passed by the first appellate Court was confirmed and the same was marked as Ex.A2. But it will not amount to resjudicata. Without filing pleadings, issues and documents, the plaintiff/respondent is not entitled to raise the plea of resjudicata. For the reason, he relied upon the decision of the Apex Court reported in AIR 1964 SC 1810 (Gurbux Singh v. Bhooralal). He further submits that once the respondent/plaintiff kept quiet for making construction by the appellant/defendant in 'B,C,D' schedule properties, it is hit by doctrine of acquiescence. That factum was not considered by both the Courts below. Therefore, he prayed for allowing the second appeal. To substantiate his arguments, he relied upon the following decisions:

- (i)AIR 1965 Madras 318 (The Associated Cement Companies Ltd. by Manager J.P.Munsiff, v. L.S.Ramakrishna Gowder);
- (ii)AIR 1977 Madras 342 (S.Palanivelu v. K.Veradammal);
- (iii)AIR 1981 Madras 220 (R.S.Muthuswami Gounder v. A.Annamalai and others);

9.Resisting the same, learned counsel for the plaintiff/respondent submits that in para-2 of the written statement itself, the appellant/defendant admitted the title of the respondent/plaintiff to 'A to D' schedule properties, but now he estopped from questioning the title. In the earlier judgment itself, it was specifically mentioned that the suit properties are settled in favour of the plaintiff/respondent by his grand mother and to prove the same, title deed was filed in the earlier suit in O.S.No.915 of 1995. Under such circumstances, there is no necessity for the plaintiff/respondent to file the suit for declaration of title by filing the title deed. He further submits that once the appellant/defendant admits that he took lease of entire 'A to D' schedule properties belonging to the respondent/plaintiff, now he shall not be turned down and stated that 'B to D' properties are Government Poramboke. Further, doctrine of acquiescence and plea of equitable estoppel will not applicable to the facts of the present case. 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.

Substantial Question of law No.2:

11.The plaintiff/respondent herein has filed the present suit for ejectment in respect of 'A' schedule property and for mandatory injunction and recovery of possession in respect of 'B to D' schedule properties. The first limb of argument advanced by the learned counsel for the appellant/defendant that once the title has been disputed by him, the plaintiff/respondent ought to have filed the title deed to prove his title to the suit properties.

12.It is pertinent to note that the respondent/plaintiff himself has filed a suit in O.S.No.915 of 1995 before the Principal District Munsif Court, Mayiladuthurai for injunction and the same was dismissed, against which, the plaintiff/respondent herein has preferred A.S.No.56 of 1998, which was allowed. Admittedly, O.S.No.915 of 1995 is filed for declaration that the defendant/appellant herein is not entitled to obtain license from the Commissioner, Kuthalam, who is the second defendant therein, to run business in 'B' schedule property and restrain the second defendant/Commissioner to issue license to the defendant for his business. In Ex.A1, it was stated that Ex.A6 rental receipt was marked in O.S.No.915 of 1995.

13.In the earlier suit in O.S.No.915 of 1995, it was mentioned that in S.No.381/1, the respondent/plaintiff is having 5 cents and in S.No.382/2, he is having 81 cents. So the respondent/plaintiff is the owner of S.No.381/1, which is the suit survey number.

14.The appellant/defendant in para-2 of his written statement specifically stated as follows:

"No doubt the defendant is the tenant of the ground site belong to the plaintiff. But the entire property which is now under the occupation of the defendant was given on lease to the defendant. On the north of plaintiff's property there is the vaikal poramboke. That poramboke property was annexed by the defendant. "

It is not the case that 'B to D' schedule properties are Government poramboke. As per Ex.A1, in the previous suit in O.S.No.915 of 1995, the title deed was marked. That factum was rightly considered by both the Courts below and came to the correct conclusion that the plaintiff/respondent is the owner of the properties. But in respect of 'A' schedule property, there is a tenancy arrangement. But in respect of 'B,C,D' schedule properties, there is no lease agreement.

15.On perusal of Ex.A1/judgment in A.S.No.56 of 1998, it reveals that in the previous suit in O.S.No.915 of 1995, rental agreement in respect of 'A' schedule property was marked as Ex.A6. Further it reveals that originally, the suit properties are owned by one Alamelu Achi, who is the grand mother of the plaintiff/respondent and mother of P.W.1/Baskaran and the same was evidenced by the deed dated 18.05.1989 under Ex.A1. She settled the suit properties in favour of her grand son namely, Venkatesan, who is the respondent/plaintiff and he is in possession and enjoyment of the same. So the title deed was marked in the previous suit, wherein the appellant/defendant is also one of the parties to the proceedings. As already stated that the appellant/defendant in his written statement admitted that the respondent/plaintiff is the owner of the suit properties. Hence both

the Courts below rightly held that the respondent/plaintiff is the owner of the suit property and granted decree. Under such circumstances, substantial question of law 2 is answered against the appellant/defendant.

Substantial Question of law No.1:

16. According to the appellant/defendant, P.W.1 is an V.A.O. and even though he is residing in Kuthalam, he is aware of the fact that the defendant/appellant has put up super structures in the suit properties, however having kept quite at that time, now he cannot claim for recovery of possession, which is barred in law. As per doctrine of acquiescence, the respondent/plaintiff is entitled to claim only compensation.

17. It is pertinent to note that as soon as the appellant/defendant has made construction in 'B' schedule property, the respondent/plaintiff has filed a suit in O.S.No.915 of 1995 on the file of the Principal District Munsif Court, Mayiladuthurai for declaration that the appellant/first defendant therein is not entitled to obtain license for doing business in 'B' schedule property and also injunction restraining the Commissioner, Kuthalam/second defendant therein to issue license to the appellant for doing business in the suit properties. That suit was dismissed, against which, the respondent/plaintiff has preferred an appeal in A.S.No.56 of 1998 and the same was allowed. Aggrieved over the same, the appellant/defendant has preferred S.A.No.225 of 2001 before this Court, which was dismissed and that has been evidenced by Ex.A2. In A.S.No.153 of 2003, a plea of doctrine of acquiescence has been raised. But the Courts below correctly held that the appellant/defendant has entered into the suit properties and after he made construction, the plaintiff/respondent has immediately filed the suit and after filing the suit, construction was completed. So the appellant/defendant is not entitled to take shelter under the doctrine of acquiescence.

18. At this juncture, it is appropriate to consider the following decisions relied upon by the learned counsel for the appellant/defendant:

(i) In AIR 1965 Madras 318 (The Associated Cement Companies Ltd. by Manager J.P.Munsiff, v. L.S.Ramakrishna Gowder), wherein it was held that land owner estopped from recovering possession because of his conduct is not entitled to damages for portion occupied by trespasser. But the above decision is not applicable to the facts of the present case. In the above decision, the appellant has secured 420 acres of land under a lease for mining purpose in several survey numbers. But the respondent purchased the same property in S.No.961/5 for doing his business, for which he made construction only in the year 1950. At that time, he kept quite, so it was held that "right to recover possession of it from a trespasser albeit that the later had put up a construction upon it, an exception does exist to such a rule

where the owner is precluded by any conduct on his part from claiming possession". So the above decision is not applicable to the facts of the present case.

(ii) In AIR 1977 Madras 342 (S.Palanivelu v. K.Veradammal), it was held that acquiescence by the owner while trespasser built on trespassed land, owner should be compensated and trespasser should not be evicted. The above decision is also not applicable to the facts of the present case.

(iii) The above decision has been followed in AIR 1981 Madras 220 (R.S.Muthuswami Gounder v. A.Annamalai and others), wherein it was held that at the time of construction itself, it was objected, even after filing suit, the defendant completed the construction, now he wanted to take shelter under the doctrine of acquiescence. Further, the defendant had gone to the extent of saying that 'B to D' schedule properties are not belonging to the plaintiff. In the case on hand, when the same defence raised before the first appellate court, it was rightly held in para-12 of its judgment that since the defendant has completed his construction after filing the suit, he cannot take shelter under the doctrine of acquiescence. In such circumstances, the above decision is not applicable to the facts of the present case. Therefore, the appellant/defendant is not entitled to take shelter under the doctrine of acquiescence. Thus, Substantial Question of law 1 is answered against the appellant/defendant.

Substantial Question of Law No.3:

19. Learned counsel for the appellant/defendant would submit that the suit is not hit by resjudicata. Since the respondent/plaintiff has not filed pleadings, decree in the typed set of papers in respect of 'C and D ' schedule properties, it cannot be decided in respect of 'C and D schedule properties, 'B' schedule property alone has been decided. Since in the absence of filing plaint, written statement and other documents, the doctrine of resjudicata cannot be established. For the reason, he relied upon the decision of the Apex Court reported in AIR 1964 SC 1810 (Gurbux Singh v. Bhooralal). In the above decision, it deals with Order 2 Rule 2(3) of C.P.C. and in para-7, it was held as follows:

"7. . . . This apart, we consider that learned Counsel's argument must be rejected for a more basic reason. Just in the case of a plea of res judicata which cannot be established in the absence on the record of the judgment and decree which is pleaded as estoppel. We consider that a plea under Order 2 Rule 2, Civil Procedure Code cannot be made and except on proof of the plaint in the previous suit the filing of which is said to create the bar. . . . "

20. At this juncture, 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 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 proceedings 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.]”

In the above section, it was specifically mentioned that 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. In the case on hand, plaint, written statement, issues and the judgment passed by the trial Court were not filed before the Court to show that the issue has been substantially decided between the parties in respect of same subject matter of the suit. So the present suit is not barred under Section 11 of C.P.C. (i.e.) doctrine of resjudicata. Thus, Substantial question of law 3 is answered accordingly.

21. In view of the answers given to Substantial questions of law 1 to 3, Exs.A1 to A4 proved that 'A to D' schedule properties are belonging to the respondent/plaintiff. In respect of 'A' schedule property, there was a rental agreement, which was exhibited as Ex.A6 in the previous suit. The appellant/defendant had trespassed into the suit properties and made construction. But the appellant/defendant has completed the construction after filing the suit. So the appellant/defendant is not entitled to invoke doctrine of acquiescence. Hence the respondent/plaintiff is entitled to ejectment in respect of 'A' schedule property and recovery of possession in respect of 'B,C,D' schedule properties. Both the Courts below have considered all the aspects in proper perspective and correctly decreed the suit. Hence, the judgment and decree passed by both the Courts below does not suffer any illegality or irregularity and they does not warrant any interference and they are hereby confirmed.

22. In fine,

- Second Appeal is dismissed with costs.
- The decree and judgment passed by both the Courts below are hereby confirmed.
- Two months time is granted to the appellant/defendant to hand over the possession of the suit property to the respondent/plaintiff.
- Consequently, connected Miscellaneous Petition is closed.

-s/d-

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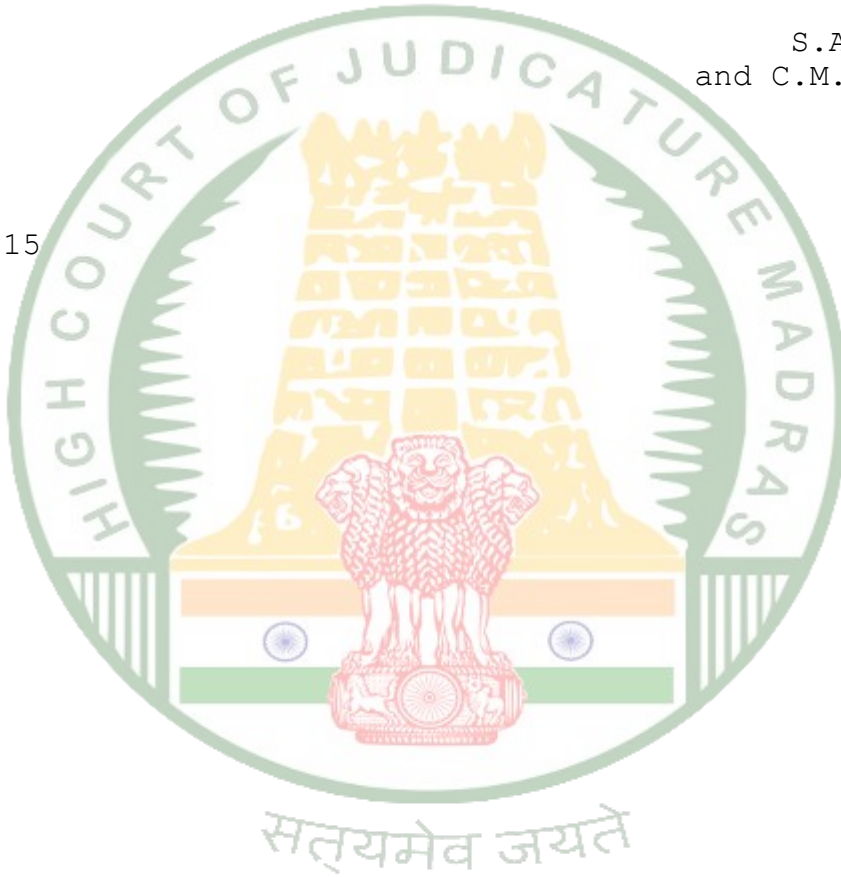
- 1.The Principal Sub-Court, Mayiladuthurai,
- 2.The Principal District Munsif Court, Mayiladuthurai.
- 3.The Record Keeper, V.R.Section, High Court, Chennai.

+1 cc to Mr.A.MuthuKumar Advocate sr.34046

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