



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Judgment Reserved on : 21.06.2017

Judgment Pronounced on : 20.11.2017

CORAM : THE HONOURABLE Mr. JUSTICE N.SESHASAYEE

S.A.(MD).No.32 of 2016

Francis

: Appellant/Appellant/Plaintiff

Vs.

1.K.Madhavan Nair

2.S.Alexander

: Respondents/Respondents/Defendants

Prayer: Second Appeal filed under Section 100 of the Code of the Civil Procedure against the judgment and decree dated 21.06.2012 passed in O.S.No.147 of 2011 on the file of the learned Sub-Court, Padmanabhapuram and confirmed by judgment and decree dated 12.01.2015 passed in A.S.No.65 of 2012 on the file of the District Judge, Kanyakumari at Nagercoil.

For Appellant : Mr.M.P.Senthil

For Respondents : Mr.K.Srikumaran Nair [R1]

JUDGMENT

This appeal is preferred by the unsuccessful plaintiff who lost his suit for declaration of title and for possession of the suit property successively before the Courts below.

I Prelude:

2. The suit properties herein exhibit an unabated propensity for litigation since 1981 and the present litigation is an offspring of this propensity. A prelude narrative of the facts therefore may enable easy appreciation of the cause that led to the current action. They are:

- There are two items of suit properties. The first item of property is the eastern 47 cents in Old No.1708/A2 and A3 and correlated to R.S.No.657/10 of Ponmanai Village, Kalkulam Taluk, Kanyakumari District. The second item of property is the western 47 cents site comprised in the same survey number with 50 rubber trees.
- These properties originally belonged to one Harihara Iyer. They were outstanding on a mortgage. To redeem the same, Harihara Iyer filed O.S.65 of 1981 before the Principal District Munsiff Court, Padmanabapuram. On 01-04-1982, a preliminary decree was passed, and on 22-08-1984, a final decree for redemption too was passed. This was challenged by the mortgagee in A.S.No.24 of 1985.
- During the pendency of A.S.24 of 1985, Harihara Iyer and his sons entered into a sale agreement for the sale of the suit properties with one Madhavan Nair, the first respondent/first defendant herein. Towards the sale price Madhavan Nair had paid an advance amount of Rs.8000/- under the said agreement.



Time too was stipulated for completing the sale, which was no more than a couple of months.

- Pursuant to the sale agreement, Madhavan Nair filed E.P. 220 of 1989 for delivery. On 15-12-1989, he took delivery of the suit properties. The delivery list in this E.P is marked as Ex.B-1 in the present suit. Harihara Iyer and his sons offered some resistance to Madhavan Nair taking delivery, but were unsuccessful. However, that issue is not relevant here.
- Thereafter, Harihara Iyer had filed O.S. 243 of 1996 before the District Munsiff Court, Padmanabhapuram, which was subsequently transferred to the Sub Court, Padmanabhapuram and was numbered as O.S.40 of 1997. This suit was laid against Madhavan Nair, for a decree of prohibitory injunction to restrain the latter from disturbing former's possession. Madhavan Nair, for his part had filed O.S.No. 415 of 1996 before the District Munsiff Court, Padmanabhapuram, against Harihara Iyer and his sons for injunction that his possession of the suit properties was not disturbed.
- During the pendency of these suits Harihara Iyer sold the suit properties under two sale deeds dated 03-07-1996 and 12-08-1998 to a certain Francis. He is the plaintiff here. His two sale deeds are Exts.A-1 and A-2.
- Subsequently, on 07-06-2001, O.S.No.40/1997 that Harihara Iyer had filed was dismissed for default. The copy of the plaint, judgment and the decree in O.S.No.40 of 1997 are Exts.B-2 to B-4.
- On 30.7.1998, O.S.No.415/1996 that Madhavan Nair had filed was dismissed on merit. Challenging the said decree, he preferred A.S.111/1998 before the Sub Court, Padmanabhapuram. This appeal was later not pressed and accordingly dismissed. The copies of the judgment and decree in O.S.415 of 1996 are Exts.A-19 and A-20 and those in A.S.111 of 1998 are Exts.A-21 and A-22.
- In the meantime, Madhavan Nair had filed another suit in O.S.60 of 1998 against the present plaintiff Francis, who, to repeat, was a purchaser of the suit property from Harihara Iyer, alleging that Francis had forcibly dispossessed him and sought recovery of possession of the suit properties. This suit was dismissed by the trial court on 11.6.2002. The copy of the judgment of the trial Court is Ext.B-5.
- The decree in O.S.60/1998 was challenged by Madhavan Nair in A.S.98/2002 before the District Court, Nagercoil, and the same was allowed. Ext.B-6 is the copy of the judgment in



A.S.No.87 of 2002. Its primary reasoning is that, Francis was not a bonafide purchaser since he had purchased a part of the suit properties from Harihara Iyer under the present Ext.A-1, sale deed dated 03-07-1996, in violation of an order of interim injunction passed in O.S.415 of 1996, restraining his vendor from alienating the same. It also referred to Sec.53-A of the Transfer of Property Act for granting a decree for recovery of possession of the suit properties from Francis.

- Francis, in turn challenged the decree in A.S.No.87 of 2002 in S.A(MD) 364 of 2004. On 06-11-2009, this was dismissed by this Court. Ex.A-12 is the copy of the judgment. In Ex.A-12 judgment, this Court has essentially fallen back on Sec.6 of the Specific Relief Act and also referred to Section 53A of the Transfer of Property Act, and found that Francis had no right to forcibly dispossess Madhavan Nair, and if at all any, he should resort to legal process for recovering possession of the suit properties.
- Francis attempted to challenge it before the Supreme Court in SLP (Civil) 6368/2010, but his SLP was dismissed. Ext.B-8 is the copy of the order in the SLP. This has now led to the filing of the present suit by Francis.

II Pleadings:

A. Plaintiff's case

3. The first half of the plaint essentially deals with the filing of O.S.60 of 1998 by Madhavan Nair, its dismissal, and A.S.No.87 of 2002 that the latter had filed with success and S.A.(MD) No.364 of 2004 that he himself had filed, its judgment. The material facts that are subsequently pleaded are:

- a) During the pendency of S.A.364 of 2004, on 19-03-2009, the first defendant along with the Panchayat President of Ponmanai village visited the plaintiff and told him that the second defendant had entered into a sale agreement with him and that he had handed over possession to the 2nd defendant. Second defendant on the strength of the said sale agreement, attempted to dispossess the plaintiff forcibly. The plaintiff pleaded with him that he had no house to reside, owing to which the second defendant orally leased out the building in the suit property to the plaintiff on a monthly rent of Rs.300/-. The remaining land in the suit property was occupied by the second defendant at the instigation of the first defendant. Therefore, the defendants have dispossessed him as early as 19-03-2009, but permitted him to reside as a tenant. As the plaintiff was an illiterate, he failed to inform the same either to the Hon'ble High Court or to the



b) However, suppressing this, the first defendant Madhavan Nair, in collusion with the second defendant, had filed E.P.22 of 2010 in O.S.60 of 1998, and on 06-09-2010 obtained an order for delivery. The second defendant (the agreement holder from the first defendant) filed a claim petition in E.A 196/2010 and the same was dismissed on 01-07-2011. However, since possession was already taken from the plaintiff nothing required to be delivered.

c) Defendants have no manner of right to possess the suit property. Be that as it may, on 04-07-2011, defendants along with some strangers attempted to evict the plaintiff forcibly from the buildings and to commit waste. This was timely prevented.

Hence, the suit is laid for declaring plaintiff's title and for possession.

B. Case of the First defendant:

4. In his written statement, in the initial part he narrates the early history of various litigations. The material facts pleaded afresh are:

a) The observation pleaded in paragraph No.33 of the judgment in S.A.364 of 2004 are only casual and general in nature, addressed to hypothetical situations. This Court has neither upheld the plaintiff's title, nor has given him a right to file a fresh suit to recover possession. The plaintiff has misinterpreted this observation of the High court just to escape the Execution proceedings initiated by this defendant in O.S.60 of 1998.

b) The oral lease as alleged by the plaintiff under the second defendant and the circumstances he has stated in which it was so obtained are all false. There is no truth in the allegation of the plaintiff that he has been dispossessed of even on 19-03-2009. The present suit itself is filed with the connivance of, and collusion with the second defendant.

c) After the dismissal of S.A.364 of 2004, this defendant filed E.P. 22 of 2010 for delivery. The second defendant in collusion with the plaintiff had filed E.A. 196/2010 styled as a Claim petition. That was dismissed. Aggrieved by the outcome of the same, the present suit is filed. The plaintiff has no right to be in possession.

d) In the meantime, delivery was ordered in E.P.22 of 2010 through an Advocate Commissioner aided by police protection. Challenging it, the plaintiff filed CRP.No.1499 of 2011 before this Court, and enjoyed an order of stay for a while. On a compassionate ground he was granted time till 30-11-2011, for vacating the property. In instituting the



present suit, the plaintiff is abusing the judicial process of the Court.

- e) The second defendant has filed O.S.35 of 2011 before Sub Court, Padmanabhapuram, against this defendant with the connivance of the plaintiff. The suit is liable to be dismissed.

C. The case of the second defendant:

5. The second defendant claims to have entered into a sale agreement with the first defendant. His pleadings are:

- a) On 19-03-2009, the second defendant had entered into a sale agreement with the first defendant for the purchase of the suit property for a consideration of Rs.3.0 lakhs. On the same day, first defendant took possession and handed over the same to the second defendant. Since the plaintiff pleaded that he had no house, second defendant leased out the residential building for a monthly rent of Rs.300/-. After 19-03-2009, the first defendant had no right to dispossess either this defendant or the plaintiff.

- b) This defendant has filed O.S.35 of 2010 against the first defendant for specific performance of the contract that he had entered into with the first defendant.

III Approach of the Courts below:

A. Trial Court.

6.1 It framed three issues and three additional issues. The primary issue is whether the plaintiff has title to the suit properties. The next set of issues are if (i) the suit is barred by res judicata, (ii) barred by limitation and (iii) the suit is maintainable.

6.2 Before the trial court, plaintiff examined himself as P.W.1. For the defendants, none of the defendants have entered the witness box. However, they have produced Exts.B-1 to B-13, all of which are judgments, or other orders of the Court.

6.3. The Trial Court has entered findings against the plaintiff in all these issues and dismissed the suit. Its reasonings are:

- a) That in paragraph 33 of Ext.A-12 judgment in S.A.(MD) 364 of 2004 (extracted in paragraph 19.2 below), this court has not decided any of the rights of the plaintiff, and hence the finding of the District Court in A.S.87 of 2002 (Ext.B-6) as to the validity of Exts. A-1 and A-2 sale deeds has become final.

- b) In Ext.B-6 judgment, it was held that the present plaintiff had purchased the suit property under Ext.A-1 when there was an interim injunction restraining Harihara Iyer passed in O.S.15 of 1996 was in force, and as a consequence the same is invalid. Secondly, Madhavan Nair has been in possession of the



suit properties pursuant to an agreement of sale, and the same is protected by Sec. 53-A of the Transfer of Property Act. The High Court too in its judgment in S.A.(MD) 364 of 2004 has affirmed that Madhavan Nair was entitled to protect his possession under Sec.53A of the Act.

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A finding on res judicata was entered in favour of the first defendant, but it was presumably rooted in the judgement of the District Court in A.S.87 of 2002. On issues pertaining to limitation and maintainability of suit, the trial Court found them against the plaintiff, but the judgement does not specify or detail them.

B. The First Appellate Court

7. Aggrieved by the decree of the trial court, plaintiff Francis has filed A.S.65 of 2012 before the Principal District Court. The first appellate Court too dismissed the appeal and non-suited the plaintiff primarily on the ground that in Ext.B-6 judgment in A.S.87 of 2002, the first appellate court has held that Exts.A-1 and A-2 sale deed were held invalid.

IV The second appeal:

8. On admission, this Court has framed the following substantial questions of law:

- 1) Whether the Courts below are right in denying a decree for possession and declaration, especially when the sale deeds under Ex.A1 and A2 are valid and genuine one and executed for proper consideration without applying the purport of Section 54 of the Transfer of Property Act?
- 2) Whether the Courts below are right in dismissing the suit against the appellant without adverting to the purport of Section 51(8) and 51(9) of the Transfer of Property Act which clearly applies to the case of the appellant?
- 3) Whether the Lower Courts below are right for non-application of mind that Section 53-A of Transfer of Property Act applicable to the 1st respondent ?

A. The Arguments

9. The learned counsel for the appellant chiefly submitted:

- It is an admitted fact that Madhavan Nair has not obtained any sale deed from Harihara Iyer and his sons pursuant to the sale agreement executed in 1985. The only right that Madhavan Nair seeks to protect is his possession of the suit property, obtained in part performance of the contract under Section 53-A of Transfer of Property Act.



protection in Sec. 53A of the Transfer of Property Act, he must have either performed his part of contract or must have at least conveyed his willingness to perform the same. In other words, there is a need for him to plead and prove his willingness to perform his part of the contract, more akin to Sec. 16(c) of the Specific Relief Act. This, Madhavan Nair has not done at anytime. Indeed, this aspect weighed with the District Munsiff when he dismissed O.S.415/1996 under Ext.A-19 judgment that Madhavan Nair had filed seeking a decree of prohibitory injunction against Harihara Iyer. Unfortunately, the Courts below have not only overlooked it, but have also treated Madhavan Nair's possession of suit properties as absolute, as if it was founded on title. Reliance was placed on the authorities in Mohan Lal (deceased) through his Lrs & Others Vs Mira Abdul Gaffar & another [AIR 1996 SC 910], Ranchhoddas Chhaganlal Vs Devaji Supdu Dorik & Others [(1977)3 SCC 584, S. Maruthai & another Vs Gokuldoss Dharam Doss & four others [1999(III) CTC 724]

- Since Madhanvan Nair had entered possession pursuant to an agreement of sale, he is not even entitled to claim adverse possession either against his transferor or against anyone who claim under the latter. The decision of this Court in Pappammal & Others Vs Sarojini & another [2011(3) CTC 567] was relied on.
- The finding of the Courts below that the judgement in Ext.B-6 would constitute res judicata is faulty as they have ignored the principle that the judgement of the first appellate Court in Ext.B-6 would merge with Ext.A-12 judgement of this Court in SA(MD) 364 of 2004, in which this Court has arrived at its conclusion based on grounds other than the one the District Court has propounded.
- To cap it, Madhavan Nair has not chosen to produce the sale agreement nor has he chosen to examine himself. He has produced various judgments involving the suit properties, but these judgments essentially discuss the rights or liabilities of the parties and they cannot be equated to the document of title.

10. Per contra, the learned senior counsel appearing for Madhavan Nair, the first defendant/first respondent, argued more in line with the reasoning of the Courts below, and contended that there is a clear finding in A.S.87 of 2002 that the sale deeds that the plaintiff has obtained were invalid as they were executed in violation of an interim order of injunction and this finding has become final and operate as res judicata. He laid considerable

emphasis on the lawful nature of Madhavan Nair's possession and relied on the decisions Patel Natwarlal Rupji Vs. Kondh Group



Kheti Vishayak and Another [(1996) 7 SCC 690] and P.S.Sugumaran Vs. Ragini alias Usha and another [(2001) 3 MLJ 257]. The learned counsel insisted that this Court in second appeal should go slow in interfering with the concurrent findings of the Court below.

B. Discussion and Decision

11.1 Before the discussion gets commenced, it is necessary to state who is pitted against whom in this litigation. It starts with two major characters: Harihara Iyer and Madhavan Nair, the first defendant. Harihara Iyer was the original owner of the property. This is not disputed. Madhavan Nair had entered into an agreement of sale with Harihara Iyer about thirty-two years ago as of today, and he manages to retain this status as an agreement holder unaltered, till date. He however, has obtained an advantage in that he has obtained possession of the suit properties under the said sale agreement.

11.2 The plaintiff is a purchaser of the suit properties from Harihara Iyer under two sale deeds, Exts.A-1 and A-2, the first in 1996 and the other in 1998. From now he would replace Harihara Iyer.

11.3 The battle lines are drawn along classical lines: It is a duel between a holder of a sale agreement dated in 1985, in whom no title is vested (See Sec.54 of the Transfer of Property Act) versus a purchaser of the suit properties. One has possession without title and the other has title without possession. One is keen to resist title and the other is anxious to be in possession. There is no need to introduce that the former is Madhavan Nair, the first defendant, and the latter is Francis, the plaintiff. It makes a simple equation which law could resolve with less strain on Courts. That however, did not take place, as the strategies that parties evolved fired and backfired that finally left this Court with an equation in apparent complexities. What gives a further flavour to this complexity is the introduction of a third character, the second defendant. He claims himself to be the agreement holder of an agreement holder that Madhavan Nair is.

12. Now, Madhavan Nair (the first defendant) plays a solitary piece in res judicata to checkmate the plaintiff's claim of title. His moves are:

- a) That the reasoning of the High Court in its judgment in S.A. (MD)364 of 2004 does not contain any findings on the rights of the parties, more particularly that of Francis, but are observations merely. Therefore, what stands as final is the finding of the first appellate Court in A.S.87 of 2002 that the sale deeds (marked Exts.A-1 and A-2) herein were invalid.

<https://hcservices.courts.gov.in/hcservices/> the plaintiff's sale deeds have already been found invalid in an earlier suit, and that having become final, the



same will operate as res judicata in the present suit and bars the plaintiff from asserting title to the suit properties based on Exts.A-1 and A-2 sale deeds.

13. The core point, howsoever it may be phrased, is whether the finding on validity of Ext.A-1 and A-2 sale deeds in the judgement of the District Court in A.S.87 of 2002 constitutes res judicata. This takes the discussion to the next stage: To investigate whether the ingredients necessary for constituting res judicata are available in this case. This is pivoted on an appropriate understanding of:

- a) The character of possession of the suit properties in the hands of the first defendant Madhavan Nair;
- b) If a sale effected in violation of an order of interim injunction prohibiting a sale of property is void ab initio or has become non est in the eye of law; and
- c) The effect of Ext.B-6 judgment in AS 87 of 2002 after the judgment of this Court in SA 364 of 2004.

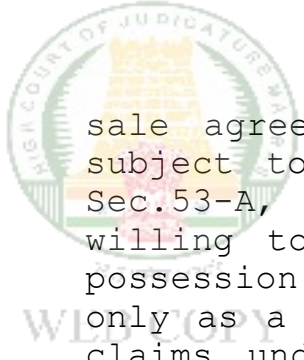
14.1 Admittedly, Madhavan Nair was put in possession of the suit properties in part performance of the agreement of sale. But what it is its character? Sec.54 of the Transfer of Property Act inter alia reads:

"...

A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties."

It does not, of itself, create any interest in or charge on such property."

The statute is plain and straightforward. An agreement holder for the purchase of an immovable property is not entitled to any right to have immediate possession, until the agreement of sale fructifies into an actual sale. He has in law only a contractual right of personal action against the owner/transferor of the immovable property, either to seek specific enforcement of the contract, or to seek damages in case of breach of contract. Since he, as an agreement holder is not entitled to possession, in the absence of any contract to the contrary, if he enters possession, it will amount to plain trespass and hence unlawful. If, however, a purchaser/transferee under an agreement of sale is put in possession of the property to be purchased, his possession is considered lawful, not because any right or interest in the land has vested in him, but because such possession is contractually consented to by the transferor of the property. His possession is only permissive and lawful, but still without any interest over the land. Sec.53-A of the Transfer of Property Act merely provides for lawful possession. Since it is not backed by any right over the land, a possession obtained pursuant to a written



sale agreement can only be defended in terms of Sec.53-A, but subject to the condition, which, to use the very expression of Sec.53-A, reads that "...the transferee has performed or is willing to perform his part of the contract..". It is hence, possession obtained in part performance of a contract can be used only as a shield against any attempt of the transferor or anyone claims under him to dispossess the transferee (because of the statutory protection of the lawful possession), but not as a sword against the transferor (which requires a right or interest over the immovable property).

14.2 The agreement of sale that Madhavan Nair had entered into with Harihara Iyer is not made part of the records in the present suit, but its salient aspects are extracted in Ext.A-12 judgment of this Court in S.A.(MD)364 of 2002. This agreement appeared to have directed Madhavan Nair to take possession of the properties from the mortgagee of Harihara Iyer, and to complete the sale within 05-06-1985. However, in the last thirty-two years since obtaining the sale agreement in 1985, Madhavan Nair is yet to speak about his willingness to perform his part of the contractual obligation. The records made available discloses that he has performed only one part of the contractual term in taking possession from the mortgagee of the suit property and be in possession, but as to the performance of the reminder part where he is required to pay or tender payment of the balance sale consideration and to have the sale deed executed, he has neither conveyed his willingness to perform it to Harihara Iyer, nor has he informed the same to the Court with a suit for specific performance, nor has he entered the witness box to depose about it. This would imply that the character of possession of the suit properties in the hands of Madhavan Nair is no more than permissive, but owing to his failure to preform his part of the contract his only right to protect his possession in terms of Sec.53A of the Transfer of Property Act is lost to him. Therefore, but for the finding of the Courts below that the present suit is barred by res judicata, the plaintiff's right to relief in the suit faces no tenable challenge.

15. Now what is the tenability of Madhavan Nair's plea in attaching finality to the finding of the District Court in A.S.87 of 2002 on the validity of Exts.A-1 and A-2 sale deeds and the same operating as res judicata in his strategy to non suit the plaintiff? This shifts the spotlight to the following facts:

- Madhavan Nair, had filed O.S.415 of 1996 against Harihara Iyer and his sons. Ext.A-19 is the copy of the judgement in the said case. This suit was instituted seeking permanent injunction for restraining Harihara Iyer and his sons from interfering with his peaceful possession of the suit property.
- https://hcservices.courts.gov.in/06services/1996, Madhavan Nair claims to have obtained an order of interim injunction restraining his transferor Harihara Iyer



from alienating the property. However, on 03-07-1996, Harihara Iyer sold a portion of the suit properties to the plaintiff under Ext.A-1. On 13-07-1998, this suit was dismissed on the ground that Madhavan Nair who claimed possession only pursuant to part performance of his agreement of sale, could not use it as a sword against his own transferor, and that he had also failed to establish his willingness to perform his part of the contract. Madhavan Nair challenged this decree in A.S.111 of 1998 before the Sub Court, Padmanabhapuram, and it was later not pressed by him and was dismissed (as could be seen from Ext. A-21 judgment). Since, Madhavan Nair had not withdrawn O.S.415 of 1996 but had only allowed his appeal in A.S.111 of 1998 to be dismissed, the finding in O.S.415 of 1998 was allowed to remain.

- It was after the dismissal of O.S.415 of 1996, on 12-08-1998, plaintiff had purchased the other half of the suit property under Ext.A-2. Soon thereafter, the plaintiff had dispossessed Madhavan Nair forcibly, which drove the latter to file O.S.60 of 1998, before the Sub Court. As indicated a few times earlier this suit was dismissed Vide judgement in Ext.B-5 and in the appeal challenging the said decree in A.S.87 of 2002, the District Court has held that Ext.A-1 sale deed was invalid as it was executed in violation of an order of interim injunction in O.S.415 of 1996.

16.1 Sec.11 of the Code of Civil Procedure reads:

" 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 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.

....."

The ingredients that the Civil Procedure Code mandates for constituting res judicata remain unchanged for more than a century of its existence and the Courts of this country are not tired of stating them repeatedly. They are as fundamental as a batsman checking his grip and balancing his stance at the crease. Still, the Courts below have missed them. The essentials of the doctrine are:

- There should be an earlier suit than the one at hand;
- That both the suits are litigated between the same parties or by those who claim under them;
- That they should have been filed under the same title.

<https://hcservices.ecourts.gov.in/hcservices/> • The matter currently at hand must be directly and substantially in issue in the earlier suit;



- That the finding on such matter must have attained finality even in the former suit.

17.1 In order a decision in an earlier suit, or on an issue in the earlier suit should bar the Court from trying the subsequent suit or an issue therein, the Court trying the subsequent suit must,

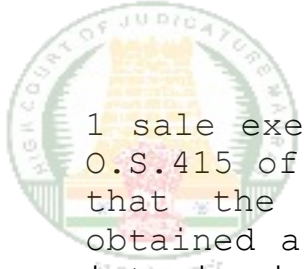
- First endeavour to ascertain from the pleadings in the former suit if they gave rise to an issue which was directly and substantially in issue in the sense that it was necessary for deciding that case, is also involved in the case pending before it;
- Next to satisfy itself if the said issue has been decided conclusively in the earlier suit as between the parties to it and if it has attained finality.

17.2 This is the minimum expected. In Syed Mohd. Salie Labbai (Dead) by L.Rs. Vs. Mohd. Hanifa (Dead) by L.R.s and other [AIR 1976 SC 1569], the Supreme Court has prescribed that :

" 8. The best method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suits and then to find out as to what had been decided by the judgments which operate as res judicata. It is well settled that pleadings cannot be proved merely by recitals of the allegations mentioned in the judgment."

It is to state the basic rule: That he who pleads res judicata should place all the facts constituting it including the pleadings in the former case.

17.3 The first defendant herein who pleads res judicata, has not produced the pleadings in OS 60 of 1996. A faulty start indeed. This would imply that before rushing to invoke the doctrine of res judicata to non-suit the plaintiff, the Courts below have denied themselves of an opportunity to ascertain if the pleadings in O.S.60 of 1998 involved any issues that could be considered as directly and substantially involved as the one now before it, more particularly, and contextually, if it involved an issue on the validity of Exts.A-1 and A-2 sale deeds for their execution in violation of order of injunction. When this Court attempted to ascertain the same to the extent they are disclosed in the judgments of both O.S.No.60 of 1996 and A.S 87 of 2002 (Exts.B-5 and B-6), (out of sheer curiosity to know though it is stricto sensu neither permitted nor recommended by the Supreme Court in the present case) they do not even remotely suggest that they gave rise to an issue for the Court to decide if Ext.A-



1 sale executed in violation of an interim order of injunction in O.S.415 of 1996 was non est or invalid. All that they disclose is that the defendant therein (plaintiff here) had fraudulently obtained a sale deed dated 03-07-1996 in violation of an order of interim injunction dated 27-06-1996, stops there, and does not proceed to allege anything about the invalidity of the sale deeds in question. Unless the plaintiff herein (defendant in OS.60 of 1998) is put on notice as to the legal consequence of Ext.A-1 sale deed in the manner Madhavan Nair now contends, the former might not be even under a need to defend the same in the earlier suit, and necessarily no triable issue could be raised on it.

17.4 This precisely was done by the trial court in O.S. 60 of 1998 when it did not choose to frame an issue on it, and correctly so. It was only in A.S.87 of 2002, the District Court had raised it as a point for decision. In the absence of pleadings in O.S.60 of 1998, it is impossible to hold that a point as raised by the District Court in A.S.87 of 2002 existed for a decision. If these are the attendant circumstances for the District court to raise a point on the validity of Ext.A-1 sale in A.S 87 of 2002, then what it had held on the said point cannot be termed as a finding on a matter directly and substantially in issue for granting a decree for Madhavan Nair. (It may be added here as a tail piece that even as per the said reasoning of the District Court, only Ext.A-1 can be said to come under the cloud of violation of the interim order since Ext.A-2 was executed after the dismissal of the suit. But the District Court in A.S.87 of 2002 has held that both the sale deeds are invalid.)

18. Here two aspects need to be immediately stated:

- In Thomson Press (India) Ltd V. Nanak Builders & Investors P. Ltd., [2013 (2) CTC 104], the Supreme Court, taking a deviation from its earlier view in Vidur Impex and Traders Pvt. Ltd. V. Tosh Apartments Pvt. Ltd., & Others [(2012) 8 SCC 384], has held that a sale in violation of an order of injunction does not render the sale non est, but would only exposes the party in violation of the order to an action in contempt. In other words, such sale cannot be held void but only as voidable. To this it may be added that even the view that a document executed in violation of an order of the Court was considered non est by courts was essentially intended to uphold the majesty of justice. When the Court has decided to maintain a certain status quo during the pendency of a suit, it frowned upon a conduct that violated it, and hence it asserted its authority to restore status quo ante for preserving the cause of justice. Now, in the context of the facts of the present case, even if Ext.A-1 came very near to being treated as non est for violating an order of interim
- can it still be treated as one even after the dismissal of the very suit in which the interim order was



passed? Will it not then breed greater injustice than the one sought to be averted? Secondly, can this issue be considered collaterally in a subsequent suit or proceedings, when a sale in violation of an interim order was not held non est by the Court in the very suit in which such violation took place? At least for the present, in view of the decision of the Supreme Court in Thomson Press case referred to above, these issues lose some of their significance.

- The other aspect is, there is a difference between reasoning of the Court in arriving at a finding and the finding itself. The Supreme Court in Mysore State Electrical Board Vs Bangalore Woolen Cotton and Silk Mills Ltd., and others [AIR 1963 SC 1128] has brought out this difference when it declared that

"..what becomes res judicata is the 'matter' which is actually decided and not the reason which leads the court to decide the 'matter'..."

See also Avudayappan Chettiar Vs Kanthimathi Ammal [AIR 1966 Madras 319].

19.1 If whatever that has formed the reason for the decree in A.S.No.87 of 2002 is to survive despite the judgment of this Court in S.A (MD).No.364 of 2004, for the Courts below to invoke res judicata, then it must have passed the scrutiny of this Court and obtained its approval. But this did not happen.

19.2 In S.A.(MD) 364/2002, this Court slanted in favour of Sec.6 of the Specific Relief Act for deciding the appeal. Given the sequence of events that followed the execution of Ext.A-2 sale deed dated 12-08-1998 and filing of O.S.60 of 1998, this Court in SA(MD)364 of 2004 appeared to have taken cognizance of the nature of Madhavan Nair's possession and the protection that Sec.53-A of the Transfer of Property Act has accorded to it, and has carefully avoided treading along the same line of reasoning as the District Court in A.S.87/2002. In paragraph No.33 of its judgment this Court has observed as follows:

"Even assuming that the plaintiff has taken possession as an agent of the vendors, the fact remains that he was in possession of the property till he was dispossessed in the year 1996. The case of the defendant is that he has taken possession in pursuant to the sale deed. On execution of sale deed, the vendor is bound to put the purchaser in possession. If the vendor's possession is disproved the defendant would not have taken possession from vendor or from any person on his behalf. Even a wrongful possessor has the rights of an owner with respect to all persons except the true owner. Such a wrong doer, who is deprived of his possession, can



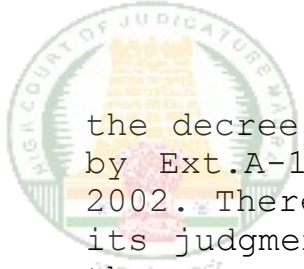
recover his possession from any person, simply on the ground of his previous possession. Even the true owner, who takes his own possession without due process of law, may be forced in this way to restore the possession. The law discourages people from taking the law into their own hands, howsoever, good and sound their title may be. In a case, where the plaintiff has been in peaceful and settle possession of the suit property is dispossessed by the defendant, otherwise than by due process of law, the status quo ante to the date of cause of action must be restored followed by consequential reliefs. The defendant may then seek recovery of possession by due process of law from the plaintiff. Simply because the defendant has a better title than the plaintiff, he cannot be permitted to do a wrong and the same cannot be allowed to be continued even after the lapse of 10 years."

When the plaintiff is known to be in lawful possession, though without title, and was dispossessed by one with title, forcibly, the only right the person in possession has is to have his possession restored under Sec.6 of the Specific Relief Act. This is the right this Court has recognised in its judgment and has made it its foundation. Unfortunately, the trial Court in this case considers it as a document of observation and not as one recognising the rights of parties.

20.1 A decree is defined in Sec.2(2) CPC as meaning a formal expression of an adjudication that conclusively determines the rights of the parties before it. And, a judgment is defined in Sec.2(9) CPC as the statement of grounds for a decree. It is no longer a point for debate that an appeal is a continuation of a suit and the decree of the Court below would merge with the decree of the appellate Court.

20.2 Broadly, the appellate Court can decide an appeal before it (a) by concurring both with the finding and conclusion arrived by the Court below; (ii) concur with the final conclusion of the court below without concurring with the grounds justifying the conclusion. In this case, it would substitute its own grounds for arriving at the same conclusion that the court below has arrived; and (iii) differ from the Court below both on the aspects of grounds for adjudication and the conclusion arrived.

20.3 The judgement in S.A. 364(MD) of 2004 is a speaking one in which this Court has retained the conclusion finally arrived by the District Court, but did not appear to have concurred with the grounds on which the District Court has decided A.S.87 of 2002. If the judgment ought to be the foundation for the decree, then



the decree of this Court in SA (MD) 364/2004 can be sustained only by Ext.A-12 judgment and not by the one delivered in AS 87 of 2002. Therefore, unless the appellate Court retains or confirms in its judgment any of the findings of the Court below and arrive at the same conclusion, it obliterates the reasoning given by the latter. What survives in the ultimate analysis is the judgment of the final court of appeal, and the judgments of the Courts below are relevant only for the purpose of understanding the process of their judging. Necessarily, whatever that has passed for reasoning of the District Court in A.S. 87 of 2002 can not have a life longer than the date of judgment in SA(MD) 364 of 2004.

20.4 Now it could be derived from the above that where the only right inhere in the first defendant in OS 60 of 1998 was the one available in Sec.6 of the specific Relief Act, then the decision on the validity of Ext.A-1 in A.S. 87 of 2002 was hardly necessary for the decision. Therefore, notwithstanding the fact that there was no pleading in the earlier suit to warrant the application of res judicata, the fact remains even whatever that was held on the validity of Ext.A-1 was unnecessary for the decision in AS 87 of 2002. In Brahma Vart Sanatan Dharm Mahamandal Vs Kanhaiya Lal Bagla [(2001)9 SCC 562] and in R. Srinivasa Row Vs Kaliaparumal (minor) by father [AIR 1966 Madras 321], it is held that a finding not necessary for a decision in the earlier suit would not constitute res judicata in the subsequent suit. In K.J Mehta & Co., Vs Preetam Singh [(1979)92 LW 404], this court has held that a casual observation which is not the resultant of an adjudication on an issue will not be res judicata in a subsequent suit.

21. To conclude this point, this Court finds that doctrine of res judicata has no application in the present suit. To sum up the reasons:

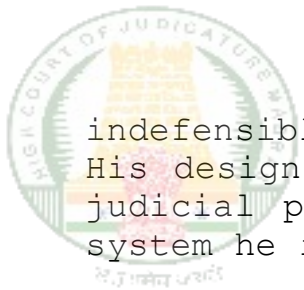
- O.S.60 of 1998 did not raise any issue on the validity of Exts. A-1 and A-2 sale deeds. Nor Exts.B-5 or B-6 judgments indicate that the parties, more particularly the plaintiff, have gone for trial with the knowledge that this point was involved in the case.
- That the finding of the District court in A.S 87 of 2002 was not necessary for the decision in the appeal. Hence, it cannot be termed as one directly and substantially in issue.
- At any rate, after the judgment of this Court in S.A.(MD) No.364 of 2004, whatever that was in Ext.B-6 judgment in A.S.87 of 2002 that might have influenced the courts below to believe as supplying material for invoking res judicata, is



22. There is one another fringe aspect that remains to be addressed. What now holds the plaintiff at a distance from the decision in this case is his pleading that he was granted the lease of the house in the suit property by the second defendant. The second defendant, to remind, is the agreement holder from the first defendant Madhavan Nair, who himself is another agreement holder. Inasmuch as Madhavan Nair himself does not have any right or interest over the suit properties, he cannot transfer anything greater than what he has to the second defendant. For the second defendant to give the property in lease to the plaintiff, he must have an interest or right over the suit properties which is capable being transferred within the meaning of Sec.105 of the Transfer of Property Act. With no subsisting right, title or interest in the property, the second defendant cannot grant any lease of the suit properties to its very title holder, the plaintiff. An admission cannot divest one of his right over an immovable property and confer it on another, and hence the pleading such as the one the plaintiff has made cannot be considered as conferring any right in the second defendant. Otherwise, it would lead to an anomaly in law, if a person, with no encumbrance on his property, were to become a lessee of his own property. It appears from the attending circumstances that the plaintiff's pleadings on lease appears to be a plea made in desperation, aimed solely to retain possession. It cannot affect plaintiff's title.

23. Can this Court now interfere with the concurrent findings of the Courts below? The foregoing discussion is a pointer to the fact that commencing from conceiving the legal rights of the parties and concluding with their application of res judicata, the Courts below have unwittingly slipped to concoct its findings from a cocktail of legal misconceptions. A finding which is either not in consonance with law, or is in conflict with the law declared, and directly affects the right of the parties, can hardly be termed a finding in law, and it does not attain a greater status merely because two courts have walked the wrong lane twice over to arrive at the same conclusion. Sec.100 of CPC does not bar an interference in situations such as these. On the other hand, it casts a duty on this Court to interfere to set right the findings that the Courts below have arrived at. Section 103 CPC empowers this Court to determine any issue sufficient for the disposal of the appeal, (a) which has not been determined by the Court of first instance and the lower appellate Court, and (b) which has been wrongly determined by such Courts by a reason of a decision on a question of law as referred to in Sec.100 of CPC.

24.1 Turning to first defendant's conduct, he, with no right over the suit property, and a defaulter in law, having failed to perform his part of the contract, chose to squat on an advantage that possession of the suit properties gave him. He defended the



indefensible on grounds that hardly can pass a legal scrutiny. His designs are devious; his ways are hideous; and, he abused the judicial process with baseless defence and with impunity. In our system he is not the first one, nor is he going to be the last.

24.2 In Vinod Seth Vs Devinder Bajaj [(2010)8 SCC 1] Supreme Court made a high amplitude statement and stressed that awarding costs must serve as a deterrent to vexatious, frivolous and speculative litigations and defences. In Sanjeev Kumar Jain Vs Raghubir Saran Charitable Trust [(2012) 1 SCC 455], the Supreme Court has recorded the impotency of Sec.35-A CPC, where it has capped the compensatory costs that could be awarded at Rs.3,000/-, to act as a deterrent against vexatious litigations and defences, and advocated a case for realistic revision. Also see Ashok Kumar Mittal Vs Ram Kumar Gupta, [(2009) 2 SCC 656] and V.Chandrasekaran Vs Administrative Officer & Others [(2012)12 SCC 133]. If the vision is to slim down the docket pendency, and to provide prompt justice in a just cause, then right Rules must be in place for weeding out those who gamble on the system unjustly and hinder the course of speedy justice to the deserving. Their menace must be struck hard before it turns malignant. Hence, there is an urgency to convert the concern expressed by the Supreme Court in Sanjeev Kumar Jain case for a realistic revision of exemplary costs into a strategic legislative action.

24.3 For the present, this Court imposes Rs.3,000/- as compensatory costs on the first defendant. A paltry sum it is, but adequate enough to injure his conscience and offend his dignity.

25. To conclude, this Court allows this appeal with cost throughout plus a compensatory cost of Rs. 3,000/- under Sec.35-A of CPC on the first defendant and the judgment and decree dated 12-01-2015 passed in A.S.No.65 of 2012 on the file of the District Judge, Kanyakumari at Nagercoil, is set aside and the suit in O.S.No.147 of 2011 on the file of Sub Court, Padmanabhapuram, is hereby decreed.

Sd/-

Assistant Registrar(C.O.)

/True Copy/

Sub Assistant Registrar

To:

1. The District Judge, Kanyakumari at Nagarcoil.

2. The Subordinate Judge, Sub Court, Padmanabhapuram.

+1CC to Mr.M.P.Senthil, Advocate, SR.No. 88372

+1CC to Mr.K.Sreekumaran Nair, Advocate, SR.No. 88287

Judgment in S.A(MD).No.32 of 2016

20.11.2017