

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.03.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

SECOND APPEAL NO.961 OF 2010
AND M.P.NO.1 OF 2010

V. Karunakaran ... Appellant/ Appellant/Defendant

-Vs-

1. P. Rathinammal
2. S. Tamilselvi
3. V.P.Natarajan
4. R. Yasodha Rani
5. C. Kannaki

... Respondents/ Respondents/Plaintiff

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 11.01.2008 made in A.S.No.321 of 2007 on the file of the Additional District Judge, Fast Track Court-V, Chennai, confirming the judgment and decree dated 12.06.2006 made in O.S.No.2452 of 2002 on the file of XV Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.Murali Krishnan
for Mr. P. Anbazhagan

For R1, R2, R4 & R5 : Mr.N.Kishore Kumar

R-3 : NA

J U D G M E N T

Aggrieved over the concurrent finding of the Courts below, the defendant / appellant preferred the above Second Appeal.

2. The brief facts of the Second Appeal are as follows:

(a) The appellant and one Late Palaniappan are brothers. The first respondent is the wife of Late Palaniappan

and other respondents are the children of Late Palaniappan. The appellant and late brother have jointly purchased the "A" Schedule property in the name of Palaniappan. They jointly mortgaged the property in the year 1973 and 1979. The appellant got married on 12.09.1979 and he was allotted a portion measuring to an extent of 1200 sq.ft by way of oral partition. He put up a thatched roof house measuring an extent of 400 sq.ft and has been residing in the property for over 29 years without any hindrance. The appellant's brother expired in the year 1984 and thereafter, there was no cordial relationship between the appellant and the respondents. Since the respondents interfered with the peaceful possession, the appellant filed a suit for permanent injunction in O.S.No.2414 of 2002. Thereafter, the respondents filed a suit in O.S.No.2452 of 2002 for recovery of possession and consequential injunction. The Trial Court decreed both the suits. Against which, both the appellant and the respondents preferred two appeals in A.S.No.135 of 2007 and A.S.No.321 of 2007 respectively. The Lower Appellate Court allowed the appeal preferred by the respondents and dismissed the appeal preferred by the appellant.

(b) Aggrieved over the dismissal of the appeal in A.S.No.321 of 2007 confirming the decree passed in O.S.No.2452 of 2002, the appellant / defendant preferred the above Second Appeal on the following substantial questions of law:

" A) When the appellant filed Ex.B1 and Ex.B2 mortgage deed executed by the appellant and his brother in respect of the A & B schedule property. Whether the courts below are justified in not drawing presumption that whether the appellant was a co-owner or licensee?

B) When the respondents has not proved that the appellant was a licensee in the suit property from 1984 and further the respondents admitted that the appellant is in possession of the 'B' Schedule property from 1973 onwards whether the courts below is justified in granting relief to the respondents? "

3. The learned counsel for the appellant would contend that the respondents have drastically failed to prove that "A" schedule property is a self-acquired property. The deceased Palaniappan had no source of income and the appellant's paternal uncle registered the property in the name of his brother as he was a minor then. Since the appellant is continuously in possession from the year 1979 and by virtue of Exs.B1 and B2, mortgage deeds, it is categorically proved that the appellant is a co-owner. The finding of the Courts below that the relationship between the appellant and the respondents was

originally a permissive occupant and therefore, a licensee is erroneous. Therefore, the finding that the appellant is a licensee is erroneous and the judgment and decree is liable to be set aside.

4. I have given my anxious consideration to the documents and the evidence deposed by the parties before the Trial Court.

5. From a perusal of Ex.B11, deposition of the appellant as D.W.1, in the cross examination, categorical admission has been made by the appellant that he was 13 years old at the time of purchase of the property. Therefore, it can be inferred that the appellant would not have contributed for the purchase of property as he was not having any independent income. Even though the appellant pleads that the property was registered in the name of his late brother by his paternal uncle as then he was a minor, there is nothing on record to show that the property was purchased out of the funds from the joint family or that it has ancestral nucleus. A mere statement that Exs.B2 and B3, the two mortgage deeds jointly executed by his late brother and himself would not prove that the appellant is the co-owner. The appellant has drastically failed to prove that the property is a joint family property and it was purchased in the name of his brother out of the joint family funds. In fact, as rightly found by the Courts below, there is no pleading as to how the purchase was made. Further, the appellant as D.W.1 admitted that there was no oral partition at all. In that event, the case of the appellant that he is a co-owner fails. The Courts below have rightly considered that mere execution of mortgage deed will not confer any title. This finding is further substantiated through the further admission of the appellant. It is categorically admitted that since the property was mortgaged with his friend, his name was also included. Therefore, it is clear that the appellant was included as a joint mortgagor at the request of his friend, by way of abundant caution. Therefore, the contention of the appellant that he is the co-owner is not established by oral or documentary evidence. On the other hand, the title to the property is clearly established by the respondents. The sale deed, which is marked as Ex.A1, stands in the name of Late A.Palaniappan, husband and father of the respondents 1, 2 to 5. Secondly, Ex.A2 - mortgage deed dated 25.08.1982, would clearly show that the property was purchased by Late A.Palaniappan, out of his own funds in his name and all the three mortgage deeds were discharged by Late A.Palaniappan. The appellant would in his cross examination categorically admit that he was not aware of the third mortgage deed dated 25.08.1982 and that it was for the purpose of discharging the debt due to the second mortgage. Therefore, the property is a self acquired property of the appellant is clearly established.

The appellant has failed to prove that he is the co-owner of the property. He was minor at the time of purchase of the property. Therefore, the contention of the appellant that he contributed for the purchase of the property is negatived. In view of the discussions, the contention of the appellant that he shall be construed to be a co-owner is not sustainable and hence, the first question of law is answered in the negative.

6. Even though the possession of the appellant from the year 1973 is admitted, it is one of permissive occupant. Admittedly, appellant was a minor at the time of purchase of the property and he was residing with his late brother. He got married in the year 1979 and continue to reside in the same property. It is also admitted that he was living in a thatched house put up by him for an extent of 330 sq.ft. The contention of the appellant that there was a oral partition was negatived by his own admission in the cross examination. Further, he is unable to prove that he is in possession of alleged allotted portion of 1200 sq.ft. There are no evidence such as revenue or other records to show that the property transferred and stood in the name of the appellant. In such an event, it can be inferred that the appellant continued to be in possession till the demise of his brother i.e., 1983 as a permissive occupant. After the demise of his brother, there was strained relationship and the respondents had caused legal notice for evicting him.

7. The appellant had also filed a suit in O.S.No.7324 of 1997 for permanent injunction restraining the respondents from evicting him. In the pleadings, it is categorically admitted that the respondents are the absolute owners. Thereafter, the subsequent suit in O.S.No.2414 of 2002 was also filed for the same relief. When the respondents raised the issue of res-judicata, the appellant had withdrawn the previous suit without reserving any liberty. The Lower Appellate Court had found that the subsequent suit is hit by res-judicata under Order 23 Rule 1 of Civil Procedure Code as no liberty has been granted in favour of the appellant. From the year 1984 onwards, the respondents have objected to the alteration of the property, provision of electricity connection to the appellant and filed the above suit for the recovery of possession. Therefore, from the year 1984 onwards, the jural relationship of the appellant and the respondents was in the nature of licensor or licensee. In such circumstances, onus is on the part of the appellant to prove that he was in possession of the property adverse to the interest of the respondents and that he is entitled to derive title through adverse possession.

8. As already discussed, the appellant has failed to prove his possession as a co-owner and that by way of issuing legal notice, the respondents sought eviction of the appellant, as the title holders of the property. As already stated, the

respondents derived title to the property and proved that the appellant has no right or title. Hence, he can be treated only as a licensee and he cannot claim any right on the basis of his continuous possession. Therefore, the second question of law is also answered against the appellant.

9. Further, the judgment of the Hon'ble Supreme Court in RAMCHANDRA DAGDU SONAVANE (DEAD) BY L.RS. AND ORS. VS. VITHU HIRA MAHAR (DEAD) BY L.RS. AND ORS., [AIR 2010 SUPREME COURT 818] would stand against this case. The relevant paragraph of this judgment reads as under:-

" 31. Res-judicata and Code of Civil Procedure :- It is well known that the doctrine of res-judicata is codified in Section 11 of the Code of Civil Procedure. Section 11 generally comes into play in relation to civil suits. But apart from the codified law, the doctrine of res-judicata or the principle of the res-judicata has been applied since long in various other kinds of proceedings and situations by Courts in England, India and other countries. The rule of constructive res-judicata is engrafted in Explanation IV of Section 11 of the Code of Civil Procedure and in many other situations also Principles not only of direct res-judicata but of constructive res-judicata are also applied, if by any judgment or order any matter in issue has been directly and explicitly decided, the decision operates as res-judicata and bars the trial of an identical issue in a subsequent proceedings between the same parties. The Principle of res-judicata comes into play when by judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implications even then the Principle of res-judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it, is deemed to have been constructively in issue and, therefore, is taken as decided [See AIR 1978 SC1283].

10. The Lower Appellate Court by its common judgment dismissed the suit filed by the appellant and allowed the appeal preferred by the respondents. When there are two decrees on the basis of the common judgment, both the decrees should have been challenged. The finding in one suit will have the impact on the

other also. In so far as the decree in respect of O.S.No.2414 of 2002 has become final, the findings have also become final. Since the appellant has not challenged the findings of the Courts below by filing a separate appeal, the present appeal is hit by res-judicata also.

11. Since the questions of law raised in the Second Appeal are answered against the appellant, the Second Appeal stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-IX)

//True copy//

Sub Assistant Registrar

asi/tk

To

1. The Additional District Judge
Fast Track Court-V
Chennai.

2. The XV Assistant Judge
City Civil Court
Chennai.

+1cc to Mr.P.Anbazhagan, Advocate SR.No.17303

+1cc to Mr.N. Kishorekumar, Advocate SR.No.16583

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GMV (12/09/2018)