

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 10.08.2018	Delivered on: 22.01.2019
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CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.1938 of 2002

Panneer Selvam ... appellant/1st defendant
Vs.

1.Meharunnissa,
rep.by Power Agent,
Kamaraj.

2.Balu

3.Shanthi ... Respondents/ Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree of the Additional Subordinate Court, Mayiladuthurai dated 12.09.2001 in A.S.No.98 of 1999 confirming the judgment and decree of the District Munsif Court, Sirkali dated 29.09.1999 in O.S.No.302 of 1994.

For Appellant : Mr.S.Sounthar

For Respondents : R1 and R3 NA
R2- Notice dispensed with

JUDGMENT

This Second Appeal has been filed by the first defendant against the judgment and decree passed by the Additional Sub Judge, Mayiladuthurai, in A.S.No.98 of 1999 dated 12.09.2001 confirming the judgment and decree passed by the District Munsif Court, Sirkali in O.S.No.302 of 1994 dated 29.09.1999.

2. The appellant herein had filed a suit in O.S.No.195 of 1992 on the file of the District Munsif Court, Sirkali

to restrain the first respondent herein by means of permanent injunction from interfering with his peaceful possession and enjoyment of the suit property.

3. The first respondent herein had filed a suit in O.S.No.302 of 1994 on the file of the District Munsif Court, Sirkali for recovery of possession of the suit property and for future mesne profits.

4. The District Munsif, Sirkali had tried both the suits jointly and by the common judgment and decree dated 29.09.1999 dismissed the suit filed by the appellant herein in O.S.No.195 of 1992 with costs and decreed the suit filed by the first respondent herein in O.S.No.302 of 1994 with costs. He directed the appellant herein to surrender vacant possession of the suit property within a period of two months. Insofar as mesne profits is concerned, he directed for separate enquiry under Order 20 Rule 12 CPC. Aggrieved by the judgment and decree passed in O.S.No.302 of 1994, the first defendant had filed an appeal in A.S.No.98 of 1999 on the file of the Additional Sub Judge, Mayiladuthurai. The learned Additional Sub Judge, Mayiladuthurai by the judgment dated 12.09.2001 had dismissed the said appeal confirming the judgment and decree passed by the trial Court. However, he directed the parties to bear their respective costs. Feeling aggrieved, the first defendant in O.S.No.302 of 1994 has filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial Court.

5. The averments made in the plaint, in brief, are as follows:

The suit property is classified as Government Poramboke land. The plaintiff had occupied the same 30 years ago and recognizing her possession, the Government had issued B-memos. The plaintiff had put up a thatched superstructure and paying the house tax. She has also obtained electricity connection to the suit property. The first defendant appears to have paid a sum of Rs.6,000/- to the plaintiff's husband Dasthagir and entered into possession of the suit property. The said agreement seems to have been entered into on 02.03.1991 and the said agreement was to be in force for 3 years. The plaintiff was not aware of the aforesaid arrangements as she was in other shores. The plaintiff's husband Dasthagir died in May, 1992. The plaintiff received summons in the suit in

O.S.No.195 of 1992 instituted by the first defendant as plaintiff. In the said suit the first defendant as plaintiff had produced a xerox copy of the alleged agreement between him and the said Dasthagir. Only thereafter, the plaintiff came to know of the contents of the arrangements which had been made between her husband and the first defendant. Eventhough the arrangement between the first defendant and the said Dasthagir is not binding on the plaintiff, to avoid unnecessary contentions and to purchase peace, she through her power-agent, tendered Rs.6,000/- to the first defendant on 04.08.1994, but he refused to receive the same. Hence, the plaintiff had filed the above suit for recovery of possession based on her possessory-title.

6. The averments made in the written statement filed by the first defendant and adopted by the third defendant, in brief, are as follows:

(a) The power agent is not entitled to maintain the suit on behalf of the plaintiff. The first defendant obtained the possession of the suit property from one Dasthagir under a document dated 02.08.1991 after the payment of Rs.6,000/- to the said Dasthagir. The said Dasthagir authorized the first defendant to make improvements in the suit property. The said Dasthagir assured that he would pay the cost of all improvements that would be made by the first defendant. The terms of the said document was binding upon the plaintiff. The plaintiff cannot shirk her liability when she claims right under the said Dasthagir. The first defendant had made improvements through the third defendant to the tune of Rs.20,000/-. The defendants 1 and 3 had extended the construction by putting up new cross walls and side walls and had also done flooring works in the suit property and thus a sum of Rs.20,000/- was spent upon the suit property.

(b) The third defendant is a tenant under the first defendant, he agreed to pay a sum of Rs.150/- as a rent per month. The third defendant is entitled to the benefits of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. Hence, the suit for recovery of possession is not maintainable. The second defendant is an unnecessary party. The allegations that the defendants are trespassers is not sustainable. The suit has not been properly valued and the suit as framed is not maintainable. Therefore, the defendants 1 and 3 prayed to dismiss the above suit.

7. Based on the aforesaid pleadings, the learned

District Munsif, Sirkali had framed necessary issues and tried the suit in O.S.No.195 of 1992 and O.S.No.302 of 1994 jointly. Evidence was recorded in O.S.No.302 of 1994 and the same was treated as evidence in O.S.No.195 of 1992. During trial on the side of the plaintiff, the plaintiff was examined as PW1 and Ex.A1 to Exs.A14 were marked as exhibits. On the side of the defendants, the first defendant examined himself as DW1 and he also examined three more witnesses as DW2 to DW4. They have marked Ex.B1 as exhibit on their side.

8. The learned District Munsif, Sirkali, after considering the materials placed before him, found that since Ex.B1 mortgage deed has not been registered, it is inadmissible in evidence. He further found that since the plaintiff is the owner of the property, the arrangement made by her husband with the first defendant will not bind upon her and hence, she is not bound to pay any amount to the first defendant. He further found that the defendants 2 and 3 are not entitled to avail the benefits under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. He further found that the first defendant is a trespasser and he is bound to deliver vacant possession of the suit property. He further found that since the first defendant is a trespasser, he is not entitled to seek injunction against the true owner. Accordingly, he dismissed the suit which was filed by the appellant herein in O.S.No.195 of 1992 with costs and decreed the suit, which was filed by the first respondent herein in O.S.No.302 of 1994 and directed the defendants to deliver vacant possession within a period of two months. He also passed an order for separate enquiry under Order 20 Rule 12 CPC in respect of mesne profits.

9. The appellant herein, who is the first defendant in O.S.No.302 of 1994, feeling aggrieved against the judgment and decree passed in O.S.No.302 of 1994 had filed an appeal in A.S.No.98 of 1999 on the file of the Additional Sub Judge, Mayiladuthurai. But he has not filed any appeal against the dismissal of his suit in O.S.No.195 of 1992. The learned Additional Sub Judge, concurred with the findings of the trial Court that Ex.B1 is not admissible in evidence as it was not registered. Further, he was of the view that since no appeal has been filed against the judgment and decree passed in O.S.No.195 of 1992, the judgment passed in that suit would operate as resjudicata. Accordingly, he dismissed the said appeal. However, he directed the parties to bear their respective costs. Feeling aggrieved, the first defendant in O.S.No.302 of 1994 has filed the present second appeal.

10. Since the second defendant remained *exparte* before the trial Court and also before the first Appellate Court, notice to him, in this second appeal has been dispensed with. Though the first respondent, after receipt of the notice, entered appearance through her Advocate, subsequently, she also remained *exparte* and hence, after hearing the argument of the learned counsel for the appellant and perusing the records, judgment is being passed in the second appeal.

11. This Court, at the time of admitting the second appeal, had formulated the following substantial questions of law:-

" a) Whether the Lower Appellate Court is right in holding that findings in O.S.No.195 of 1992 will operate as *resjudicata* against appeal filed by appellant challenging decree passed in O.S.No.302 of 1994, when issues involved in both the suits are different?

b) Whether the Courts below are right in holding Ex.B1, usufructory mortgage executed by husband of first respondent/plaintiff will not be binding on her overlooking Section 41 of the Transfer of Property Act?

c) Whether the Courts below are right in holding that the first respondent is entitled to recover possession even without paying improvement cost to the appellant, who is in any event, entitled to compensation as holder of defective title?"

12. The learned counsel for the appellant has submitted that the Courts below failed to see that the first respondent in the capacity as legal representative of the deceased Dasthagir, is bound by mortgage deed Ex.B1. He further submitted that the Courts below failed to see that the evidence of PW1, DW1 to DW4 would show that the husband of the first respondent enjoyed the property ostensibly and hence, any alienation made by ostensible owner is binding on real owner as per Section 41 of the Transfer of Property Act. He further submitted that the Courts

below failed to see, in any event, the first respondent cannot recover possession of the suit property without paying the cost for improvements made by the appellant in view of the Section 51 of the Transfer of Property Act. He further submitted that the first Appellate Court erred in holding that findings in O.S.No.195 of 1992 would operate as resjudicata against appeal filed by the appellant challenging the decree passed in O.S.No.302 of 1994, when issues involved in both the suits were different and therefore, he prayed to allow the second appeal and set aside the judgment and decree passed by the Courts below and dismiss the suit in O.S.No.302 of 1994.

13. It is an admitted fact that the suit property is a Poramboke land and the same has been occupied by the plaintiff and had put up the thatched house and also obtained electricity connection to the said house. It is also an admitted fact that the plaintiff was in other shores and her husband Dasthagir looked after the property.

14. According to the appellant/first defendant, the husband of the plaintiff namely, Dasthagir had created usufructory mortgage on 02.03.1991 by receiving a sum of Rs.6,000/- and handed over the possession of the suit property to him and from that date onwards, he is in possession of the suit property as mortgagee. His further case is that the said Dasthagir had executed Ex.B1 mortgage deed. The plaintiff, in the plaint, has not disputed the said mortgage deed. In fact in para-7 of the plaint, she has stated that eventhough the arrangement between her husband and the first defendant is not binding on her, to avoid unnecessary contentions and to purchase peace, she through her power agent tendered Rs.6,000/- to the first defendant on 04.08.1994, but he refused to receive the same. So, it is clear that she has admitted the execution of Ex.B1 mortgage deed by her husband. However, the trial Court took a view that since Ex.B1 has not been registered, the first defendant cannot seek any relief based on the said document. The trial Court also found that since Ex.B1 was executed by her husband and not by the plaintiff, the said document will not bind upon her. The first Appellate Court also confirmed and concurred with the aforesaid views of the trial Court. This Court is of the considered opinion that the aforesaid findings are not correct.

15. At this juncture, it would be relevant to refer to the commentaries made in "Transfer of Property Act (Act IV of 1882) Volume-I, 3rd Edition, By Hon'ble Mr. Justice S.N.Dwivedi, Page-825, wherein it has been stated as follows:-

"...Non-registration or invalid registration. Right of mortgagor to recover possession. It is clear, that where the mortgage deed is not registered and the mortgagee, although he acquires possession yet he acquires no right in the immovable property as mortgagee; he remains in possession without title, and it is open to the mortgagor to file a suit for recovery of possession of the property based on his title. In such a case, it may be open to the defendant to plead that the advanced moneys, which though advanced on an invalid mortgage, must in equity be repaid to him before the plaintiff takes back possession of the property."

16. From the aforesaid commentaries, it is clear that if the mortgage deed is not registered and the mortgagee is in possession of the property under an invalid mortgage, when the mortgagor claims possession, in equity he should repay the mortgage money to the mortgagee. In fact, the trial Court also referred to the aforesaid commentaries in its judgment, but it has held that in view of the aforesaid commentaries where a mortgagor claims possession based on the unregistered mortgage, he has to repay the mortgage money on equity basis, but in this case the plaintiff has not claimed possession as mortgagor, but she claimed possession on the basis of title.

17. Admittedly, when the plaintiff was in other shores, her husband looked after the suit property as agent. As per Section 186 of the Indian Contract Act, 1872, the authority of an agent may be expressed or implied. Under Section 226 of the Indian Contract Act, 1872, contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person. Therefore, the acts done by the husband of the plaintiff will bind upon her and she cannot contend that the arrangement made by her husband with the first defendant will not bind upon her. As already pointed out that in fact, the plaintiff herself has stated in her plaint that she tendered the mortgage money of Rs.6,000/- to the first defendant, but he refused to receive the same.

Therefore, the findings of the Courts below that the first defendant cannot seek relief based on Ex.B1 on the ground that it is an unregistered document and also it was not binding upon the plaintiff, as it was not executed by her are not correct.

18. Coming to the next question that whether filing of the appeal against the judgment and decree passed in O.S.No.195 of 1992 will operate as resjudicata, for filing appeal against the judgment and decree passed in O.S.No.302 of 1994, according to the appellant, the issues involved in both the suits are different and hence, the principle of resjudicata will not apply. This Court is not able to accept the said contention.

19. Admittedly, the appellant herein had filed a suit in O.S.No.195 of 1992 against the first respondent based on Ex.B1 mortgage deed seeking permanent injunction. The first respondent had filed a suit in O.S.No.302 of 1992 seeking delivery of possession. The trial Court had tried both the suits jointly and found that the appellant is in possession of the suit property only as a trespasser and as such he is bound to deliver the possession of the suit property. It has also found that since the appellant herein, is a trespasser, he is not entitled to seek injunction against the true owner. Accordingly, it dismissed the suit which was filed by the appellant in O.S.No.195 of 1992 and decreed the suit which was filed by the first respondent in O.S.No.302 of 1994. Therefore, the judgment and decree passed in O.S.No.195 of 1992 will bind upon the appellant.

20. The first Appellate Court, relying upon the decision of this Court in K.Sarjamoideen Vs. K.Moideen Batcha and others, reported in AIR 1979 Madras 155, held that the appeal in A.S.No.98 of 1999 is barred by the principle of resjudicata. In the aforesaid decision, in para-6, it is held as follows:-

"6. It cannot be denied that the subject-matter of the two cross-suits in the present case was precisely the same, namely, the conduct of the business of the tailoring mart, although the reliefs claimed in the two suits were, understandably different, injunction being asked for in the one case and possession being asked for in the other. This difference, however, in the reliefs asked for, cannot make

for any difference in the application of the rule of res judicata, since in both the suits the question that was directly and substantially in issue was the same. In these events, the learned Subordinate Judge ought to have held that an appeal against one of the decree alone would be clearly barred under Section 11 of the Code. He was not right in proceeding to dispose of the appeal on merits."

21. In view of the aforesaid decision, the findings in O.S.No.195 of 1992 will operate as resjudicata against the appeal filed by the appellant, challenging the judgment and decree passed in O.S.No.302 of 1994. Therefore, the second appeal is liable to be dismissed on this ground. Accordingly, the substantial questions of law are answered.

22. In the result, the Second Appeal is dismissed. No costs.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

dna
To

- 1.The Additional Subordinate Court, Mayiladuthurai.
- 2.The District Munsif Court, Sirkali.

3. The section officer,
VR Section,
High court Madras

+1cc to Mr.Mr.S.Sounthar, Advocate SR.No. 4963

S.A.No.1938 of 2002

A.SK(25/03/2019)

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