

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON: 07.02.2010
PRONOUNCED ON: 18.02.2020
CORAM :

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

S.A.No.860 of 2009
& MP.No.1 of 2009

Raja Vellaiyan ... Appellant/Defendant
Vs.

Sri Sundara Vinayagar,
Sri Selva Vinayagar,
Sri Anjaneyaswamy Devasthanam,
rep. by its Chairman,
87, Royapettah High Road,
Mylapore,
Chennai-600 004 ... Respondent/Plaintiff

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 13.11.2008 passed in A.S.No.267 of 2008, on the file of the learned VII Additional City Civil Judge, Chennai confirming the judgment and decree dated 20.11.2007 made in O.S.No.1664 of 2003 on the file of learned XV Assistant City Civil Judge, Chennai.

For Appellant : Mr.P.R.Raman, Sr.Counsel
Mr.C.Seethapathy
For Respondent : Mr.Prakash Goklaney

JUDGMENT

This Second Appeal has been filed against the Judgment and decree dated 13.11.2008 passed in A.S.No.267 of 2008, on the file of learned VII Additional City Civil Judge, Chennai, confirming the judgment and decree dated 20.11.2007 made in O.S.No.1664 of 2003 on the file of learned XV Assistant City Civil Judge, Chennai.

2. The facts which gave raise to the filing of the present Second Appeal, are stated hereunder:

The parties are hereinafter described as per the litigative status in the suit proceedings. The plaintiff is the public temple having several properties in and around Mylapore, Chennai. The defendant is one of the tenants, having a small shop in the suit schedule property, paying a rent of Rs.125/- p.m. to the temple. Before instituting the suit against the defendant, the plaintiff approached the Rent Control Court and filed a case for eviction in R.C.O.P.No.994

of 1992 before XV Judge, Small Causes Court, Chennai. In the rent control proceedings, the tenant, namely, the defendant herein took a preliminary objection as to the maintainability of the rent control proceedings on the ground that the plaintiff being a public temple, would be exempted under Section 29 of the Act and also in view of G.O.Ms.No.2000. The Rent Control Court, after taking note of the objection, dismissed the said RCOP. After dismissal of RCOP, the plaintiff instituted a suit in O.S.No.1664 of 2003 which was heard by the XV Asst.Judge, City Civil Court, Chennai, seeking delivery of vacant possession of the schedule property and for damages for use and occupation at Rs.2000/- per month from 01.02.2003 till the date of handing over of vacant possession.

3. The suit was resisted by the defendant/tenant by way of Written Statement, stating that having chosen to go before the Rent Control Court, it was not open to the plaintiff to approach the Civil Court, seeking eviction. According to the defendant, the plaintiff having chosen the jurisdiction under the Rent Control Act, can remove itself from the said jurisdiction and resort to common law remedy before a Civil Court. The defendant also filed an additional Written Statement before the trial Court, objecting to the maintainability of the suit, since the competent authority to initiate legal proceedings on behalf of the temple, was Board of Trustees and not the Chairman or Executive Officer. As according to the defendant, the suit was instituted by the Chairman.

4. The trial Court which framed the issues on the basis of the pleadings and after perusing the pleadings and evidence placed on record, had allowed the suit to the extent that the plaintiff was entitled to the relief of recovery of possession of the suit schedule property from the defendant and the plaintiff was entitled to Rs.125/- per month towards damages and not as claimed by the plaintiff at Rs.2000/- per month.

5. The trial Court while decreeing the suit in regard to the recovery of possession, has discountenanced both the legal objections namely, that the plaintiff having chosen to go before the Rent Controller, cannot chose to come before the Civil Court for eviction and the suit was not instituted by the competent authority. The trial Court, has held that in regard to the first objection it was not open to the defendant to raise such objections for the simple reason, that it was the defendant who questioned the maintainability of the Rent Control proceedings in view of the status of the plaintiff being a public temple exempted under the provisions of the Rent Control Act. Having taken such objection, it was not proper on the part of the defendant to raise the objection as to the maintainability of civil suit. Regarding the authority who instituted the suit, the trial court held that the Chairman of the temple was authorized by the trustees of the

Board by resolution dated 09.03.2003 which was marked as Ex.A5. Even earlier, when the rent control proceedings were initiated, the Trustees of the Board authorized the Chairman to file the same. As regard the merits, the trial Court also found that it was an admitted case by the defendant that he was the tenant under the plaintiff. Hence, the legal notice issued on 20.12.2002 which was marked as Ex.A2 was valid and the notice was also received with postal acknowledgment, which was marked as Ex.A3. Though, a reply was given by the defendant to the legal notice on 21.02.2003 which was marked as Ex.A4 denying the validity of the legal notice, the trial Court held that in view of the admitted position regarding the relationship of the plaintiff and the defendant, the notice issued by the plaintiff was valid in terms of Section 106 of Transfer of Property Act. For all these reasons, the trial Court allowed the substantial claim of the plaintiff particularly, in regard to the recovery of possession.

6. As against the judgment and decree passed by the trial Court in O.S.No.1664 of 2003 dated 20.11.2007, the defendant preferred an appeal in A.S.No.267 of 2006, before VII Additional City Civil Court, Chennai.

7. The lower Appellate Court has dealt with the appeal in its entirety agreeing with the findings of the trial Court both on legal objections raised on behalf of the defendant and also the inter se claim on merits. The lower appellate Court completely concurred with the findings of the trial Court and dismissed the appeal. As against that, the present Second Appeal has been preferred by the defendant.

8. This Second Appeal has been admitted on the following substantial question of law:

"Having elected to proceed under the T.N.Buildings (Lease & Rent) Control Act and waiving the benefit of the exemption granted under G.O.Ms.No.2000, Home Department, dated 16.08.1976 could the respondent thereafter maintain a suit for eviction against the appellant?"

9. Mr.P.R.Raman, the learned Senior Counsel appearing for the appellant/defendant would submit that the trial Court was not right in entertaining the suit particularly, when the plaintiff had chosen to go before the Rent Controller by invoking the provisions of the Tamil Nadu Buildings (Lease & Rent) Control Act. Having failed to secure any orders, it was not open to the plaintiff to resort to different legal remedy. When the learned Senior Counsel was confronted by this Court as to how the defendant could raise such objections when he himself has questioned the maintainability of the Rent Control proceedings, whether it was open to the defendant to approbate and reprobate and non-suit the plaintiff, the learned Senior Counsel would submit that as far as the legal objection is concerned, there cannot be any res judicata as held by the

Hon'ble Supreme Court of India. The learned Senior Counsel would rely on a decision reported in "1970(1) SCC 613 (Mathura Prasad Bajoo Jaiswal and others versus Dossibai N.B.Jeejeebhoy)". He would draw the attention of this Court to paragraph Nos.9 to 11 in support of his contentions, which are extracted hereunder:

"9. A question of jurisdiction of the Court, or of procedure, or a pure question of law unrelated to the right of the parties to a previous suit, is not res judicata in the subsequent suit. Rankin, observed in Tarini Charan Bhattacharjee's case:

"The object of the doctrine of res judicata is not to fasten upon parties special principles of law as applicable to them inter se, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory by precluding the parties from reopening or re-contesting that which has 'been finally decided.'"

10. A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not, in our judgment, operate as res judicata. Similarly by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute, the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise.

11. It is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be, reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law, i.e. the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same for the expression "the matter in issue" in Section 11 Code of Civil

Procedure means the right litigated between the parties, i.e. the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land."

10. The learned Senior Counsel also relied upon a decision reported in "(1991) 1 SCC 494 (Isabella Johnson (smt.) versus M.A.Susai (Dead), by L.Rs.)" wherein, he would draw the attention of this Court to a portion of paragraphs 5 and 6, which is extracted as under:

"5. We find that in 'Mathura Prasad Bajoo Jaiswal and Others v. Dossibai N.B. Jeejeebhoy, [1970] 3 SCR 830 at p. 836, a Bench comprising three learned Judges of this Court has taken the view that a decision on the question of jurisdiction of the court or a pure question of law unrelated to the right of the parties to a previous suit, is not res judicata in the subsequent suit. The Court observed:

"It is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law, i.e. the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in S. 11 of the Code of Civil Procedure means the right litigated between the parties, i.e. the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one

purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land."

6. The same view has been reiterated by a Bench comprising three learned Judges of this Court in *Sushil Kumar Mehta v. Gobind Ram Bohra* (dead) through his Lrs., [1990] 1 SCC 193. We find that the decision of three learned Judges of this Court in *Mathurn Prasad Bajoo Jaiswal and Others v. Dossibai N.S. Jeejeebhoy*, has not been noticed at all by the Division Bench comprising two learned Judges of this Court which delivered the judgment in *Avtar Singh and Others v. Jagjit Singh and Another*, and hence, to the extent, that the judgment in *Avtar Singh's* case takes the view that the principle of res judicata is applicable to an erroneous decision on jurisdiction, it cannot be regarded as good law. In our opinion a court which has no jurisdiction in law cannot be conferred with the jurisdiction by applying principles of res judicata. It is well settled that there can be no estoppel on a pure question of law and in this case the question of jurisdiction is a pure question of law."

11. According to the learned Senior Counsel, that the legal principle is well settled and there cannot be a successful plea of estoppel against his objections when the matter is to be decided on a pure question of law, particularly, when the question of jurisdiction is involved. Therefore, he would submit that once the jurisdiction aspect is raised, the appellant/defendant cannot be barred from raising such objection. According to the learned Senior counsel, both the Courts below have over looked this crucial legal aspect and proceeded to negative the defendant's objections. In these circumstances, the learned Senior counsel would implore this Court to interfere with the judgments and decrees of both the Courts below.

12. Per contra, Mr. Prakash Goklaney, learned counsel for the respondent/plaintiff would submit that the both the Courts below, have rightly discountenanced the legal objections raised on behalf of the defendant and also found on merits that the legal notice issued by the plaintiff temple was in

terms of Section 106 of the Transfer of Property Act and was therefore, valid. When the defendant himself had admitted that he was a tenant, the attempt by the defendant to take refuge under unsustainable technical objection, was rightly negatived by both the Courts below. The judgments and decrees of the Courts below were on the basis of clear understanding of the objections raised by the defendant and therefore, the same do not call for interference by this Court.

13. Lastly, the learned counsel for the respondent would also submit that a learned Judge of this Court in respect of the same plaintiff herein, has passed a judgment and decree on 04.01.2019 in S.A.487 of 2014 directing the eviction of one of the tenants of the plaintiff. The learned Judge has also enhanced the rent payable by the tenant suo motu by invoking the inherent jurisdiction. He therefore, urged this Court to dismiss the Second Appeal.

14. Considered the submissions put forth by Mr.P.R.Raman, learned Senior Counsel for the appellant/defendant and Mr.Prakash Goklaney, learned counsel for the respondent/plaintiff and perused the entire materials placed on record.

15. This Court is unable to appreciate as to how the defendant could be allowed to question the maintainability of the suit when the defendant was successful in his objection to the maintainability of the rent control proceedings initiated by the plaintiff for eviction of the tenant and secured an order from the Rent Controller, dismissing the rent control proceedings as not maintainable. When the rent control proceedings stood terminated against the plaintiff on the ground of maintainability on the basis of the fact that the plaintiff temple was a public temple exempted under Section 29 of the Tamil Nadu Buildings Lease & Rent) Control Act and also as per the Government Order in G.O.Ms.No.2000 dated 16.8.1976 at the instance of the defendant, it did not lie in the mouth of the defendant to raise objection as to the maintainability of the suit filed by the plaintiff temple. When the Rent Control proceedings hit the road block on the basis of the objections by the defendant himself, the plaintiff has rightly chosen to go before the Civil Court by availing common law remedy. In the circumstances, the objection raised by the defendant as to the maintainability of the suit to say the least, was mischievous, ill-conceived and motivated. Rightly the trial Court brushed aside such objection and more rightly the lower Appellate Court has confirmed the same. As regards the other objection regarding the maintainability of the suit, since the suit was not instituted by the competent authority, the trial Court has found that the trustees of the Board, had authorized the Chairman of the temple to file the suit. In fact, the resolution of the Board to that effect was marked as Ex.A5 in the suit proceedings. In fact, the trial Court proceeded to give a finding that even earlier when the

rent control proceedings were initiated, it was authorized by the trustees of the Board. In the face of such a clear finding by the trial Court, the second objection as to the maintainability of the suit proceedings was negatived rightly. After finding both legal objections from the defendant side had no valid basis, the trial Court proceeded to hold that the tenancy had been admitted between the parties and the legal notice issued by the temple which was marked as Ex.A2 was in consonance with Section 106 of the Transfer of the Property Act and the notice was valid. Thereafter, the trial Court proceeded to order eviction as the occupation of the defendant after the notice period was unauthorized and illegal.

16. However, the trial Court did not accept the claim of the plaintiff for damages to the tune of Rs.2000/- per month, but stuck to the figure admitted by the defendant and directed a sum of Rs.125/- per month payable as damages to the plaintiff by the defendant. No doubt, the plaintiff has not filed any appeal against the direction granting a meagre compensation towards damages.

17. The lower Appellate Court, on correct appreciation of facts and circumstances and also the legal objections and on merits, has completely concurred with the view taken by the trial Court. Of course, the lower Appellate Court had no scope to strike a discordant note in the findings of the trial Court in meeting the legal objections as well as merits of the inter se dispute. The lower Appellate Court has therefore, rightly brushed aside the legal objections and confirmed the judgment and decree passed by the trial Court which, in the opinion of this Court, cannot be faulted at all.

18. Accordingly, the substantial question of law is answered against the appellant and in favour of the defendant.

19. The decisions relied upon by the learned Senior counsel for the appellant/defendant cited supra, in the opinion of this Court, do not come to the aid of the appellant at all as the same cannot be legally pitchforked into the distinguishable factual matrix and circumstances of the case on hand.

20. In conspectus of the above narrative, what would emerges is, how a tenant of a public temple could successfully squat on the property beyond the period of permissible occupation, that too years together, by raising such motivated objections which do not have legs to stand on, the defendant has kept the Courts engaged for considerable time in dealing with such invalid and ill-conceived objections. Such self-serving objections have unfortunately helped the wrong cause of the defendants and allowed him to stay on in the property for 17 years. Although both the Courts below have not granted, particularly, the trial Court, not

allowed the amount for damages as prayed for, which in the opinion of this Court, is without any justification. This Court which enjoys inherent power, can always suo motu enhance the damages sans appeal by the respondent/plaintiff in this regard.

21. Although, both the Courts below have appreciated in regard to grant of main relief to the plaintiff temple as to the recovery of possession of its property from the avaricious tenant/defendant, yet while doing so, both the Courts below have failed to render justice to the plaintiff temple and in that process helped the undeserving tenant who was allowed to stay in the property for 17 years with a meagre rent of Rs.125/- per month which was probably fixed two decades before.

23. In the above circumstances, taking cue from the judgment and decree of the learned Judge of this Court recently passed in S.A.No.487 of 2014 dated 04.01.2019 and after invoking inherent power conferred on the Appellate Court under Order 41 Rule 33 CPC, in order to render justice to the deprived plaintiff, this Court enhances the rent payable to the respondent/plaintiff to the tune of Rs.1000/- per month towards damages from the date of institution of the suit till the date of realization. The respondent/plaintiff is entitled to recover the damages from the appellant/defendant.

24. In the result, the Second Appeal fails and the same is dismissed. Consequently, connected MP is closed. The parties shall bear their own costs. The appellant/defendant is directed to vacate and hand over the suit schedule premises to the plaintiff within a period of two months from the date of receipt of a copy of this judgment.

Suk/dn

सत्यमेव जयते Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

To

- 1.The VII Additional City Civil Judge, Chennai
- 2.The XV Assistant City Civil Judge, Chennai

+1cc to Mr.C.Seethapathy , Advocate SR.No. 13382

+3ccs to Mr.Prakash Goklaney , Advocate SR.No. 13376

S.A.No.860 of 2009

A.SK(19/02/2020)