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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.07.2021

DELIVERED ON : 27.07.2021

CORAM:

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

S.A.No.772 of 2007

Kalyani ... Appellant /Third Defendant

vs.

C.Padmanabhan ...Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of Code of Civil Procedure against the Judgment and Decree dated 04.04.2007 in A.S.No.71 of 2006 on the file of the Sub-Court, Tirupattur, Vellore District reversing the Judgment and Decree dated 08.08.2006 in O.S.No.209 of 2004 on the file of District Munsif's Court, Tirupattur.

For Appellant : Mr.R.Subramanian

For Respondent : Mr.Bharath Gowtham
for Mr.T.R.Rajaraman

JUDGMENT

This second appeal has been filed challenging the reversal findings of the lower appellate court by its judgment and decree dated 04.04.2007 passed in A.S.No.71 of 2006 reversing the findings of the trial court in its judgment and decree dated 08.08.2006 passed in O.S.No.209 of 2004.

2. The Appellant is the third defendant in the suit O.S.No.209 of 2004 on the file of the District Munsif Court, Tirupattur. Originally the suit O.S.No.126 of 1998 was filed by the respondent/plaintiff before the Sub Court, Tirupattur seeking for the following reliefs: (a) to declare the right, title and interest of the plaintiff in the suit schedule property and (b) to direct the defendants to deliver the possession of the suit schedule property to the respondent/plaintiff. Thereafter the said suit O.S.No.126 of 1998 on the file of Sub Court, Tirupattur was transferred to the file of District Munsif Court, Tirupattur and the same was renumbered as O.S.No.209 of 2004.



3. For the sake of convenience, in the forthcoming paragraphs, the parties are described as per their litigative status in the suit.

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4. The case of the plaintiff as pleaded in the plaint is that the suit schedule property was sold to him by the first defendant under a sale deed dated 24.06.1985 marked as Ex.A2 before the trial court. According to the plaintiff, at the time of sale in his favour, there was a mortgage in favour of T.G.Sekar in respect of $\frac{1}{2}$ share in the property and the said T.G.Sekar was in possession of the said $\frac{1}{2}$ share. It is the case of the plaintiff that he filed O.P.No.21 of 1986 under section 83 of Transfer of Property Act for redemption of mortgage and for recovery of possession from the mortgagee, T.G.Sekar as well as from the second defendant Chandra. O.P.No.21 of 1986 was dismissed by the District Munsif Court, Tirupattur by its judgment dated 27.08.1997 on the ground that the second defendant is a trespasser and possession cannot be granted to the plaintiff in the O.P. filed under section 83 of the Transfer of Property Act, seeking for redemption of mortgage. In the said judgment, District Munsif Court has given its finding that the mortgage in favour of T.G.Sekar having been discharged during the pendency of O.P.No.21 of 1986, the redemption of mortgage will not arise and the relief of possession cannot be granted to the plaintiff against the second defendant who is a trespasser and the said relief can be granted only by a separate proceeding initiated by the plaintiff.

5. A written statement was filed before the trial court by the defendants denying the allegations of the plaintiff. The defendants have pleaded that the suit is barred by res judicata, since the relief of recovery of possession was negatived in the earlier proceedings namely O.P.No.21 of 1986. The defendants have also pleaded that they are in possession and enjoyment of the suit schedule property for more than 12 years and therefore, the suit is barred by law of limitation.

6. Issues were framed by the trial court. The Defendants 1 and 2 namely D.Shanmugam and Chandra respectively died during the pendency of the suit and the third defendant is their daughter. During trial, the plaintiff examined himself as PW1 and another witness on his side was also examined as PW2 and Exhibits A1 to A13 were marked on his side. The third defendant examined herself as DW1 along with one Rajammal as DW2 and Ex.B1 & Ex.B2 were marked on her side.

7. The trial court by its judgment and decree dated 08.08.2006 dismissed the suit filed by the plaintiff on the ground that the suit is hit by res judicata, since in the



earlier O.P. namely O.P.No.21 of 1986 filed under section 83 of Transfer of property Act seeking for redemption of mortgage, the relief of possession was negatived. Aggrieved by the judgment and decree dated 08.08.2006 passed in O.S.No.209 of 2004, the plaintiff preferred an appeal before the Sub Court, Tirupattur in A.S.No.71 of 2006 against the third defendant.

8. The lower appellate court (Sub Court, Tirupattur) by its judgment and decree dated 04.04.2007 in A.S.No.71 of 2006 reversed the findings of the trial court by decreeing the suit in favour of the plaintiff by giving the following reasons: (a) the relief of possession is not hit by res judicata, since liberty was given to the plaintiff in the judgment dated 27.08.1997 passed in O.P.No.21 of 1986 by the District Munsif Court, Tirupattur to file a separate proceeding for recovery of possession; and (b) the period of earlier proceedings in O.P.No.21 of 1986 on the file of District Munsif, Tirupattur i.e., from 16.12.1986 to 27.08.1997 has to be excluded under section 14 of the Limitation Act. Hence, the suit O.S.No.209 of 2004 on the file of the District Munsif Court, Tirupattur is well within the period of limitation and is not barred by law of limitation as held by the trial court.

9. Aggrieved by the judgment and decree dated 04.04.2007 passed by the lower appellate court (Sub Court, Tirupattur) in A.S.No.71 of 2006 reversing the findings of the trial court, the third defendant has preferred this second appeal.

10. This Court on 06.08.2007 admitted this second appeal on the following substantial questions of law:

" 1.Has not the lower appellate court failed to see that the suit is barred by limitation as per Article 65 of the Limitation Act and the suit not having been filed within 12 years, the plaintiff's right stands extinguished under section 27 of the Limitation Act?

2. Is not the lower appellate court wrong in relying on the findings in the earlier O.P. in favour of plaintiff and at the same time rejecting the plea of res judicata?"

Submissions of the learned counsels:

11. Mr.R.Subramanian, learned counsel for the Appellant/third defendant drew the attention of this Court to the findings of the lower appellate court and would submit that the findings of the lower appellate court on limitation is perverse. He would submit that the lower appellate court having held that the suit should be filed within 12 years from the date of sale, ought not to have held that the suit has been filed



within the period of limitation by applying section 14 of limitation Act excluding the period of earlier proceedings in O.P.No.21 of 1986 i.e., from 16.12.1986 to 27.08.1997. He would submit that without any pleading in the plaint seeking for exclusion of the said period, the lower appellate court has suo motu erroneously held that the plaintiff is entitled for the benefit of section 14 of the limitation Act.

12. Mr.R.Subramanian, learned counsel for the Appellant/third defendant also drew the attention of this Court to Order VII Rule 6 of CPC and would submit that the said provision mandates the plaintiff to specifically state as to how the suit is barred by limitation. According to him, the plea of exemption from limitation in the plaint is mandatory. He also drew the attention of this Court to section 9 of the Limitation Act and would submit that once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it. Further he would submit that under section 3 of the Limitation Act, the Court has a duty to verify the period of limitation before taking the plaint on file. He would then submit that even otherwise, the earlier proceedings under section 83 of Transfer of Property Act where the only issue was whether the plaintiff is entitled to redeem the mortgage or not. Therefore according to him, the pendency of O.P.No.21 of 1986 on the file of the District Munsif Court, Tirupattur could not save limitation. Further according to him, the title of plaintiff was disputed by the second defendant in the earlier proceedings and hence limitation would run from that time onwards.

13. Learned counsel for the Appellant/third defendant relied upon a decision of the Hon'ble Supreme Court in the case of Sopanrao and another vs. Syed Mehmood and others reported in 2019 (4) CTC 730 in support of his submissions. Relying upon the said decision, he would submit that limitation in a suit for possession is 12 years under Article 65 of the Limitation Act, when possession becomes adverse to the plaintiff. Relying upon the same decision, he would submit that merely because one of the reliefs sought for in O.P.No.21 of 1986 i.e., for redemption of mortgage, the outer limitation of 12 years will not be lost. Hence, according to him, the lower appellate court has erroneously reversed the findings of the trial court as the suit filed by the plaintiff is barred by law of limitation.

14. Per contra, Mr.Bharath Gowtham learned counsel representing Mr.T.R.Rajaraman, learned counsel for the respondent/plaintiff would at the outset submit that Article 65 of Limitation Act has no applicability for the facts of the instant case. He drew the attention of this Court to Article 65



of the Limitation Act and would submit that the said Article is applicable only when the possession of the defendant becomes adverse to the plaintiff. He then drew the attention of this Court to the written statement filed by the defendants in the suit O.S.No.209 of 2004 and would submit that there is no plea of adverse possession made by the defendants in their written statement. He would submit that neither in the deposition of the third defendant before the trial court, such a plea was taken. Hence, he would submit that Article 65 of the Limitation Act does not get attracted as according to him, the said Article will get attracted only when the defendants take the plea of adverse possession.

15. Mr.Bharath Gowtham, learned counsel would also submit that the plaintiff is a bonafide purchaser of the suit schedule property for a valuable consideration under a sale deed dated 24.06.1985 (Ex.A2) from D.Shanmugam (deceased) the first defendant in the suit. He would submit that the sale deed Ex.A2 has also not been challenged by the defendants.

16. Mr.Bharath Gowtham, learned counsel would further submit that the suit filed by the plaintiff is well within the period of limitation and therefore, there was no necessity for the plaintiff to make a specific plea seeking exclusion of the period when O.P.No.21 of 1986 was pending on the file of the District Munsif Court, Tirupattur under section 14 of the Limitation Act.

17. Mr.Bharath Gowtham, learned counsel also drew the attention of this Court to the following authorities in support of his submissions:

(a) A decision of Hon'ble Supreme Court in the case of Indira vs. Arumugam and Another reported in (1998) 1 SCC 614; Relying upon the aforesaid decision, he would submit that once title is established on the basis of relevant documents and other evidence, unless defendant proves adverse possession for the prescriptive period, the plaintiff cannot be non-suited under Article 65 of the Limitation Act.

(b) A Single Bench Judgment of Madras High Court in the case of Chinnathayammal and others vs. K.Padmavathy and another reported in 2011 (2) MWN (Civil) 494; The said decision has followed the aforesaid decision of the Hon'ble Supreme Court in Indira's case.

(c) A decision of the Hon'ble Supreme Court in the case of Bishwanath Prasad Singh vs. Rajendra Prasad and another reported in (2006) 4 SCC 432; Referring to the said decision, Mr.Bharath Gowtham, learned counsel would submit that the proceedings under section 83 of



the Transfer of property Act, are only ministerial and nothing is "Heard and finally decided" and will not operate as res judicata in any other proceedings with regard to the suit property. Mr. Bharath Gowtham would submit that the lower appellate court has rightly reversed the findings of the trial court though the reasoning may not be correct.

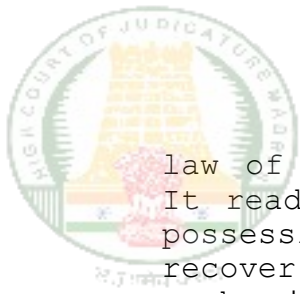
Discussion:

18. Admittedly the sale deed dated 24.06.1985 (Ex.A2) executed by the first defendant in the suit (deceased) for the suit schedule property in favour of the plaintiff remains unchallenged, though a plea has been taken by the defendants in the suit O.S.No.126 of 1998 on the file of the Sub Court, Tirupattur that the mortgagee T.G.Sekar and the plaintiff colluded together and fraudulently by exploiting the alcoholic addiction of the first defendant obtained a sale deed. As rightly contended by the learned counsel for the respondent/plaintiff, Mr. Bharath Gowtham, the plea of adverse possession has also not been taken by the defendants in the written statement filed by them in O.S.No.126 of 1998.

19. The concept of adverse possession contemplates hostile possession i.e., the possession which is expressly or impliedly in denial of the title of the true owner to the knowledge of the true owner and claiming the title as an owner in himself by the person claiming to be in adverse possession. In other words such hostile possession shall not be secret and person in adverse possession must not acknowledge the title of the true owner but has to deny the title of the true owner. The adverse possession must be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.

20. In the case on hand, the defendants have admitted that the sale deed dated 24.06.1985 (Es.A2) has been executed by the first defendant in favour of the plaintiff. But they have pleaded that the plaintiff has exploited the alcoholic addiction of the first defendant and has fraudulently obtained the sale deed in his favour. The sale deed dated 24.06.1985 (Ex.A2) also remains unchallenged by the defendants before any court of law. There is also no specific plea taken by the defendants in the suit claiming adverse possession.

21. Section 3 of the Limitation Act says that the Court will not take cognizance of any suit, which is barred by limitation even if issue of limitation is not taken as a defence. Thus, the law of limitation bars remedy but not the right. But Section 27 of Limitation Act is an exception to the general principle of



law of limitation and origin of concept of Adverse possession. It reads as, if a person fails to file a suit for recovery of possession, within the period of limitation, his right to recover the possession of that property also extinguishes. If such situation occurs, a true owner extinguishes his ownership over the property. But at the same time, property cannot be left owner less. It must be in the name of any other person or any other person must be entitled to have a right over it. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts right over it and the person having title omits or neglects to take legal action against such person for years together. It is important to note that the starting point of limitation of 12 years under Article 65 of the limitation act is counted from the point of time "when the possession of the defendants become adverse to the plaintiff".

22. The necessary elements of adverse possession are

- (a) The possession must be actual, visible, exclusive, hostile and continued for the entire period of twelve years.
- (b) The possession must be with an intention to oust the real owner.

23. Mere long possession of the defendants for a period of more than 12 years without intention to possess the suit land adversely to the title of the plaintiff and to latter's knowledge cannot result in acquisition of title by the defendants over the suit schedule property.

24. A person pleading adverse possession has no equities in his favour, since he is trying to defeat the rights of the true owner. Thus it is for the defendants to clearly plead and establish all the facts necessary for adverse possession. A person who claims adverse possession should show:

- (a) On what date, he came into possession,
- (b) What was the nature of his possession,
- (c) Whether the factum of possession was known to the other party,
- (d) How long his possession has continued, and
- (e) His possession was open and undisturbed.

25. Mere long possession of the suit schedule property by the defendants without adverse animus against real owner (the plaintiff herein) will not ripen into title. The burden of proving adverse possession rests upon the defendants who raises such a plea.



26. In the case on hand, the title of the plaintiff over the suit schedule property has been established under Ex.A2 sale deed dated 24.06.1985. The Hon'ble Supreme Court in the case of Indira vs. Arumugam and Another reported in (1998) 1 SCC 614 relied upon by the learned counsel for the plaintiff has made it clear that once title is established by the plaintiff on the basis of relevant documents and other evidence, unless the defendant proves adverse possession for the prescriptive period, the plaintiff cannot be non-suited. Since the defendants have neither taken the plea of adverse possession in their written statement, nor have they been able to prove adverse possession by satisfying the necessary elements for adverse possession, the decision relied upon by the learned counsel for the respondent/plaintiff referred to supra is squarely applicable to the facts of the instant case.

27. The plaintiff has also pleaded in Paragraph 5 of the plaint in O.S.No.209 of 2004 that only after the judgment dated 27.08.1997 passed in O.P.No.21 of 1986 by the District Munsif Court, Tirupattur filed for redemption of mortgage under section 83 of Transfer of Property Act, the defendants have prevented him from taking access of the remaining $\frac{1}{2}$ share in the suit property. Further in the cause of action paragraph in the plaint, he has specifically pleaded that the mortgagee T.G.Sekar has delivered possession of the portion of the suit schedule property only on 27.08.1997. A categorical stand has been taken by the plaintiff that he was unable to take possession of the suit schedule property only after 27.08.1997. The suit has been filed in the year 1998. If 27.08.1997 is the date on which, the plaintiff was prevented from taken possession of the suit schedule property, the suit having been filed in the year 1998 is well within the period of limitation. No contra evidence has also been produced by the defendants to prove that even before 27.08.1997, they prevented the plaintiff from taking possession of the suit schedule property as their main plea in their written statement is that the sale deed dated 25.06.1985 Ex.A2 has been obtained fraudulently by the plaintiff. When the plaintiff has established his title over the suit schedule property by virtue of Ex.A2, the burden is on the defendants to prove that they are in possession of the suit schedule property adverse to the interest of the plaintiff for more than 12 years which they have miserably failed to do so as seen from the evidence available on record. Hence, the suit filed by the plaintiff in O.S.No.209 of 2004 before the District Munsif Court, Tirupattur is well within the period of limitation. There was no necessity for the lower appellate court to apply section 14 of the limitation act as even when the suit was filed, the suit filed by the plaintiff is well within the period of limitation due to the aforementioned reasons.



28. Further, O.P.No.21 of 1986 has been filed under section 83 of Transfer of Property Act seeking for redemption of mortgage which arises out of a separate cause of action and has nothing to do with the relief which has been sought for against the defendants in O.S.No.209 of 2004. The cause of action for O.P.No.21 of 1986 and the cause of action for O.S.No.209 of 2004 are totally different.

29. The District Munsif Court, Tirupattur by its judgment dated 27.08.1997 in O.P.No.21 of 1986 has rightly directed the plaintiff to initiate separate proceedings against the defendants for recovery of possession who are the trespassers in the suit schedule property. The District Munsif Court, Tirupattur in its Judgment dated 27.08.1997 in O.P.No.21 of 1986 has also given a finding that the defendants in O.S.No.209 of 2004 are trespassers and had dismissed O.P.No.21 of 1986 only on the ground that during pendency of the said O.P., the plaintiff had discharged the mortgage created in favour of T.G.Sekar, the first respondent therein. The relief for recovery of possession against the defendants in O.S.No.209 of 2004 was dismissed only on the ground that under section 83 of the Transfer of Property Act filed for redemption of mortgage, such a relief cannot be granted as the cause of action for filing of redemption of mortgage suit and the cause of action for recovery of possession against a trespasser are different. Though a plea of res judicata was taken in the written statement filed by the defendants before the trial court, the said plea was not seriously raised by the learned counsel for the Appellant/third defendant before this Court. But having regard to the fact that such a plea was infact taken in the grounds of appeal, this Court deems it fit to consider that plea also.

30. The doctrine of res judicata has been defined under section 11 of Code of Civil Procedure, 1908. The doctrine of res judicata means the matter is already judged. It means no court will have the power to try any fresh suit or issues which have been already settled in the former suit between the same parties. Also the Court will not try the suits and issues between those parties under whom the same parties are litigating under the same title and matter has already been judged and decided by the competent court. The doctrine of res judicata is applied by the court where issues directly and substantially involved between the same parties in the former and present suit, are same. The identity of the subject matter is not only to the identity of the subject matter in its physical sense, but also in its juridical sense.



31. In the case on hand, though the subject matter of the property is one and the same in O.P.No.21 of 1986 as well as in O.S.No.209 of 2004, the cause of action for filing the respective litigations are different. O.P.No.21 of 1986 was filed under section 83 of Transfer of Property Act, seeking for redemption of mortgage, whereas O.S.No.209 of 2004 was filed for recovery of possession against a trespasser. Though the second defendant in the suit O.S.No.209 of 2004 was a party respondent in O.P.No.21 of 1986, the District Munsif Court, Tirupattur by its judgment dated 27.08.1997 dismissed the said O.P. only on the ground that during pendency of O.P.No.21 of 1986, the mortgage was discharged by the plaintiff and since the main relief is only for redemption of mortgage and the plaintiff having got the said relief, the consequential relief of possession against a trespasser cannot be granted in a petition filed under section 83 of Transfer of Property Act. Only on the aforesaid ground, O.P.No.21 of 1986 was dismissed by the District Munsif Court, Tirupattur on 27.08.1997. In the same judgment, the plaintiff has also been granted liberty to initiate a separate legal proceedings for recovery of possession against the defendants in O.S.No.209 of 2004 who according to the plaintiff are trespassers. A finding has also been given in the judgment dated 27.08.1997 in O.P.No.21 of 1986 that the defendants in O.S.No.209 of 2004 are trespassers. A categorical plea has also been taken that only after judgment dated 27.08.1997 passed in O.P.No.21 of 1986, the plaintiff was prevented from taking possession of the suit schedule property by the defendants in O.S.No. 209 of 2004. Therefore, the question of getting leave under Order 2 Rule 2 CPC will also not arise.

32. Order 7 Rule 6 will apply only in cases where the case of the plaintiff is that he is seeking exemption from the limitation law by applying section 14 of the limitation act excluding the period during which O.P.No.21 of 1986 filed under section 83 of Transfer of Property Act was pending. Before the District Munsif Court, Tirupattur, as seen from the pleadings as well as from the evidence available on record, it is not the case of the plaintiff that he is seeking such an exclusion as according to him, the suit is filed well within the period of limitation since he was prevented from taking possession of the property only after the judgment dated 27.08.1997 passed in O.P.No.21 of 1986 on the file of the District Munsif Court, Tirupattur.

33. For the foregoing reasons, the suit filed by the respondent/plaintiff is well within the period of limitation and Article 65 of the Limitation Act does not get attracted in view of the fact that the defendants have never pleaded adverse



possession or have they been able to establish adverse possession before the courts below. Only when the adverse possession is established, Article 65 of the Limitation Act comes into play. But in the case on hand, no such case has been made out by the Appellant. Hence, the first substantial question of law formulated at the time of admission of this second appeal is answered against the Appellant/third defendant.

34. With regard to the second substantial question of law namely as to whether the suit is hit by res judicata is concerned, the cause of action for the proceedings in O.P.No.21 of 1986 and O.S.No.209 of 2004 are totally different and hence, the second substantial question of law is also answered against the defendants as the principles of res judicata will not get attracted. O.P.No.21 of 1986 has been filed for redemption of mortgage under section 83 of the Transfer of Property Act and by judgment and decree dated 27.08.1997, the District Munsif Court, Tirupattur has rightly given a finding after recording the fact that the mortgage having been discharged, the suit for possession as against a trespasser in a redemption suit is not maintainable and hence, directed the plaintiff to file a separate suit for the said relief.

35. In the result, there is no merit in this second appeal. Accordingly, this second appeal is dismissed and the judgment and decree dated 04.04.2007 passed in A.S.No.71 of 2006 is hereby confirmed. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1.The Sub-Court,
Tirupattur,
Vellore District.

2.The District Munsif's Court,
Tirupattur.



3.The Section Officer,
VR Section, High Court,
Madras-104.

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+1cc to M/s.R.Subramanian, Advocate Sr.35882
+1cc to M/s.T.R.Rajaraman, Advocate Sr.36469

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