



S.A.No.1082 of 1997

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 27.01.2023

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.No.1082 of 1997

1.Gopal

2.Pandiammal

... Appellants/Respondents 1 & 2/
Defendants 2 & 3

Vs

1.P.Alagar Asari

2.A.Palaniswami

3.A.Subramaniam

4.A.Murugesan

5.A.Ganesan

6.A.Veerasingam

7.A.Muthuvel

... Respondents 1 to 7/
Appellants/Plaintiffs

8.K.Thangavel

9.Velmurugan alias Murugan

10.Selvaraj

11.Kanthimathi alias Pappathi

... Respondents 8 to 11/
Respondents 3 to 6/Defendants 4 to 7



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Prayer:- Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 05.02.1997 made in A.S.No.95 of 1996 on the file of the Principal Sub Court, Dindigul, reversing the judgment and decree dated 24.01.1995 made in O.S.No.399 of 1987 on the file of the Additional District Munsif's Court, Dindigul.

For Appellants : Mr.Srinivasan
for Mr.R.Nandakumar
For R3 : Mr.Prabhu Rajadurai
for Mr.N.Damodaran

J U D G M E N T

The 2nd and 3rd defendants are the appellants. Respondents 1 to 7/plaintiffs filed a suit for declaration and injunction. The suit was dismissed by the trial Court. The first appellate Court reversed the findings of the trial Court and granted decree for declaration and injunction in respect of 'A' Schedule property. Aggrieved by the same, defendants 2 and 3 are before this Court.

2.1. According to respondents 1 to 7/plaintiffs, the 1st respondent Alagar Asari and one Seeni Asari were brothers. Respondents 2 to 7 are the 1st respondent's children. The first item of Schedule 'A' and Schedule 'B' of



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the suit properties originally belonged to Seeni Asari and the second item of 'A' and 'B' Schedule properties belonged to the 1st respondent, Alagar Asari, the said Seeni Asari and their brother Kuppusami Asari. Thus, Seeni Asari had only 1/3rd share in Item-2 of 'A' and 'B' Schedule properties. It was contended by respondents 1 to 7 that the said Seeni Asari by sale deed dated 31.08.1961, marked as Ex.A.1, sold his interest in the suit properties in favour of his brothers viz., the 1st respondent and Kuppusami Asari. Subsequently, there was a partition between the 1st respondent and Kuppusami Asari on 10.05.1971 under Ex.A.2, whereunder the suit properties were allotted to the share of the 1st respondent and his children. Thus, respondents 1 to 7 traced their title over the suit property. It was further contended by them that Seeni Asari subsequently claimed that he had right of reconveyance over the suit properties and filed a suit for specific performance of alleged reconveyance agreement in O.S.No.1264 of 1971 and the same was dismissed. The appeal filed by Seeni Asari against the judgment in A.S.No.161 of 1974 was also dismissed. It was further contended by respondents 1 to 7 that the said Seeni Asari died on 07.08.1986 and the 1st defendant in the suit viz., deceased Valliammal was



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his permanently kept mistress. The 2nd appellant/3rd defendant was claimed to be the sister's daughter of the deceased 1st defendant and the 1st appellant/2nd defendant was the 2nd appellant's husband. The deceased 1st defendant and the appellants claiming share in the estate of Seeni Asari tried to interfere with the possession of respondents 1 to 7 and hence, they were constrained to file a suit for declaration and injunction.

2.2. The suit was resisted by the deceased Valliammal and the appellants herein mainly on the ground that earlier, the 1st respondent and his brother Kuppusami Asari filed a suit for injunction against Seeni Asari in O.S.No.2173 of 1971 and the same was dismissed. The said decision would operate as *res judicata* against the prayer in the present suit. It was further contended that the 1st respondent and his brother filed a suit against Seeni Asari in O.S.No.575 of 1974 seeking possession of the suit properties and the said suit was dismissed for default on 07.02.1979. As plaintiffs in the said suit, the 1st respondent and his brother had not filed any petition to restore the same and therefore, the present suit is barred under Order 9 Rule 9 of Code of Civil Procedure.



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2.3. It was further contended that the suit property had been in possession and enjoyment of Seeni Asari for all along during his life time and after his death, the deceased 1st defendant Valliammal in her capacity as a legal representative of his estate, enjoyed the suit property. The averment in the plaint as if the said Valliammal was a permanently kept mistress of Seeni Asari was denied by the deceased 1st defendant and the appellants. It was specifically claimed that the deceased 1st defendant Valliammal was the legally wedded wife of Seeni Asari. By raising a plea of continuous enjoyment, the deceased 1st defendant and the appellants had also raised a plea of adverse possession.

3. The trial Court, on the basis of the evidences available on record, came to the conclusion that the deceased 1st defendant Valliammal was the legally wedded wife of Seeni Asari and the appellants prescribed their right over the suit property by adverse possession and consequently, dismissed the suit. Aggrieved by the same, respondents 1 to 7 filed an appeal in A.S.No.95 of 1996 on the file of the Principal Sub Court, Dindigul. The



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learned first appellate Judge reversed the findings of the trial Court that the deceased 1st defendant Valliammal was the legally wedded wife of Seeni Asari and held that the factum of marriage between Seeni Asari and Valliammal had not been proved. The lower appellate Court also based on the earlier findings rendered in Ex.B.2 judgment to which the 1st respondent and the said Seeni Asari were parties, held that respondents 1 to 7 proved their title over the suit property. The first appellate Court also on the basis of the revenue documents produced by respondents 1 to 7 had given a finding with respect to their possession over the suit property. Ultimately, the first appellate Court allowed by the appeal by setting aside the findings of the trial Court and granted a decree for declaration and injunction in respect of suit 'A' Schedule property. Aggrieved by the same, the appellants are before this Court.

4. At the time of admission, this Court formulated the following substantial questions of law:

*“1. Whether the plaintiffs are not barred under Or.
9 Rule 9 C.P.C. from filing the present suit as the earlier*



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suits for similar reliefs have been dismissed?

2. Whether marriage cannot be presumed between Valliammal and Seenii because of their long cohabitation and on the evidence of P.W.1. The strong presumption in favour of wedlock as contemplated under Sec.114 of the Evidence Act has not been rebutted? and

3. Whether Ex.B.18 Will which came into existence 4 years prior to the death of the propounder can be doubted on the basis of some trivial inconsistency in the evidence of one of the witnesses?”

5.1. The learned counsel for the appellants mainly raised two legal points in this second appeal and he has not advanced any argument in respect of the third question of law regarding Will. The learned counsel for the appellants submitted that earlier, respondents 1 to 7 herein filed a suit for declaration of title and recovery of possession in respect of the suit properties in O.S.No.575 of 1974 and the same was dismissed for default under Order 9 Rule 8. Therefore, the present suit is barred under Order 9 Rule 9 of Code of Civil Procedure.



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5.2. It is the contention of the learned counsel for the appellants that when the earlier suit was dismissed under Order 9 Rule 8 of Code of Civil Procedure, respondents 1 to 7 can only file an application for restoration of that suit and the second suit on the same cause of action is barred. The learned counsel also assailed the findings of the Courts below on the plea of the appellants regarding adverse possession, by taking this Court to various documents filed by the appellants. The learned counsel also submitted that Seeni Asari and the deceased 1st defendant had lived together as husband and wife for a long time and long cohabitation as husband and wife would give a presumption as to marriage. The learned counsel for the appellants relied on *Badri Prasad Vs Deputy Director of Consolidation and others* reported in *AIR 1978 SC 1557* in support of his contention.

6.1. Per contra, the learned counsel appearing for the 3rd respondent submitted that perusal of the decree passed in the earlier suit in O.S.No.575 of 1974 under Ex.B.4 is not clear whether the suit was dismissed under Order 9 Rule 8 of Code of Civil Procedure. Therefore, the bar under Order



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9 Rule 9 would not get attracted. The learned counsel further submitted that the appellants failed to produce the plaint in O.S.No.575 of 1974 and hence, the present suit cannot be presumed to be on the same cause of action in order to attract bar under Order 9 Rule 9.

6.2. The learned counsel further submitted that mere living together would not be sufficient to presume marriage between the said Seeni Asari and Valliammal. The appellants failed to plead that there was a marriage between Seeni Asari and Valliammal and in the absence of plea of valid marriage, there cannot be any presumption of the same. The learned counsel relied on *Gurbux Singh Vs Bhooralal* reported in *AIR 1964 SC 1810* for the proposition that production of pleadings in the earlier suit is necessary for raising a plea of bar under Order 9 Rule 9.

7. Heard the arguments of the learned counsel for the appellants and the learned counsel for the 3rd respondent. Perused the typed set of papers and other records.



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8. A bar under Order 9 Rule 9 for filing subsequent suit can be pressed into service only when the earlier suit was dismissed under Order 9 Rule 8 and the subsequent suit is filed based on the same cause of action. In Ex.B.3 and Ex.B.4, judgment and decree passed in the earlier suit, it was not stated specifically that the earlier suit in O.S.No.575 of 1974 was dismissed under Order 9 Rule 8. Even assuming that the said suit was dismissed under Order 9 Rule 8, in order to claim bar under Order 9 Rule 9, it should be established that the subsequent suit was filed on the same cause of action in which the earlier suit was filed. To prove the said fact, the plaint in the earlier suit viz., O.S.No.575 of 1974 should have been produced before the Court. The appellants failed to produce the plaint in O.S.No.575 of 1974. Therefore, from the judgment and decree passed in the earlier suit, we cannot presume, in the absence of copy of plaint in the earlier suit, that the present suit is based on the same cause of action on which the earlier suit was filed. Therefore, the said contention of the learned counsel for the appellants is rejected.



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9. The learned counsel for the appellants by placing reliance on ***Badri Prasad case*** cited *supra*, submitted that if a man and a woman lived as husband and wife for long time, a strong presumption arises in favour of marriage.

10. In the case on hand, it has been specifically pleaded by respondents 1 to 7 in their plaint that the deceased 1st defendant Valliammal was not a legally wedded wife of Seeni Asari and was only a permanently kept mistress of Seeni Asari. The appellants in their written statement though claimed that Valliammal was the legally wedded wife, they have not made any specific plea regarding the marriage between Seeni Asari and the deceased 1st defendant Valliammal. The details of factum of marriage like date and place of marriage etc., were not at all pleaded in the written statement, nor any attempt was made to prove the marriage also. In this regard, the learned counsel for the 3rd respondent relied on ***Surjit Kaur Vs Garja Singh and others*** reported in ***(1994) 1 SCC 407***, wherein the Hon'ble Apex Court observed as follows:

“12. As rightly contended by the respondent, mere



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living as husband and wife does not, at any rate, confer the status of wife and husband. In B.S.Lokhande case AIR 1965 SC 1564, it was laid down that the bare fact of the man and woman living as husband and wife does not, at any rate, normally give them the status of husband and wife even though they may hold themselves out before the society as husband and wife and the society treats them as such.”

11. In the case on hand, when there is a specific plea in the plaint filed by respondents 1 to 7 that Valliammal was only a permanently kept mistress, the appellants should have pleaded details regarding the factum of marriage viz., date, place, etc., of the marriage. In the absence of specific plea regarding the factum of marriage with details and convincing evidences, the appellate Court rendered a factual finding that the deceased 1st defendant Valliammal was not the legally wedded wife of Seeni Asari. This Court has not seen any perversity in the approach of the first appellate Court and therefore, the said finding needs no interference.

12. It is seen from the records especially Ex.B.3, the title of the 1st respondent had been upheld by the Court below in a suit filed against



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Seeni Asari. There is a clear finding that Seeni Asari sold his interest in the suit property to his brothers the 1st respondent and Kuppusami Asari and thereafter, there was a partition, whereunder the suit property was allotted to the 1st respondent and his children. Therefore, there is no difficulty in coming to the conclusion that respondents 1 to 7 proved their right over the suit property.

13. As far as the question of possession is concerned, based on the revenue documents produced by respondents 1 to 7, especially Ex.A.6 patta and Ex.A.7 *kist* receipts, the first appellate Court had given a factual finding that respondents 1 to 7 proved their possession over the suit property. When the possession of respondents 1 to 7/plaintiffs is upheld, there is no case for considering alleged adverse possession of the appellants.

14. The learned counsel for the appellants, by relying on the findings in the earlier suit that Seeni Asari was in permissive occupation of the suit property therein, submitted that the appellants proved their adverse possession by virtue of long enjoyment. Firstly, when there is a finding in



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the earlier litigation that Seeni Asari was in permissive possession, the appellants, who are claiming right under him, cannot turn around and claim adverse possession. Secondly, in the earlier suit, there was a finding that Seeni Asari was in permissive occupation of Kottam in S.No.170/2. The present suit is filed in respect of agricultural lands in S.Nos.170/2B and 170/2C. There is no evidence to connect the Kottam found to be in permissive possession of Seeni Asari and the present suit property. Thirdly, the first appellate Court, based on the revenue documents produced by respondents 1 to 7, came to the conclusion that they had proved their lawful possession over the suit property. Therefore, the contention raised by the learned counsel for the appellants on the plea of adverse possession is also rejected.

15.1. In view of the discussions made above, all the questions of law, formulated at the time of admission, are answered against the appellants and the second appeal is dismissed.



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15.2. In fine,

(i) the Second Appeal is dismissed by confirming the judgment and decree passed by the first appellate Court; and

(ii) in the facts and circumstances of the case, there will be no order as to costs.

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NCC : Yes

Index: Yes/No

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To

- 1.The Principal Sub Judge,
Dindigul.
- 2.The Additional District Munsif,
Dindigul.
- 3.The Section Officer, VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

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