



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.07.2024

CORAM

THE HONOURABLE MRS.JUSTICE **N.MALA**

S.A.No.674 of 2021
and CMP.No.1642 of 2021

1. K. Palanisamy
2. P. Ayyammal
3. P. Venkatesh
Appellants

...

Vs.

Thangam
Respondent

...

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree passed by the 1st Additional District and Sessions Court, Salem dated 08.11.2017 made in A.S.No.83 of 2016 confirming the judgment and decree of the Principal Subordinate Court, Salem dated 30.03.2016 made in O.S.No.409 of 2014.

For Appellants : Mr.S.P.Yuaraj

For Respondent : Mr.R.Nalliyappan

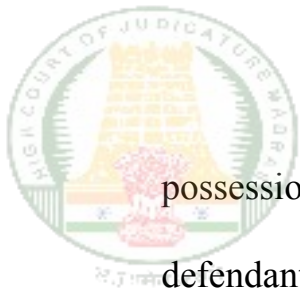
JUDGMENT

The defendants in the suit are the appellants in the Second Appeal. The Second Appeal is filed against the common judgment and decree passed by the



1st Additional District and Sessions Court, Salem dated 08.11.2017 made in A.S.No.83 of 2016 confirming the common judgment and decree passed by the Principal Subordinate Court, Salem dated 30.03.2016 made in O.S.No.409 of 2014 and A.S.No.409A of 2014.

2. The plaintiff filed the suit for partition of her $\frac{1}{2}$ share in the suit property. The plaintiff states that she and the 1st defendant, who is her husband purchased the suit property jointly under the sale deed dated 17.04.1995 registered as Doc.No.1764/1995. When the property was purchased it was a vacant site and out of the hard earnings of both the plaintiff and the 1st defendant a terraced house attached with a shed was constructed in the year 2008. The terraced house consists of three separate houses. The plaintiff also states that the defendants 2 & 3 are the son and daughter of the 1st defendant through his 1st wife. The plaintiff states that she begot two sons namely Viswanathan and Prakash through the 1st defendant. After the marriage of the plaintiff's son namely Viswanathan differences arose between the plaintiff and the 1st defendant and the 1st defendant was constantly harassing the plaintiff to convey her share of the property to him. While so, the plaintiff came to know that the 1st defendant executed the settlement deed dated 12.10.2010 in favour of the 2nd & 3rd defendants towards his $\frac{1}{2}$ share in the suit property to the extent of 1824 sq.ft. According to the plaintiff, the suit property is in enjoyment and



possession of the 1st defendant and there was no partition. The 2nd & 3rd defendants taking advantage of the settlement deed dated 12.10.2010 in their favour were trying to create encumbrance over the property and evicted the plaintiff by illegal means. Under the circumstances, the plaintiff was constrained to file the suit for partition of her ½ share in the suit property and to declare the settlement deed dated 12.10.2010 as null and void and also to grant permanent injunction restraining the defendants and their men from encumbering or alienating the suit property.

3. The 1st defendant filed written statement and it was adopted by the defendants 2 & 3. The 1st defendant states that the plaintiff is his 2nd wife and that on demand and request of her parents at the time of marriage, the 1st defendant purchased the suit property jointly in the plaintiff's name and his name. The defendant states that the suit property was purchased by the 1st defendant from out of his own earnings and for name sake the plaintiff's name was added in the sale deed. The 1st defendant denied that out of hard earnings of the plaintiff, the 1st defendant constructed the terrace building in the year 2008. The 1st defendant also referred to certain matrimonial proceedings, which in my view are not necessary for the purpose of the present case. The 1st defendant states that as owner of ½ share in the property he was entitled to



execute the settlement deed in favour of his sons the 2nd & 3rd defendants herein. The defendant states that the plaintiff knew about the settlement deed as early as in 2010 but she filed the suit in the year 2014 after the lapse of statutory period and therefore the suit was barred by limitation. As counter claim the 1st defendant raised the plea of benami and pleaded that the 1st defendant was exclusively entitled to the suit property because the plaintiff was added in the sale deed for name sake only. Counter claim of the defendants was numbered as O.S.No.409A of 2014.

4. The trial Court by common judgment in O.S.No.409 of 2014 and O.S.No.409A of 2014 allowed the suit in O.S.No.409 of 2014 and dismissed the counter claim in O.S.No.409 A of 2014. Before the trial Court the plaintiff examined two witness herself, as PW1 and one other witness and marked Ex.A1 to A5. On the defendant side four witnesses were examined and five documents were filed. The defendants filed two appeals in A.S.No.79 of 2016 against O.S.No.409A of 2014 and A.S.No.83 of 2016 against O.S.No.409 of 2014. The lower Appellate Court by common judgment and decree confirmed the judgment of the trial Court. Aggrieved by the judgment and decree of the lower Appellate Court in A.S.No.83 of 2016 against O.S.No.409 of 2014 the defendant has filed the above Second Appeal.



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5. The learned counsel appearing for the respondent took a preliminary objection on the maintainability of the Second Appeal on the ground that through the appellant filed the Second Appeal against the judgment and decree in O.S.No.409 of 2014 he did not file any appeal as against the judgment and decree in O.S.No.409(A) of 2014 (counter claim). According to the learned counsel in the counter claim the appellant had taken a specific plea that the suit property exclusively belonged to the 1st defendant and the said plea was rejected by the trial Court as well as by the lower Appellate Court and therefore the appellant ought to have filed a Second Appeal against the judgment and decree in O.S.No.409(A) of 2014 also. The learned counsel submitted that the decree in O.S.No.409(A) of 2014 having reached finality the appellant could not claim exclusive right in the suit property. The learned counsel submitted that the decree in O.S.No.409 (A) of 2014 as confirmed in A.S.No.79 of 2016 would operate as res judicata and therefore the present appeal is not maintainable.

6. The learned counsel for the appellant fairly admitted that no appeal was preferred against the judgment and decree in O.S.No.409(A) / 2014 as confirmed in A.S.No.79 / 2014.



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7. The learned counsel for the respondent relied upon the judgments of this Court in the cases of 1. *Arumugha Nainar Vs Lakshmana Perumal (died) and others* reported in 1992 (1) MLJ 457 and 2. *D.Krishnamurthi Vs K.Parasuraman* reported in 1993 (2) MLJ 674 in support of his submissions.

1. In *Arumugha Nainar Vs Lakshmana Perumal (died) and others* reported in 1992 (1) MLJ 457 it was held as below:-

“ 4. There is no dispute whether that the appeal filed by Lakshmana Perumal before the Additional Subordinate Judge, Tuticorin was barred by res judicata. The decree in O.S.No.111 of 1976 has become final. That was on the basis that the appellant herein had title to the property. When there was a decree already by the trial Court, which was final on the footing that the appellant herein had title to the property, it was not open to Lakshmana Perumal to contend in the appeal before the lower appellate court that the appellant had no title to the property. The lower appellate Court is clearly in error in rejecting the plea of res judicata.”

2. The facts of the case in Division Bench judgment in *D.Krishnamurthi Vs K.Parasuraman* reported in 1993 (2) MLJ 674 are similar to the facts of the present case and the relevant paragraph is extracted as below:-

“1. A preliminary objection is raised that the present appeal is barred by res judicata in view of the finality of the judgment and



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decree in O.S.No.6970 of 1982. The position has been considered in several cases by this Court. It has been held in all those cases that once a decree has become final that will operate as res judicata, vis-a-vis an appeal against another decree in another suit even if the judgment in both the suits are common. The principle is, once a decree is passed on the basis of title to the property and that decree has become final, there cannot be a conflicting decree in the pending appeal. Thus, the pending appeal will be affected by the decree which has already become final. The relevant judgments of the Supreme Court have been referred to in those cases and followed”.

8. In the light of the aforesaid judgments, I am of the view that as the appellant has failed to challenge the decree in O.S.No.409(A) of 2014 in which the appellant claims exclusive right to the suit property and the decree has attained finality, the failure of the appellant to challenge the said decree will operate as res judicata in the present Second Appeal. Therefore, the Second Appeal stands dismissed. No costs. Consequently connected miscellaneous petition is also closed.

12.07.2024

Index : Yes/No
Speaking order/Non-speaking order
dpq



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N. MALA, J.

dpq

To

1. 1st Additional District and Sessions Court,
Salem
2. The Principal Subordinate Court,
Salem

S.A.No.674 of 2021

12.07.2024