

WILLIAMS

v.

LOURDUSAMY & ANR.

(Civil Appeal Nos. 2894-2895 of 2008)

APRIL 24, 2008

[S.B. SINHA AND V.S. SIRPURKAR, JJ.]

Code of Civil Procedure, 1908 – s. 11 – Res-judicata – Suit for permanent injunction – On the ground that the plaintiff was in possession of suit land by virtue of oral agreement of sale – Vendor not made party to the suit – Suit decreed – Subsequent suit by judgment debtor for declaration of title, decreed – Upheld in first appeal – High Court in second appeal holding the subsequent appeal by the judgment debtor barred by res-judicata – Suit for specific performance of contract by decree holder also dismissed upto High Court – On appeal held: Principle of res judicata not attracted to the facts of the present case – Owner of the property from whom the parties claiming their title and interest was not made party in previous suit – Issues framed in subsequent suits were not subject of adjudication in the former suit – High Court posed unto itself a wrong question.

In respect of the suit property, respondent No. 1 filed a suit for permanent injunction against the appellant claiming himself to be the owner of the land, by virtue of oral agreement of sale by and between himself and respondent No.2. However respondent No. 2 was not impleaded as party. Appellant contested the suit on the ground that he had got the right, title and interest by reason of a registered sale deed from respondent No. 2. Trial judge framed the issues which was only in respect of first respondent's possession of the land. On that issue the suit was decreed.

Thereafter appellant filed a suit for declaration of title

A and recovery of possession impleading both the
 respondents as parties. First respondent also filed suit
 for specific performance of contract against the appellant
 as also against respondent No. 2. Trial Court decreed the
 suit of the appellant while dismissing that filed by the
 B respondent No.1 . Appeals against both the judgments
 were dismissed by first appellate court. In second appeal,
 High Court held that as the possession of the property
 had been delivered on the basis of purported oral
 agreement, the subsequent suit was barred by
 C applicability of principle of res-judicata. Hence the present
 appeals.

Allowing the appeals, the Court

HELD: 1. The principle of *res-judicata* is not attracted
 D to the facts of the present case. The principles of res-
 judicata although provide for a salutary principle that no
 person shall be harassed again and again, have its own
 limitations. In the previous suit, the respondent No. 2 was
 not impleaded as a party. In his absence therefore, the
 E issue as to whether respondent No. 2 had entered into an
 oral agreement of sale or not could not have been
 adjudicated upon. The said Court had no jurisdiction in
 that behalf. If that was decided in the said suit, the findings
 would have been nullities. Such an issue was not framed.
 [Paras 11, 12 and 14] [935-A, B, C; 937-D, E]

F *Sajjadanashin Sayed MD. B.E. EDR. (D) by LRs. vs. Musa Dadabhai Ummer and Ors. 2000 (3) SCC 350 – relied on.*

G *Chief Justice of Andhra Pradesh and Anr. etc. vs. L.V.A. Dikshitulu and Ors. AIR 1979 SC 193; Hasham Abbas Sayyad vs. Usman Abbas Sayyad and Ors. 2007 (2) SCC 355 – referred to.*

H 2.1 In a suit for permanent injunction, the Court had rightly proceeded on the basis that on the date of the

institution of the suit, the first respondent was in possession of the disputed land or not. It was not required to enter into any other question. The question as to whether the respondent had been put in possession in terms of an oral agreement of sale was not in issue. Respondent No. 2 was not impleaded as a party. A decree for specific performance of contract was not prayed for in the said suit. Neither any averment was made, nor in law the same could be made that he had been put in possession by way of a part performance of contract as envisaged under Section 53A of the Transfer of Property Act. [Paras 5 and 12] [935-D; 933-A, B]

2.2 It is one thing to say that a person is in possession of the land in suit and it is another thing to say that he has a right to possess pursuant to or in furtherance of an agreement for sale which would not only bind the vendor but also bind the subsequent predecessor. Had such an issue been framed, the appellant or the respondent No. 2 could have contended that Section 53A of the Transfer of Property Act had no application. For application of Section 53A an agreement has to be entered into in writing. The said Section provides for application of an equitable doctrine of part performance. Requisite ingredients therefor must be pleaded and proved. [Para 13] [935-E, F, G]

3. A competent Court of law has dismissed the suit for specific performance of contract filed by the first respondent opining that the respondent had failed to prove the existence of an oral agreement. If the suit for specific performance of contract had not been decreed in favour of the first respondent, the question of his continuing to remain in possession in part performance of contract would not arise. [Para 14] [935-G, H; 936-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2894-2895 of 2008.

A From the final Judgment and Order dated 19.8.2002 of the High Court of Judicature at Madras in S.A. No. 1759-1760 of 1991.

V. Prabhakar, Ramjee Prasad and M.K.D. Namboodiri for the Appellant.

B

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

C

2. Whether principle of res-judicata is applicable to the facts and circumstances of this case, is the question involved herein.

D

The basic fact of the matter is not in dispute. Second respondent was the owner of the properties. He by reason of a registered Deed of Sale dated 25.11.1987 transferred his right, title and interest in favour of the appellant.

E

3. First respondent, however, filed a suit against the appellant herein in the Court of District Munsif, Thiruvaiyaru praying for a decree for permanent injunction alleging that the land in suit admeasuring 3 cents was the subject matter of an oral agreement of sale by and between himself and the second respondent herein. It was contended that the second respondent had been in possession of the said land in terms of a patta executed under the Kudiyiruppu Act being Act 40 of 1971.

F

The contention of the appellant, on the other hand, was that he had been put in possession of the suit land by the second respondent in terms of the aforementioned deed of sale dated 25.11.1987.

G

4. The learned Trial Judge in the said suit, inter alia framed the following issues.

H

- "i) Whether on the date of the suit the plaintiff was in possession of the suit property?
- ii) Whether the plaintiff is entitled to the relief of permanent injunction as prayed for?

iii) To what else (*sic*) relief, the plaintiff is entitled to?" A

5. The question as to whether the respondent had been put in possession in terms of an oral agreement of sale was not in issue. Respondent No. 2 as noticed hereinbefore was not impleaded as a party. A decree for specific performance of contract was not prayed for in the said suit. Neither any averment was made nor in law the same could be made that he had been put in possession by way of a part performance of contract as envisaged under Section 53A of the Transfer of Property Act. B

6. The learned Trial Judge, however, held that the first respondent was in possession of the land in suit as on the date of the institution of the suit and thus granted a decree for permanent injunction. C

7. Appellant thereafter filed a suit for declaration of title and recovery of possession, which was marked as O.S. No. 182 of 1989. Both the respondents herein were impleaded as parties therein. First respondent herein also filed a suit for specific performance of contract against the appellant as also the respondent No. 2. The said suit was registered as O.S. No. 93 of 1990. D E

Both O.S. No. 182 of 1989 and O.S. No. 93 of 1990 were consolidated. By a judgment and order dated 7.11.1990, the learned Trial Judge while dismissing the aforementioned suit for specific performance of contract filed by the first respondent allowed the suit of the appellant for declaration of his title and confirmation of possession. F

8. Two appeals were preferred thereagainst by the first respondent which by reason of a judgment and order dated 28.8.1991 were dismissed by District Judge, Thanjavur (West). First respondent preferred two second appeals before the High Court. G

The High Court opined that the only substantial question of law raised by the appellant before it (respondent No. 1 herein) was the applicability of the principles of Res-Judicata. H

A Relying upon some stray observations made by the learned Trial Judge in the said O.S. No. 402 of 1987, it was held that as possession of the property had been delivered on the basis of a purported oral agreement of sale, the principles of *res-judicata* would be attracted.

B 9. Mr. V. Prabhakar, the learned counsel appearing on behalf of the appellant would submit that as no issue was framed in regard to the purported oral agreement of sale by and between respondent No. 1 and 2 nor any specific finding having been arrived at by the learned Trial Judge in the said O.S. No. C 402 of 1987, the impugned judgment is wholly unsustainable.

D 10. Section 11 of the Code of Civil Procedure provides that the Court will have no jurisdiction to try a suit or issue in which the matter directly and substantially in issue had been in issue in a former suit between the same parties.

Explanation 8 appended thereto reads as under:

E “Section 11. *Res judicata* - No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

F Explanation I. *****

Explanation II *****

G Explanation VIII. – An issue heard and finally decided by a court of limited jurisdiction, competent to decide such issue, shall operate as *res judicata* in a subsequent suit, notwithstanding that such court of limited jurisdiction was not competent to try such subsequent suit or the suit in H which such issue has been subsequently raised.”

11. The principles of res-judicata although provide for a salutary principle that no person shall be harassed again and again, have its own limitations. In O.S. No. 402 of 1987, the respondent No. 2 was not impleaded as a party. In his absence therefore, the issue as to whether respondent No. 2 had entered into an oral agreement of sale or not could not have been adjudicated upon. The said Court had no jurisdiction in that behalf. If that was decided in the said suit, the findings would have been nullities.

[See *Chief Justice of Andhra Pradesh and another etc. Vs. L.V.A. Dikshitulu and others* AIR 1979 SC 193 at 198 and *Hasham Abbas Sayyad Vs. Usman Abbas Sayyad and Ors.* (2007) 2 SCC 355]

12. As a matter of fact even such an issue was not framed. The High Court, therefore, in our opinion posed unto itself a wrong question. In a suit for permanent injunction, the Court had rightly proceeded on the basis that on the date of the institution of the suit, the first respondent was in possession of the disputed land or not. It was not required to enter into any other question. It, in fact, did not.

13. It is one thing to say that a person is in possession of the land in suit and it is another thing to say that he has a right to possess pursuant to or in furtherance of an agreement for sale which would not only bind the vendor but also bind the subsequent predecessor. Had such an issue been framed, the appellant or the respondent No. 2 could have contended that Section 53 A of the Transfer of Property Act had no application. For application of Section 53A of the Act, an agreement has to be entered into in writing. The said section provides for application of an equitable doctrine of part performance. Requisite ingredients therefor must be pleaded and proved.

14. A competent Court of law has dismissed the suit for specific performance of contract filed by the first respondent opining that the respondent had failed to prove the existence of an oral agreement. If the suit for specific performance of contract

A had not been decreed in favour of the first respondent, the question of his continuing to remain in possession in part performance of contract would not arise.

B Appellant herein filed a suit for declaration of title and recovery of possession. He proceeded on the basis that the first respondent was in possession.

The learned Trial Judge and the first Appellate Court, in our opinion, have rightly held that the principle of res-judicata was not attracted in this case.

C In *Sajjadanashin Sayed MD. B.E. EDR. (D) by LRs. Vs. Musa Dadabhai Ummer and Others* [(2000) 3 SCC 350] this Court considered the cases where in spite of specific issue and an adverse finding in an earlier suit, the same was not treated as res-judicata being purely incidental or auxiliary or collateral to the main issue stating :

E “24. Before parting with this point, we would like to refer to two more rulings. In *Sulochana Amma v. Narayanan Nair* this Court held that a finding as to title given in an earlier injunction suit would be res judicata in a subsequent suit on title. On the other hand, the Madras High Court, in *Vanagiri Sri Selliamman Ayyanar Uthirasomasundareswarar Temple v. Rajanga Asari* held (see para 8 therein) that the previous suit was only for injunction relating to the crops. Maybe, the question of title was decided, though not raised in the plaint. In the latter suit on title, the finding in the earlier suit on title would not be res judicata as the earlier suit was concerned only with a possessory right. These two decisions, in our opinion, cannot be treated as being contrary to each other but should be understood in the context of the tests referred to above. Each of them can perhaps be treated as correct if they are understood in the light of the tests stated above. In the first case decided by this Court, it is to be assumed that the tests above-referred to were satisfied for holding that the finding as to possession was substantially rested

on title upon which a finding was felt necessary and in the latter case decided by the Madras High Court, it must be assumed that the tests were not satisfied. As stated in *Mulla*, it all depends on the *facts of each case* and whether the finding as to title was treated as *necessary* for grant of an injunction in the earlier suit *and* was also the *substantive* basis for grant of injunction. In this context, we may refer to *Corpus Juris Secundum* (Vol. 50, para 735, p. 229) where a similar aspect in regard to findings on possession and incidental findings on title were dealt with. It is stated:

“Where title to property is *the* basis of the right of possession, a decision on the question of possession is *res judicata* on the question of title to the extent that adjudication of title was *essential* to the judgment; but where the question of the right to possession was the only issue actually or necessarily involved, the judgment is not conclusive on the question of ownership or title.”

Following the principle of law as enunciated in the aforementioned decision, we are of the opinion that the principle of *res-judicata* is not attracted to the facts of the case.

15. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. Appeal is allowed. There shall, however, be no order as to costs.

K.K.T.

Appeals allowed