

CASE NO.:
Appeal (civil) 2894-2895 of 2008

PETITIONER:
Williams

RESPONDENT:
Lourdusamy & Anr

DATE OF JUDGMENT: 22/04/2008

BENCH:
S.B. SINHA & V.S. SIRPURKAR

JUDGMENT:
J U D G M E N T
REPORTABLE

CIVIL APPEAL NO.2894-2895 OF 2008
(Arising out of SLP (C) Nos. 153-154 of 2007)

S.B. Sinha, J.

1. Leave granted.

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

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.

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 Kudiyruppu Act being Act 40 of 1971.

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.

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

"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?"

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.

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.

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 their 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.

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.

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.

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.

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.

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. 402 of 1987, the impugned judgment is wholly unsustainable.

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:

"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."

Explanation I. *****

Explanation II *****

Explanation VIII. \026 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 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 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. 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.

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 : "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.