

CASE NO.:
Appeal (civil) 6597 of 2005

PETITIONER:
RAMADHAR SHRIVAS

RESPONDENT:
BHAGWANDAS

DATE OF JUDGMENT: 27/10/2005

BENCH:
R.C. LAHOTI CJ & C.K. THAKKER & P.K. BALASUBRAMANYAN

JUDGMENT:
JUDGMENT

C.K. Thakker, J.

Leave granted.

The present appeal is filed against the judgment and order passed by the High Court of Madhya Pradesh at Jabalpur in Second Appeal No. 396 of 1998 by which the High Court confirmed the judgment and order passed by the Court of First Additional District Judge, Hoshangabad in Civil Regular Appeal No. 1-A of 1997, setting aside the judgment and decree passed by the Court of First Civil Judge, Class II, Hoshangabad in Civil Suit No. 31-A of 1991.

To appreciate the controversy raised in this appeal, few relevant facts may be noted.

Ramadhar - appellant herein purchased a house bearing Municipal Ward No. 80, Sheet No. 34 situate at Mohalla Gwaltoli in Hoshangabad (M.P) by a registered sale-deed dated February 23, 1981 from one Hiralal Babulal for a consideration of Rs. 12,000. In the said deed it was expressly mentioned that Hiralal was the absolute owner of the property and he had full rights to sell the house. It was also stated that in future if any of his brothers or legal representatives would make any claim or raise any dispute or the purchaser would be dispossessed, the seller would pay compensation, damages and costs to the buyer. It was the case of the appellant that Ganpat, brother of Hiralal and Bhagwandas (respondent herein) claimed that Hiralal did not have the right to sell the house inasmuch as it was the ancestral property of their family and was not self acquired property of Hiralal. According to the appellant, both, Ganpat and Bhagwandas took forcible possession of some portion of the house on the southern side of the property comprising of Dhalia (roofed house) and adjoining Angana (open land). Ganpat also constructed Chhapri (thatched roof) thereon. The appellant, therefore, was constrained to file Civil Suit No. 40-A of 1982 in the Court of Civil Judge, Class II, Hoshangabad against Hiralal (vendor), Ganpat and Bhagwandas (respondent herein) for possession and removal of unauthorized encroachment. A written statement was filed by Hiralal (vendor) admitting the claim of the plaintiff. So far as Ganpat and Bhagwandas are concerned, they filed joint written statement contending that the property was joint family property and Hiralal had no right to sell it to the plaintiff. The sale deed executed by Hiralal was, therefore, illegal, void and inoperative. The Trial Court framed necessary issues on the basis of pleadings of the parties and held that Hiralal was absolute and full owner of the property and he had right to sell it to the plaintiff. Accordingly, the sale by Hiralal in favour of the plaintiff was held legal, valid and in accordance with law. As to possession of defendant Nos.1 and 2, the Court held that defendant Ganpat was found to be in possession of the suit land but he could not produce any evidence to show

as to how his possession could be said to be lawful. Ganpat was, therefore, held to be in unlawful and unauthorized possession of property and was ordered by the Court to handover possession of Chhapri to the plaintiff. Thus, a decree was passed against him.

Regarding defendant Bhagwandas, the Court found that he was occupying the property as a tenant and was paying rent of Rs.10 per month to Hiralal. He had also constructed Chhapri and Dhalia. Bhagwandas was paying rent to original owner Hiralal. Since plaintiff-Ramadhar purchased house from Hiralal, Bhagwandas became tenant of Ramadhar and was liable to pay rent to the plaintiff, but Bhagwandas was not paying rent to him. Bhagwandas, however, could not be said to be in unauthorized possession or a 'trespasser' but was tenant. Hence, a suit in Civil Court by plaintiff-Ramadhar against defendant-Bhagwandas was not maintainable. The suit was accordingly dismissed against Bhagwandas.

The Court stated;

Hiralal PW-1 has made statement that he had made Chhapri over the suit accommodation in which Bhagwandas resided and gave him rent of Rs. 10 per month, in the Chhapri made by Hiralal Bhagwandas lived. The Dhalia constructed thereon was used by Bhagwandas. Bhagwandas paid rent Rs. 10 per month to Hiralal. Since he had purchased house from Hiralal, thereafter Bhagwandas has not paid rent of Dhalia. In this manner, from statement of plaintiff, it becomes clear that Bhagwandas is tenant of Dhalia of Hiralal since the time for which the house existed. The Dhalia has been sold to plaintiff by Hiralal. Therefore, defendant Bhagwandas became tenant of the plaintiff. In this manner defendant No. 2 Bhagwandas is tenant of Ramadhar. Therefore, it cannot be accepted that possession of defendant Bhagwandas is unauthorized encroachment.

Being aggrieved by that part of the order by which the suit of the plaintiff was dismissed against Bhagwandas, he preferred Regular Civil Appeal No. 20-A of 1983 in the Court of Second Additional District Judge, Hoshangabad but it was also dismissed on April 16, 1991 confirming the decree passed by the Trial Court.

In view of the fact that defendant-Bhagwandas was held to be tenant of Hiralal and after the sale of property by Hiralal to the plaintiff, Bhagwandas held to be tenant of the plaintiff, he initiated the present proceeding against defendant-Bhagwandas by filing Civil Suit No. 31-A of 1991 in the Court of First Civil Judge, Class II, Hoshangabad for his eviction and for arrears of rent. In the said suit, it was the case of the appellant-plaintiff that the previous suit filed by him was decided by the Trial Court wherein the defendant was held to be tenant of Hiralal and after sale of property by Hiralal to the plaintiff, tenant of the plaintiff. According to the plaintiff, he was entitled to possession of the property in accordance to the provisions of M.P. Accommodation Control Act, 1961 (hereinafter referred to as 'the Act'), inter alia on the grounds of (i) bona fide need of the plaintiff; (ii) non-payment of rent by the defendant; (iii) denial of title by the defendant; (iv) damage caused to the property by the defendant; and (v) need for reconstruction of property by the plaintiff.

The defendant filed written statement and contended that the plaintiff was not the owner of the suit house, Dhalia and open space, Hiralal had no right to sell the suit property to the plaintiff since the property was ancestral property of Babulal common ancestor of defendant and vendor Hiralal. Hiralal had inherited the property from his fore-fathers and defendant Bhagwandas, his father Ganpat and other brothers as also other family members had right therein. Since Hiralal had no right to transfer the property, the plaintiff could not get ownership right over the house. He also contended that Hiralal did not give possession of the property to the plaintiff. The defendant asserted that he was neither the tenant of

Hiralal nor of the plaintiff and there was no relationship of landlord and tenant between the plaintiff and the defendant and plaintiff was not entitled to get decree of eviction against him.

On the basis of contentions raised by the parties, the Trial Court framed necessary issues. Considering the evidence adduced by the parties, the Court held that in the earlier suit, it was decided by the Court that Hiralal was the absolute owner of the property and defendants Ganpat and Bhagwandas had no ownership right in the suit property. Therefore, when Hiralal sold the property to plaintiff Ramadhar, the latter became full owner. As Bhagwandas was in possession as tenant of Hiralal, on sale of property to Ramadhar, Bhagwandas became tenant of Ramadhar. There was thus relationship of landlord and tenant between the plaintiff and the defendant. The Court also held that the plaintiff's requirement was genuine and bona fide and he had no other house in the City of Hoshangabad. It also held that defendant had denied title of the plaintiff and on that ground also the defendant was liable to be evicted. In view of the said findings, the Trial Court decreed the suit and directed the defendant to handover possession of the suit property to the plaintiff along with payment of rent at the rate of Rs. 10 per month from the date of the suit till the date of the decree.

Being aggrieved by the decree passed by the Trial Court, the defendant preferred an appeal in the Court of the First Additional District Judge, Hoshangabad contending that the suit filed against him was not maintainable as there was no relationship of landlord and tenant between the plaintiff and the defendant. The Trial Court, submitted the defendant, committed an error of law in passing the decree and directing the defendant to handover possession of the suit property to the plaintiff. The lower Appellate Court observed that two questions had arisen; firstly, whether the landlord-tenant relationship had been established between the plaintiff and the defendant; and secondly, whether the plaintiff required the suit property for genuine need for residence? According to the lower Appellate Court, however, there was no relationship of landlord and tenant between the plaintiff and the defendant and the suit was not maintainable. The Court relied on the fact that plaintiff-Ramadhar had stated in his deposition that defendant Bhagwandas had not paid any rent to him after he purchased the property from Hiralal. The defendant refused to pay rent to him. According to the Court, in the earlier suit, what was held by the Court was that since Hiralal was the owner of the property and the defendant was paying rent of Rs. 10 per month to him, when Hiralal sold the property to the plaintiff, the plaintiff became owner of the house and Bhagwandas continued to remain tenant of the new owner-Ramadhar. In view of the fact, however, that defendant Bhagwandas had categorically stated that he was not the tenant of the property and was not paying any rent either to Hiralal or to the plaintiff, the relationship of landlord and tenant had not been proved. In view of the said finding, the Appellate Court allowed the appeal holding that the Trial Court had committed an error of law in passing the decree against the defendant. The Appellate Court thus allowed the appeal and dismissed the suit filed by the plaintiff.

Being aggrieved by the decree passed by the Appellate Court, the appellant filed Second Appeal in the High Court, but the High Court also confirmed the order passed by the Appellate Court and dismissed the appeal.

Against that order, the appellant has approached this Court. Notice was issued on August 29, 2003. Affidavits and further affidavits have been filed by the parties.

We have heard learned counsel on both sides.

The learned counsel for the appellant vehemently contended that the Appellate Court as well as the High Court had committed an error of law as also of jurisdiction in dismissing the suit filed by the plaintiff. According to the counsel, in earlier proceedings, the ownership of the

plaintiff over the suit property was established. In that suit, the case of the appellant was that he had become absolute owner of the property in the light of the sale deed executed by Hiralal in his favour. In those proceedings, it was specifically contended by defendant Bhagwandas that Hiralal was not the owner of the property and the house was a part and parcel of ancestral property and it could not have been sold by Hiralal alone. The contention was expressly negatived by the court and a finding was recorded that it was self-acquired property of Hiralal. There was no interest of any other member in the said property and sale of house by Hiralal in favour of plaintiff was legal, valid and in accordance with law. The Court observed that defendant-Bhagwandas could not produce any material whatsoever to show as to how he was claiming the ownership right. The Court also recorded a finding that defendant-Bhagwandas was a tenant of part of the property and was paying Rs. 10 per month to Hiralal. Since Hiralal sold the property to the plaintiff, defendant-Bhagwandas became tenant of new owner-Ramadhar. Defendant Bhagwandas did not challenge the said finding recorded by the Trial Court in that suit. Since no order of eviction was passed against the defendant by Civil Court in view of the finding that the defendant could not be held to be 'trespasser' but tenant of the property, the suit against him was dismissed. The plaintiff preferred an appeal which was also dismissed by the Appellate Court. It was, therefore, open to the appellant to initiate present proceedings and accordingly a suit for possession was filed by the plaintiff against the defendant. According to the counsel, it was not open to the defendant now to contend in the present proceedings that the suit property was joint family property and Hiralal had no right to sell the property to the plaintiff. The issue as to ownership had been finally and conclusively decided by Civil Court and it operated res judicata and the defendant was bound by it. It was also submitted by the counsel that since the plaintiff had been held to be absolute owner of the property, the defendant could not have denied his title and on that ground also, the plaintiff was entitled to the possession of the property. It was urged that if it was the case of the defendant that he was in lawful possession in any capacity other than tenant, he 'ought' to have raised such defence in the earlier proceedings. The finding recorded in earlier suit would thus operate as constructive res judicata also and the defendant was bound by the said judgment. It was submitted that once the plaintiff was held to be owner of the property, he was entitled to possession and the Trial Court was wholly justified in passing the decree in his favour. The Appellate Court and the High Court ought not to have set aside the said decree. He, therefore, submitted that the appeal deserves to be allowed by setting aside the judgment and decree passed by the Appellate Court and the High Court and by restoring the decree for possession passed by the Trial Court.

The learned counsel for the respondent, on the other hand, supported the order passed by the two courts below. He submitted that when the defendant was not tenant of the property, the Trial Court committed an error of law and of jurisdiction in passing the decree and courts below were right in setting aside the said decree. He also submitted that the so-called finding recorded by the Civil Court as to the status of defendant-Bhagwandas was collateral and incidental in nature and would not operate as res judicata in subsequent suit. He, therefore, prayed for the dismissal of the appeal.

Having heard learned counsel for the parties and having considered the rival contentions, in our opinion, the appeal deserves to be allowed and the judgment and decree passed by the Trial Court deserves to be restored by setting aside the judgment and decree passed by the lower Appellate Court as well as by the High Court. It is clear from the evidence adduced by the parties in the former suit as also the decree passed by the Trial Court in Civil Suit No. 40-A of 1982 that Hiralal was the absolute owner of the suit property who had sold the property to appellant-Ramadhar. The appellant, therefore, had become full owner of the property. In the said suit, the respondent herein was also joined as one of the defendants. The respondent-Bhagwandas in that suit contended that the property was joint family property and Hiralal had no right to dispose of that property since

other family members had also interest therein. The contention which was expressly taken was specifically negated by the Court and decree was passed in favour of the plaintiff. Moreover, an order of eviction was also passed against defendant No.1 Ganpat as he was found to be in unauthorized occupation of the property. Keeping in view the evidence on record that Bhagwandas-present respondent-defendant No.2 in that suit was paying Rs. 10 p.m. as rent to Hiralal, the Court observed that he could not be held trespasser and no decree could be passed by a Civil Court against him. The Court at the same time, observed that defendant-Bhagwandas could not produce any evidence as to how he was occupying the property as an owner. Since Hiralal was the owner of the property and defendant-Bhagwandas was occupying the property and paying Rs. 10 per month as rent to Hiralal, after the sale of property by Hiralal to plaintiff, Bhagwandas became tenant of the plaintiff.

To us, therefore, it is clear that the ownership right of the plaintiff came to be established by a competent court of law in earlier proceedings wherein certain specific findings of fact had been recorded that the property was not joint family property but self-acquired property of Hiralal; Hiralal had sold the said property to the plaintiff for Rs. 12,000 by a registered sale deed; defendant-Bhagwandas was paying rent of Rs. 10 per month to Hiralal; and Bhagwandas could not produce any evidence to show his proprietary rights over the property. No decree could be passed against Bhagwandas as the suit was filed by the plaintiff against the owner Hiralal, trespasser Ganpat and defendant-Bhagwandas in a Civil Court. Since the defendant was not found to be 'trespasser' or in unauthorized occupation, the suit was dismissed against him. In our opinion, therefore, it was not open to defendant-Bhagwandas to put forward the claim in the present proceedings that Hiralal was not the absolute owner of the property and the property was joint family property which Hiralal could not have sold to the appellant. It was also not open to the defendant to deny the title of the plaintiff since in appropriate proceedings, a finding had been recorded as to ownership of property and a decree had been passed by a competent Civil Court holding the plaintiff to be the owner who had purchased it from its real owner Hiralal. The Trial Court, in our opinion, was wholly justified in passing the decree in favour of the plaintiff and against the defendant.

The learned counsel for the appellant is also right in contending that the finding as to ownership of the plaintiff had attained 'finality' in the earlier proceedings in the decree passed a Civil Court. So far as the ownership rights of the plaintiff are concerned, they had not been challenged by defendant-Bhagwandas and hence that finding would operate as res judicata. In this connection our attention has been invited by the learned counsel to the following decisions;

Pawan Kumar Gupta v. Rochiram Nagdeo, [1999] 4 SCC 243;

P.K. Vijayan v. Kamalakshi Amma and Ors., [1994] 4 SCC 53;

K. Ethirajan (dead) by Lrs. v. Lakshmi and Ors., [2003] 10 SCC 578; Marwari Kumhar and Ors. v. Bhagwanpuri Guru Ganeshpuri and Anr., [2000] 6 SCC 735;

Madhavkrishna and Anr. v. Chandra Bhaga and Ors., [1997] 2 SCC 203;

Konda Lakshmana Bapuji v. Government of A.P. and Ors., [2002] 3 SCC 258; and

Most Rev. P.M.A. Metropolitan and Ors. v. Moran Mar Marthoma and Anr., [1995] Supp 4 SCC 286.

In the above decisions, various aspects of the doctrine of res judicata have been dealt with by this Court.

In Pawan Kumar Gupta, a suit filed by the plaintiff against the defendant

was dismissed by the Court but the Court negatived the contention of the defendant that the plaintiff was not the real owner of the suit property. The Court recorded a finding that the plaintiff was absolute owner. In a subsequent suit by the plaintiff against the defendant, this Court held that an issue as to the title of the property was 'directly and substantially' in issue between the parties in a former suit and decided in favour of the plaintiff. Such finding, ruled this Court, would operate as res judicata in a subsequent suit against the defendant.

The Court observed:

"The rule of res judicata incorporated in Section 11 of the Code of Civil Procedure (CPC) prohibits the court from trying an issue which "has been directly and substantially in issue in a former suit between the same parties", and has been heard and finally decided by that court. It is the decision on an issue, and not a mere finding on any incidental question to reach such decision, which operates as res judicata. It is not correct to say that the party has no right of appeal against such a decision on an issue though the suit was ultimately recorded as dismissed."

In our opinion, the learned counsel for the appellant is also right in submitting that the rule of constructive res judicata applies to the present case. The expression 'matter in issue' under Section 11 of the Code of Civil Procedure, 1908 connotes matter directly and substantially in issue actually or constructively. A matter is actually in issue when it is in issue directly and substantially and a competent court decides it on merits. A matter is constructively in issue when it 'might and ought' to have been made a ground of defence or attack in the former suit.

Explanation IV to Section 11 of the Code by a deeming provision lays down that any matter which 'might and ought' to have been made a ground of defence or attack in the former suit, but which has not been made a ground of defence or attack, shall be deemed to have been a matter directly and substantially in issue in such suit.

The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided. The object of Explanation IV is to compel the plaintiff or the defendant to take all the grounds of attack or defence in one and the same suit. [Vide *Horo v. Jahan Ara*, [1973] 2 SCC 189 192 : AIR (1973) SC 1406 (1409); *Jaswant Singh v. Custodian of Evacuee Property*, [1985] 3 SCC 648 : AIR (1985) SC 1096 : (1985) Supp 1 SCR 331; *Forward Construction Co. v. Prabhat Mandal*, (1986) 1 SCC 100 : AIR (1986) SC 391 : [1985] Supp 3 SCR 766; *Direct Recruits Class II Engineering Officers' Association v. State of Maharashtra*, [1990] 2 SCC 715 : AIR (1990) SC 1607 and *Vijayan v. Kamalakshi*, [1994] 4 SCC 53 : AIR (1994) SC 2145.

In the case on hand, it is clear that in the earlier suit, the Court had recorded a clear finding that defendant-Bhagwandas was neither the owner of the property nor he could show any right as to how he was occupying such property except as a tenant of Hiralal. If Bhagwandas was claiming to be in lawful possession in any capacity other than a tenant, he 'ought' to have put forward such claim as a ground of defence in those proceedings. He ought to have put forward such claim under Explanation IV to Section 11 of the Code but he had failed to do so. The doctrine of constructive res judicata engrafted in Explanation IV to Section 11 of the Code thus applies to the facts of the case and the defendant in the present suit cannot take a contention which ought to have been taken by him in the previous suit and was not taken by him. Explanation IV to Section 11 of the Code is clearly attracted and defendant-Bhagwandas can be prevented from taking such contention in the present proceedings.

There is one more reason also as to why the Trial Court was right in passing the decree against the defendant. As is clear from the record, even after the disposal of previous proceeding in civil suit as well as in

appeal qua defendant-Bhagwandas, the plaintiff-Ramadhar issued a notice to the defendant on June 03, 1991, by registered AD. In the said notice, the plaintiff through his advocate asked the defendant-Bhagwandas to handover possession of Dhalia and to pay arrears of rent stating therein that the plaintiff had become owner of suit property as he had purchased the property by a registered sale deed dated February 23, 1981 from Hiralal and he was occupying it as owner of the property. It was also stated that though it was the case of the plaintiff in earlier suit that defendant-Bhagwandas and his father Ganpat had illegally encroached upon the land, the Court of First Civil Judge, Class II, Hoshangabad held in the judgment dated September 2, 1983 that defendant-Bhagwandas was tenant of suit Dhalia for a monthly rent of Rs. 10 and in view of the said finding, no decree for possession was passed in favour of the plaintiff. The father of the defendant, however, was found to be in illegal possession and accordingly decree was passed against him. The notice further stated that in spite of the decree passed by the Trial Court and confirmed by the lower Appellate Court, the defendant had not paid rent to the plaintiff and he was in arrears of rent and was liable to eviction under Section 12 of the Act. It was also stated that the defendant had denied title of the landlord and was liable to be evicted on that count as well. Moreover, the defendant had damaged the property and got pits dug. The plaintiff wanted old construction to be demolished for making new construction and it was not possible without obtaining the possession of the portion occupied by the defendant and for that reason also, the landlord required the possession of the property from the defendant. It may be stated here that according to the plaintiff, the defendant neither replied to the notice nor surrendered possession of the property. In view of the said fact also, the Trial Court was right in proceeding to decide the case on merits and in passing the decree in favour of the plaintiff.

So far as the findings recorded by the Trial Court for passing a decree for possession in favour of the plaintiff are concerned, they have neither been disturbed nor set aside by the lower Appellate Court nor by the High Court. The plaintiff is, therefore, entitled to a decree for possession.

For the foregoing reasons, in our opinion, the appeal deserves to be allowed and is accordingly allowed. The decree and order passed by lower Appellate Court and confirmed by the High Court are set aside and the decree for possession passed by the Trial Court is restored. Respondent-Bhagwandas is granted four month's time to vacate the premises subject to his filing usual undertaking within four weeks from today. In the facts and circumstances of the case, there shall be no order as to costs.