CASE NO.:
Appeal (civil) 7653 of 1997
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PETITIONER:
Smt. V. Rajeshwari

RESPONDENT:
T.C. Saravanabava

DATE OF JUDGMENT: 16/12/2003

BENCH:
R.C. Lahoti & Ashok Bhan.

JUDGMENT:
J U D G M E N T

R.C. Lahoti, J.

The property in suit consists of a piece of land together with building, super-structure and other construction including wells and fencing of the property bearing house and ground No. 9, Padavattamman Koil St., Kondithope, Madras \026 1, and O.S. No.6008 \026 R.S. No.20 and R.S. No.20/1 C.C. No.8 patta No.461/1954-55 and admeasuring 1817 sft., more particularly described in the Schedule to the plaint dated 19th August, 1984.

The facts, which at this stage are no longer in dispute and stand concluded by the findings of fact by the courts below, may briefly be noticed. The property originally belonged to one Chakrapani who purchased the same on 13.6.1921. He executed a sale deed in favour of one Damodaran on 8.5.1923. Damodaran in turn executed a sale deed in favour of Thiruneelkanda Nainar on 17.10.23. Thiruneelakanda executed a settlement deed on 1.5.1950 in favour of his wife Lakshmi and son Loga Ganapathi. They executed a sale deed on 3.3.1966 in favour of Mahadevan and his wife Saroja. The plaintiff, appellant herein, purchased the property from them as per sale deed dated 10.3.1980.

The defendant was in occupation of the entire suit property on the date of the present suit.

Prior to the commencement of the present suit, there had been two other rounds of litigation which are very relevant and need to be noted. In the year 1957, the defendant-respondent herein filed Original Suit No. 2512 of 1957 claiming a share in the suit property, alleging himself to be the adopted son of Thiruneelakanda. The suit was dismissed. That litigation achieved a finality on 8.1.1964 when an appeal preferred by the defendant was dismissed by the High Court of Madras.

In the year 1965, one of the predecessors-in-title of the plaintiff (appellant herein) filed a suit for declaration of title and for possession over 240 sft. area (situated on the upper floor of the building standing over the suit property) against the respondent. The suit was numbered as O.S. 1907 of 1965 and after trial decreed on 30.1.1968. The decree was put into execution. Execution Petition No.2458 of 1975 was pending when the defendant produced before the Executing Court an injunction issued by one of the civil courts restraining execution of the decree. The Executing Court naturally closed the execution proceedings. The order of injunction and details thereof are not available on record. In what terms the Execution

Petition was closed and what happened thereafter to such execution proceedings is also not ascertainable from the record. The search for such information need not detain us in deciding the present appeals as it would be taken care of in such independent proceedings as would be indicated during the course of this judgment and also looking at the manner in which these appeals are being disposed of.

On 19.8.1984, the appellant filed the present suit for declaration of title and recovery of possession over the suit property from the defendant. On 7.8.1985, the defendant filed the written statement. Suffice it to note here itself that though the defendant denied the title of the plaintiff over the suit property, there is no plea as to the suit being barred by the principle of res judicata taken in the written statement. The only other plea taken in the written statement is one of adverse possession which is in the following words :

"This defendant has been in continuous, uninterrupted, open possession and enjoyment of the suit property for more than the prescriptive period and had thus perfected his title to the suit property by adverse possession.

This defendant is in occupation of the suit property in his own right. This defendant has been paying the Corporation tax, Water and Sewage tax and Urban Land tax for the suit property for all three years for more than the prescriptive period."

The Trial Court and the First Appellate Court decreed the suit.

It appears that during the pendency of the First Appeal, the plaintiff (appellant herein), moved an application under Order XLI Rule 27 of the CPC proposing to place on record the judgment and decree in O.S. No.1907 of 1965 wherein, as stated hereinabove, a decree was passed in favour of one of the predecessors-in-title of the plaintiff, upholding his title and directing the defendant-respondent to deliver possession over the upper floor of the building (240 sft. area) which was then in the possession of the defendant, to the plaintiff therein (i.e. predecessor-in-title of the present plaintiff). It appears that those judgment and decree have been brought on record by the plaintiff to provide additional support to his claim for entitlement to possession, and as a piece of evidence supporting the finding of the Trial Court which was already in his favour. The First Appellate court allowed the plaintiff's application, took the judgment and decree on record and then dismissed the appeal filed by the defendant. The defendant preferred a Second Appeal in the High Court. In the High Court, the plaintiff once again appears to have relied on the said judgment and decree to sustain the judgments and decrees of the two courts below in his favour and here, his step of placing reliance over the said judgment and decree boomeranged against him. The High Court formed an opinion that the issue as to title and possession over the suit property was already decided in the suit filed by the predecessor-in-title of the plaintiff (O.S. No.1907 of 1965) and therefore the present suit was barred by principle of res judicata. Solely on this reasoning, the High Court has, vide its judgment dated 25.4.1996, allowed the appeal preferred by the defendant and directed the suit filed by the plaintiff to be dismissed.

The plaintiff, respondent in the High Court, sought for a review of the judgment. Vide its order dated 24.2.1997, the High Court has directed the review petition to be dismissed. Two appeals have been preferred : one, against the main judgment, and, the other, against the order dismissing the review petition.

We have heard Shri S. Balakrishnan, the learned senior counsel for the appellant and Shri A.K. Ganguli, the learned senior counsel for the respondent. The learned counsel for the parties have taken us through all the relevant material available on record. We are satisfied that the High Court has clearly erred in allowing the defendant's appeal and setting aside the judgments and decrees of the courts below and this we say for more reasons than one.

The rule of res judicata does not strike at the root of the jurisdiction of the court trying the subsequent suit. It is a rule of estoppel by judgment based on the public policy that there should be a finality to litigation and no one should be vexed twice for the same cause.

The plea of res judicata is founded on proof of certain facts and then by applying the law to the facts so found. It is, therefore, necessary that the foundation for the plea must be laid in the pleadings and then an issue must be framed and tried. A plea not properly raised in the pleadings or in issues at the stage of the trial, would not be permitted to be raised for the first time at the stage of appeal (See: (Raja) Jagadish Chandra Deo Dhabal Deb Vs. Gour Hari Mahato & Ors. \026 AIR 1936 Privy Council 258, Medapati Surayya & Ors. Vs. Tondapu Bala Gangadhara Ramakrishna Reddi & Ors. \026 AIR 1948 Privy Council 3, Katragadda China Anjaneyulu & Anr. Vs. Kattragadda China Ramayya & Ors. \026 AIR 1965 A.P. 177 Full Bench). The view taken by the Privy Council was cited with approval before this Court in The State of Punjab Vs. Bua Das Kaushal \026 (1970) 3 SCC 656. However, an exception was carved out by this Court and the plea was permitted to be raised, though not taken in the pleadings nor covered by any issue, because the necessary facts were present to the mind of the parties and were gone into by the Trial Court. The opposite party had ample opportunity of leading the evidence in rebuttal of the plea. The Court concluded that the point of res judicata had through out been in consideration and discussion and so the want of pleadings or plea of waiver of res judicata cannot be allowed to be urged.

Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. May be in a given case only copy of judgment in previous suit is filed in proof of plea of res judicata and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in Syed Mohd. Salie Labbai (Dead) By Lrs. & Ors. Vs. Mohd. Hanifa (Dead) by Lrs. & Ors. \026 (1976) 4 SCC 780, the basic method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as res judicata. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment. The Constitution Bench in Gurbux Singh Vs. Bhooralal \026 (1964) 7 SCR 831, placing on a par the plea of res judicata and the plea of estoppel under Order II Rule 2 of the Code of Civil Procedure, held that proof of the plaint in the previous suit which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings. Their Lordships of the Privy Council in Kali Krishna Tagore Vs. Secretary of State For India in Council & Anr. \026 (1887-88) 15 Indian Appeals 186, pointed out that the plea of res judicata cannot be determined without ascertaining what were the

matters in issues in the previous suit and what was heard and decided. Needless to say these can be found out only by looking into the pleadings, the issues and the judgment in the previous suit.

That apart the plea, depending on the facts of a given case, is capable of being waived, if not properly raised at an appropriate stage and in an appropriate manner. The party adversely affected by the plea of res judicata may proceed on an assumption that his opponent had waived the plea by his failure to raise the same. Reference may be had to Pritam Kaur w/o S. Mukand Singh Vs. State of Pepsu and Ors. \026 AIR 1963 Punjab 9 (Full Bench) and Rajani Kumar Mitra & Ors. Vs. Ajmaddin Bhuiya \026 AIR 1929 Calcutta 163, and we find ourselves in agreement with the view taken therein on this point). The Privy Council decision in Sha Shivraj Gopalji Vs. Edappakath Ayissa Bi & Ors. \026 AIR 1949 Privy Council 302, appears to have taken a different view but that is not so. The plea of res judicata was raised in the Trial Court, however, it was not pressed but it was sought to be reiterated at the stage of second appeal. Their Lordships held that being a pure plea in law it was available to the appellant for being raised. Their Lordships were also of the opinion that in the facts of that case, apart from the principle of res judicata, it was unfair to renew the same plaint in fresh proceedings. The Privy Council decision is distinguishable.

Reverting back to the facts of the present case, admittedly the plea as to res judicata was not taken in the Trial Court and the First Appellate Court by raising necessary pleadings. In the First Appellate Court the plaintiff sought to bring on record the judgment and decree in the previous suit, wherein his predecessor-in-title was a party, as a piece of evidence. He wanted to urge that not only he had succeeded in proving his title to the suit property by the series of documents but the previous judgment which related to a part of this very suit property had also upheld his predecessor’s title which emboldened his case. The respondent thereat, apprised of the documents, did not still choose to raise the plea of res judicata. The High Court should not have entered into the misadventure of speculating what was the matter in issue and what was heard and decided in the previous suit. The fact remains that the earlier suit was confined to a small portion of the entire property now in suit and a decision as to a specified part of the property could not have necessarily constituted res judicata for the entire property, which was now the subject matter of litigation.

We cannot resist observing that if at all the plea of res judicata was to be availed and applied then that should have been for the benefit of the plaintiff inasmuch as his predecessor-in-title had succeeded in proving his title to part of the property in the earlier suit. We fail to understand how the judgment in the previous suit can in any way help the defendant-respondent in the present proceedings. We are clearly of the opinion that the plea of res judicata has neither been raised nor proved. There is no res judicata. The issue as to title was rightly determined by the Courts below on the basis of evidence adduced in this case. That finding has to be restored.

So is the case with the plea as to adverse possession over the suit property taken by the defendant in his written statement. The plea has been held not substantiated and rightly so. The plea is too vague. Earlier the defendant, claiming himself to be an adopted son of one of the predecessors-in-title of the plaintiff, had filed a suit for partition claiming half a share therein. Thus, he was canvassing his claim as a co-owner in possession. How and at what point of time he started prescribing hostile title, was for him to plead and prove, which he has utterly failed in doing. The plea of adverse possession raised by the defendant is devoid of any merit and cannot be countenanced.

The correct position of law, which should apply to the facts of

the case, may now be stated. To the extent to which the plaintiff's predecessors-in-title have succeeded in securing decree for declaration of title and recovery of possession over 240 square feet area of the upper floor of the building, the plaintiff should secure possession by executing that decree. As to the remaining property, the plaintiff must be held entitled to a decree in the present suit. Accordingly, both the appeals are allowed. The judgment and decree of the High Court are set aside and that of the courts below restored partly. The suit filed by the plaintiff shall stand decreed in respect of the suit property as described in the plaint excluding therefrom the 240 square feet area of the upper floor of the building forming the subject-matter of decree in Original Suit No.1907 of 1965. The plaintiff is declared to be the title owner of the said property. The defendant shall deliver vacant and peaceful possession over the same to the plaintiff. The plaintiff is also held entitled to a decree for enquiry into mesne profits in terms of Order XX Rule 12(1)(c) of the C.P.C., for the period between the date of the suit and the date of delivery of possession to the decree-holder pursuant to this decree. Consistently with the directions, as aforesaid, a decree shall be drawn up by the trial Court. The costs throughout shall be borne by the defendant-respondent.