

SUPREME COURT OF INDIA

K. Ethirajan (Dead) by Lrs.

Versus

Lakshmi

C.A.no.8720 of 1997

(Shivaraj V. Patil and D.M. Dharmadhikari, JJ.)

26.09.2003

JUDGMENT

DHARMADHIKARI, J. –

1. By judgment dated 11.7.1996 passed in Second Appeal No. 649 of 1987, the High Court of Madras has reversed the concurrent findings recorded in the judgments of the courts below and dismissed the suit preferred by deceased - plaintiff, K. Ethirajan [now represented in this appeal by the appellants as his legal representatives] for partition of the suit property consisting of a house and land appurtenant to it described as T.S. No. 71/2 area 3.0536 grounds in village - Ayanavaram, Taluk - Madras extended area, District - Madras [Tamil Nadu].

2. It is not in dispute between the parties that the suit properties were owned by widow - Gangammal, Deceased K. Ethirajan (the original plaintiff) was Gangammal's sister's son and was allowed to occupy a portion of the suit properties since before coming into force of the (Tamil Nadu) Estates (Abolition and Conversion into Ryotwari) Act, 1948 [hereinafter referred to as an Act of 1948].

3. The widow - Gangammal died in the year 1939. The deceased - M. Gurunathan, the original defendant [represented in this appeal by his legal representatives as respondents) claimed right to the suit properties by inheritance claiming relationship with Gangammal as son of her husband's brother. Claiming title to the suit properties by inheritance, he had filed a suit O.S. No. 530 of 1948 (decided on 27.6.1949) against the step-brothers of Gangammal describing the latter as in unlawful possession of the suit property. He obtained a decree of possession of the suit property. He obtained a decree of possession against the step-brothers of Gangammal in the said suit. The deceased - original plaintiff K. Ethirajan, who was sister's son of Gangammal and in occupation of the portion of the suit property was not a party to the said suit O.S. No. 530 of 1948 which was decreed on 27.6.1949.

4. It is also not in dispute that in proceedings taken in accordance with Section 18(4) of the Act of 1948, the Director of Settlement recognised the joint ownership and possession of deceased - plaintiff K. Ethirajan and deceased - defendant M. Gurunathan on the suit property and granted a *joint patta* (marked as Ex. A-7 in this suit) in their favour. This order of Director, Settlement under the provisions of Section 18(4) read with Section 5(2) of the Act of 1948 granting joint patta to the parties was passed on 28.8.1970. The grant of the said *joint patta* to the contesting parties was upheld by all the higher authorities under the Act of 1948. The claim of deceased - defendant for

recognition of his exclusive right to the suit properties, being nearest heir of Gangammal was rejected by all the authorities concerned under the Act of 1948. It is on the basis of this joint patta (marked in the suit as Ex. A-7) that the suit for partition filed by the plaintiff was decreed by the trial court as well as by the First Appellate Court.

5. The trial court and the first appellate court in granting decree of partition in favour of the plaintiff, apart from relying on the joint patta (Ex. A7), relied on the judgments passed in the previous litigation with regard to the suit properties between deceased - plaintiff (K. Ethirajan) and the deceased - defendant (M. Gurunathan). The deceased - defendant (M. Gurunathan) had filed Original Suit No. 9003 of 1973 against deceased - K. Ethirajan, seeking his eviction and delivery of possession of a portion of suit land of the dimension 37' x 20' with a super-structure thereon used for residence. Deceased - K. Elthirajan as defendant in the said earlier suit resisted his eviction on grounds *inter alia* that he is in possession of the disputed land and the super-structure, being the adopted son of Gangammal and had been granted a joint patta in the proceedings which concluded in his favour under the Act of 1948.

6. The earlier Original Suit No. 9003 of 1973 seeking eviction of deceased - plaintiff (K. Ethirajan) from suit property was dismissed by the court 12th Assistant Judge, City Civil Court, Madras by judgment dated 06.10.1976, a copy of which has been produced and marked in the proceedings of the trial court in the present suit as Ex. A-22. The trial court in the said suit held that the deceased - K. Ethirajan cannot be held to be in possession of the suit property as a mere licensee of the deceased - M Gurunathan. He was held to be in possession of the suit property as owner since 1940 as evidenced by various documents of possession filed by him and the joint patta granted by the authorities under the Act of 1948. The trial Court also held that deceased - K. Ethirajan having remained in continuous possession of the suit property as owner had perfected his title by remaining in adverse possession for more than the statutory period of 12 years.

7. Aggrieved by the dismissal of his suit for eviction, deceased - M Gurunathan filed Appeal Suit No. 389 of 1977 to the Principal Judge of City Civil Court. The said appeal was also dismissed by judgement dated 24.4.1979. The judgment of the appellate court in Appeal Suit No. 389 of 1977 decided on 24.4.1979 has been exhibited in the present suit and marked as Ex. A-23. The appellate court by its judgment rejected the plea of deceased - M. Gurunathan that deceased - K. Ethirajan was his licensee and held that K. Ethirajan was in possession since much prior to the grant of the alleged licence or permission to him. It was also held that grant of joint patta under the proceedings of the Act of 1948 in favour of deceased - K. Ethirajan belies the case of deceased - M Gurunathan of grant of any leave or licence to him for constructing a hut for his residence on the suit property. The appellate court did not consider it necessary to go into the plea of adverse possession set up by K. Ethirajan in view of the findings in favour of deceased - K. Ethirajan on other issues arising from grant of joint patta to the contesting parties in the proceedings under the Act of 1948. The plea based on adverse possession set up by K. Ethirajan was, however, negatived on the ground that if he was basing his claim of ownership and possession on the basis of joint patta (Ex. A-7), the question of adverse possession *inter se* between co-owners could not arise. The litigation initiated by deceased - M. Gurunathan against deceased - K. Ethirajan challenging the latter's right and title to remain in possession of the suit property came to an end with the judgment of the appellate court dated 24.4.1979 passed in Appeal Suit No. 389 of 1977. Deceased - M. Gurunathan who had lost his suit did not carry the matter further in the appeal to the High Court.

8. It is on the basis of the judgment of the trial court in previous litigation between the parties in Original Suit No. 9003 of 1973 dated 06.10.1976 (Ex. A-22) and the appellate judgment in that suit

dated 24.4.1979 (Ex. A-23) coupled with joint patta (Ex. A-7), the trial court and the first appellate court in the present suit, granted a preliminary decree of partition of the suit properties in favour of deceased - plaintiff K. Ethirajan.

9. In the Second Appeal No. 649 of 1987 preferred by the LRs of deceased - M. Gurunathan, the High Court has upset the concurrent findings and judgments of the two courts below and dismissed the suit of partition filed by deceased K. Ethirajan.

10. The High Court held that the joint patta (Ex. A-7) cannot be treated to be a foundation to claim joint ownership to the suit properties. It held that de hors patta (Ex. A-7), deceased - plaintiff K. Ethirajan was required to prove that he is co-owner of the suit property in question. According to the High Court even on the basis of the judgments in previous litigation between the parties the plaintiff is not entitled to seek a decree of partition as in previous litigation he had based his case merely on adverse possession and never set up a case of co-ownership. In the opinion of the High Court, since the plea of co-ownership. In the opinion of the High Court, since the plea of co-ownership was not set up in the previous suit between the parties (that is Original Suit No. 9003 of 1973), it bars the present suit of partition filed by deceased K. Ethirajan on the basis of joint ownership of the suit properties. The aforesaid reasoning of the High Court on two separate issues recorded separately deserves reproduction to appreciate the rival contentions raised by the learned counsel for the parties in this appeal :-

"It is settled law that co-ownership cannot be created by a judgment or an order under an enactment. The plaintiff's name was also entered in that register only when he was found to be in possession of a portion of the property. A person in possession need not be a co-owner. Both the courts below failed to note that even in Ex. A-7 the claim of ownership was not decided and the parties were directed to settle their dispute through Civil Court. De hors Ex. A-7, there is no evidence to prove the claim any right under Gangammal, all his case of co-ownership will have to go.

.....

The learned counsel for the appellant also brought to my notice the statement in para 9 of the Judgment, in the appeal filed against OS No. 9003 of 1973. That is Ex. A-23. In that judgment, we find that the present plaintiff wanted exclusive title over the entire 3-1/2 grounds and he never admitted that the first defendant is a co-owner along with him. It is worthwhile to take note of Exs. A-22 and A-23 judgments, Ex. A-22 is the judgment in OS No. 9003 of 1973, which was a suit for ejection. The plaintiff claimed that as against deceased defendant, he has perfected title. In that case the plaintiff never alleged that deceased defendant is a co-owner. He succeeded in his contention that he has perfected title. If the present contention of co-ownership was put in that case, the result might have been different. *According to me, the contention of co-ownership which is not put forward in the earlier suits evidenced by Exs. A-22 and A-33, is a bar for the present suit.* I hold that the plaintiff has miserably failed to prove co-ownership and his right to get partition in the plaint item. The courts below have not properly understood the legal issue involved in the suit and they have committed grave illegality in passing a preliminary decree."

[Emphasis added for pointed attention]

11. Learned counsel appearing for the LRs of deceased K. Ethirajan in this appeal contends that the joint patta (Ex. A-7) granted in proceedings under the Act of 1948 followed by the judgments (Exs.

A-22 & A-23) in the previous litigation between the parties conclusively establish the co-ownership of plaintiff - K. Ethirajan to the suit properties and the High Court in Second Appeal clearly committed an error of law and jurisdiction in interfering with the concurrent finding of the two courts below. It is further contended that the judgments in the previous litigation between the parties evidenced by Exs. A-22 and A-23 operate as res judicata against the defendant. Reliance is placed on para 26 in the case of *Hope Plantations Ltd. v. Taluk Land Board, Peermade and anr, 1999(5) SCC 590*.

12. In reply, learned counsel appearing for the LR's of deceased M. Gurunathan as respondents made strenuous effort to support the judgment of the High Court. It was contended that grant of joint patta (Ex. A7) under the Act of 1948 is not conclusive on the question of title and it is only civil court which could take a final decision on the question of title and claim of co-ownership by the plaintiff. It is submitted that the patta proceedings under the Act of 1948 are for the limited purpose of recognising possession of the parties in actual occupation consequent to the abolition of 'estates' and for realising the land revenue. Strong reliance is placed on the decisions of this Court in the cases of *State of Tamil Nadu etc., v. Ramalinga Samigal Madam etc., 1985 (Suppl. 1) SCR 63* and *R. Manicka v. E. Elumala Naicker, 1995(4) SCC 156*].

13. After considering the rival contentions advanced by the counsel for the parties and on perusal of the record of this case, we find that there was no justification for the High Court in second appeal to reverse the concurrent findings and judgments of the two courts below.

14. As held by this Court in the two decisions in cases of Ramalinga Samigal Madam and R. Manicka Naicker (supra), orders or decisions of the Settlement Officers granting patta under the Act of 1948 are not conclusive with regard to the dispute of title between parties to the lands in question and civil court alone is competent to decide the question of title. In the present case, the question of title to the suit properties, particularly on the plea of claim of ownership by deceased K. Ethirajan, directly and substantially arose between the same parties in earlier Original Suit No. 9003 of 1973 and the Appeal Suit No. 389 of 1977 arising therefrom. In the aforesaid previous litigation deceased M. Gurunathan sought eviction of deceased K. Ethirajan claiming exclusive title to the suit properties.

15. Deceased K. Ethirajan as defendant to the previous suit resisted it both on the ground of adverse possession as well as on the alleged co-ownership of the parties by grant of joint patta (Ex. A-7).

16. We have perused the contents of the two judgments in Civil Suit No. 9003 of 1973 (Ex. A-22) and appellate judgment dated 24.4.1979 (Ex. A-23). We find that the High Court has clearly erred in observing in the impugned judgment that in the earlier suit, co-ownership to the suit property was not claimed by deceased - plaintiff (K. Ethirajan). In the paper book containing additional documents, copies of the judgments of Exs. A-22 and A-23 have been placed before us. The trial court dismissed the suit of deceased - respondent (M. Gurunathan) on the ground that the case of grant of leave and licence set up by him was not proved and the defendant being in possession since 1940 onwards has perfected his title by adverse possession. The appellate court negatived the plea of adverse possession set up by Ethirajan as defendant but by relying on the joint patta (marked as Ex. B-6 in that suit) came to the conclusion that the parties were co-owners. It was held that between co-owners, plea of adverse possession cannot be accepted. The decree of dismissal of the suit for eviction of deceased - K. Ethirajan granted by the trial court was upheld by the appellate court on the ground that plea of grant of licence by deceased M. Gurunathan was not proved and the parties were co-owners under the joint patta in their favour. The appellate judgment upholding the

dismissal of the suit on the finding of co-ownership of the parties was not challenged by any further appeal. The said judgment has thus attained finality. The learned counsel appearing for the respondents is right in his submission that the dispute of title to the suit properties between the parties was an issue directly and substantially involved in the earlier suit and on the principle of res judicata, in the present suit defendant - M. Gurunathan or his LRs are estopped from questioning the claim of co-ownership urged by deceased K. Ethirajan and his LRs. The following observations at page 26 in the case of Hope Plantations Ltd. (supra) relied upon by the counsel appearing for the appellant fully support his argument based on the principle of res judicata and estoppel :-

"26. It is settled law that the principles of estopped and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. Rule of res judicata prevents the parties of a judicial determination from litigating the same question over again even though the determination may even be demonstrably wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are "cause of action estoppel" and "issue estoppel". These two terms are of common law origin. Again, once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is to approach the higher forum if available. The determination of the issue between the parties gives rise to, as noted above, an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operates in subsequent suits between the same parties in which the same issue arises.

17. Learned counsel appearing for the respondents in his reply to the plea based on res judicata and estoppel contended that if at all the judgments in the earlier suits (Exs. A-22 and A-23) can be held to operate as res judicata between the parties, it would be operative only in respect of a portion of the suit property measuring 37' x 20' with super-structure thereon which alone was the subject matter of dispute in the earlier suit.

The above contention advanced in reply of the learned counsel appearing for the respondents, cannot be accepted. In the earlier suit, deceased - M. Gurunathan sought eviction of deceased - K. Ethirajan from a portion of the suit property by claiming exclusive title to the whole property involved in the present suit. The case of deceased - K. Ethirajan in that suit was of adverse possession and alternatively co-ownership on the basis of joint patta (Ex. A-7).

Looking to the pleadings of the parties in that suit (copies of which are placed before us in additional paper-book), the ground urged by the respondent that in the earlier litigation, claim of exclusive ownership set up by deceased - M. Gurunathan was restricted only to a portion of the whole property involved in this suit, does not appear acceptable. On the basis of pleadings of the earlier suit, we find that the issue directly involved was claim of exclusive ownership of deceased - M. Gurunathan to the whole property left behind by deceased Gangammal although eviction was sought of the defendant from a particular portion of the land on which he had built a hut for residence. The suit was resisted by deceased K. Ethirajan claiming adverse possession and alternatively as co-owner on the basis of joint patta (Ex. A-7).

18. It is true that joint patta (Ex. A-7) granted by Settlement Authorities in proceedings under the Act of 1948 cannot itself be a source of title to claim ownership and right of partition but as has been found by the trial court and the first appellate court, the plaintiff's claim for partition is not

based on joint patta (Ex. A-7) along but judgments rendered between same parties [Exs. A-22 and A-23] in the previous suit and appeal, have also been relied wherein the claim of the present plaintiff to remain in possession of the suit property without any interference by deceased M. Gurunathan and now his LRs had been crystallised by decree of dismissal of suit for eviction against him. Based on the judgment in the previous litigation an indefeasible right to continue to occupy the suit property as owner had been created in favour of the present plaintiff and the said judgment has attained finality between the same parties and their LRs.

19. The argument that principle of res judicata cannot apply because in the previous suit only a part of the property was involved when in the subsequent suit the whole property is the subject matter cannot be accepted. The principle of res judicata under Section 11 of the Code of Civil Procedure is attracted where issues directly and substantially suit are the same - maybe - in the previous suit only a part of the property was involved when in the subsequent suit, the whole property is the subject matter.

20. In our considered opinion, therefore, the two sub-ordinate courts were right in granting decree in favour of the plaintiff by relying on the judgments in the previous, suit between the same parties and the joint patta [Ex. A-7]. The High Court in second appeal was not justified in interfering with the concurrent findings of the two courts below.

In the result, the appeal is allowed. The impugned judgment and decree dated 11.7.1996 of the High Court passed in second appeal is set aside and the judgments of the courts below are restored. In the circumstances, we, however, leave the parties to bear their own costs in this appeal.

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