

Aanaimuthu Thevar (Dead) By Lrs vs Alagammal & Ors on 12 July, 2005

Equivalent citations: AIR 2005 SUPREME COURT 4004, AIR 2005 (NOC) 509 (MAD), 2005 AIR SCW 3516, (2005) 4 EASTCRIC 426, 2005 (7) SRJ 30, (2005) 6 JT 333 (SC), 2005 (5) SLT 385, (2005) 2 CLR 222 (SC), (2005) 3 JCR 203 (SC), (2005) 4 CTC 20 (SC), (2006) 54 ALLCRIC 27, 2005 (2) CLR 222, 2005 (6) SCC 202, 2005 ALL CJ 3 1742, 2005 (5) SCALE 513, 2005 (4) CTC 20, 2005 SCFBRC 419, 2005 BLJR 3 1772, 2005 (2) ALL CJ 1742, (2006) 37 ALLINDCAS 777 (PAT), (2005) 3 MAD LW 475, (2005) 5 SUPREME 55, (2005) 4 ICC 1, (2005) 5 SCALE 513, (2005) 3 UC 1922, (2005) 4 JLJR 13, (2005) 4 ANDH LT 51, (2005) 4 CAL HN 102, (2005) 2 WLC(SC)CVL 210, (2005) 3 ALL WC 2677, (2005) 4 PAT LJR 1, (2005) 3 CIVILCOURTC 183, (2005) 4 MAD LJ 1, (2005) 4 MAD LW 35, (2005) 5 SCJ 222, (2006) 1 CIVLJ 162

Bench: D. M. Dharmadhikari, Tarun Chatterjee

CASE NO.:

Appeal (civil) 2592-2593 of 2000

PETITIONER:

AANAIMUTHU THEVAR (DEAD) BY LRS.

RESPONDENT:

ALAGAMMAL & ORS.

DATE OF JUDGMENT: 12/07/2005

BENCH:

D. M. Dharmadhikari & Tarun Chatterjee

JUDGMENT:

J U D G M E N T Dharmadhikari J.

In these two appeals arising out of the impugned common judgment passed by the High Court of Madras in Second Appeal, the neat question involved is one of res judicata. The trial court in its common judgment passed in cross suits jointly tried came to the conclusion that the judgment in former suit OS No. 843/74 between the predecessor-in-title of the appellant and the respondents cannot operate as res judicata to bar the present suit claiming title to the suit property by the appellant. The High Court by the impugned common judgment in Second Appeal has reversed the judgment of the two courts below and held that the judgment in former suit OS No.843/74 decided on 28.2.1976 operates as res judicata under section 11 of the Code of Civil Procedure. Consequently,

the suit filed by the appellant has been dismissed and the cross suit filed by the respondents has been decreed.

The facts necessary for deciding the issue of res judicata are as under:-

The property involved in the two cross suits is house door No.206 in Harvaipatt township in Madurai, South Taluk. The house was allotted by Madurai Mills Cooperative Housing Society to mother of Muthuswami Naidu (the husband of respondent No.1 and father of respondents 3 to 7). After the death of mother, the formal document of conveyance by the Housing Society came to be issued in favour of Muthuswami Naidu on 15.3.1975. Muthuswami Naidu executed a mortgage deed on 3.12.74 for raising a loan of Rupees three thousand from one Chhinnaswamy who was co-plaintiff with him in the former suit OS No. 843 of 1974.

Muthuswami Naidu as the mortgagor under mortgage deed dated 3.12.1974 and Chinnaswamy as the mortgagee jointly filed civil suit as OS No. 843/74 in the court of District Munsiff, Thirumangalam against respondent Alagammal (the wife of Muthuswami respondent No.1 herein). The mortgagor and mortgagee filed suit simplicitor for seeking permanent injunction to restrain the respondent wife of Muthuswami from interfering with the possession of the suit house on the ground that it was owned and possessed by them.

The aforesaid suit OS No.843/74 was resisted by the respondent wife pleading inter alia that when disputes had arisen in the married life of the parties, a village panchayat was called in the year 1971 in which the respondent agreed to relinquish his ownership of the suit house in favour of his wife and children for their residence on the condition that his wife would discharge dues against the house. In that suit the wife denied the existence of any alleged mortgage deed and questioned validity of the same.

On the pleadings of the parties in the former suit OS No.843/74, the following issues were framed:-

- 1) Whether the othi deed (mortgage deed) dated 3.12.1974 executed in favour of the second plaintiff is true, valid and binding upon the defendant?
- 2) Whether the plaintiffs are entitled to the relief of injunction prayed for?
- 3) Whether the defendant was in possession of the suit property?
- 4) Whether the suit is bad for non-joinder of a necessary party?
- 5) Whether the alleged settlement pleaded by the defendant is true?

6) To what relief, if any, are the plaintiffs entitled?

On the first issue, the trial court held that registered mortgage deed seemed to be genuine but it was not binding as mortgagor had failed to enter the witness box to prove it. On issue Nos.2 & 3, the trial court answered them in favour of the respondent wife by recording a finding that she had proved to be in possession of the suit house. Tax receipts evidencing payment of house tax were relied in proof of her possession. On these findings, it was held that relief of permanent injunction to restrain the respondent wife from enjoying the suit property could not be granted. On issue no. 4 regarding the alleged settlement reached in village panchayat and relinquishment of ownership and right by Muthuswami in the suit house in favour of his wife and children, the trial court recorded a finding that fact of such settlement in panchayat had been proved. The finding recorded in the words of the trial court is as under:-

"In as much as the possession of the defendant on the date of the suit having been established and no evidence having been let in by the plaintiffs to disprove the allegation that the property was settled upon the defendant in a panchayat which was held about 4 years ago. It has to be held that settlement pleaded by the defendant is true. I answer this issue in favour of the defendant."

Issue No.4 on non-joinder of children as parties to the suit, was also decided in favour of the defendant. It was held that in the Panchayat settlement, the husband relinquished the property in favour of his wife and children. Therefore, children were necessary parties and the suit was bad for mis-joinder of a necessary party.

The aforesaid judgment with decree of the trial court at Thirumangalam in suit OS No.843/74 was not appealed against by Muthuswami Naidu, the husband or his mortgagee and has attained finality.

After the judgment and decree against him in the above mentioned suit OS No. 843/74, Muthuswami Naidu sold the suit house by registered sale-deed at 15.3.1975 in favour of Annaimuthu Thevar the appellant herein. On the basis of his purchase, the present appellant instituted civil suit OS No.335/83 seeking declaration of his title and possession from respondent and her children.

The respondent wife jointly with her children filed cross suit registered OS No.202/84 seeking permanent injunction against the present appellant claiming ownership of the suit house under the settlement of the year 1971 in panchayat and the consequent judgment and decree passed inter se between her and her husband Muthuswami in civil suit OS No.843/74 decided on 28.2.1976. The cross suits were jointly tried and decided by common judgments giving rise to two appeals before the first appellate court and two second appeals before the High Court which have all been decided by common judgments.

The trial court and the first appellate court by common judgments delivered by them respectively rejected the plea of res judicata raised by the respondent wife and her children on the ground that in the former suit OS No. 843/74 the question of title to the suit house was neither directly nor substantially involved and decided. The trial court and the first appellate court, therefore, decreed

the suit of the present appellant and dismissed the cross suit of the wife and children.

The High Court in the two Second Appeals by the impugned judgment, however, took a contrary view and reversed the judgments of the courts below. On examining the counter pleas and the judgment of the trial court in the former suit between the husband and wife, the High Court came to the conclusion that the bar of *res judicata* squarely applied to the subsequent suit filed by the purchaser of the suit property from the husband of the respondent wife. According to the learned Judge of the High Court in the former suit, the right and title of husband Muthuswami to the suit house was substantially involved which was negated and the right of the wife and children was upheld. The finding of *res judicata* recorded by the High Court needs to be reproduced as arguments have been addressed on it by the learned counsel on either side before us in these appeals :-

"In the earlier judgement right and title of Muthuswami had been negated and that of Alagammal and her children were upheld. Therefore it follows that the plaintiff in the present suit claiming title through Muthuswami cannot be sustained as by the earlier judicial determination right, title and interest of Alagammal and her children had been upheld and that of Muthuswami had been negated. The earlier decision namely Ex.B.14 and B.15 definitely constitutes *res judicata*. That apart, a finding in the earlier suit that Muthuswami has no title or interest in the suit property and Alagammal and her children are the owners was the decision which had been directly and substantially necessary for the disposal of the suit O.S. No. 843 of 1974 and therefore it has to be held that the issue in the earlier suit in which the matter was directly and substantially an issue constitutes *res judicata*."

The High Court placed reliance on the decisions of this Court reported in *Sulachana Amma vs. Narain Nair* [1994 (2) SCC 14]; *Ishar Singh vs. Sarwan Singh* [AIR 1965 SC 948]; and *Jumma Masjid vs. Kodimaniandra Deviah* [AIR 1962 SC 847].

Learned counsel appearing for the appellant after taking us through the issues and findings recorded by the trial court in the former suit OS No.843/74 contended that question of title to the suit house was neither expressly nor substantially involved in the said suit and therefore the judgment cannot operate as *res judicata* in the subsequent suit. The contention advanced is that the suit was filed on the basis of a mortgage deed executed on 3.12.1974 by Muthuswami in favour of Chinnaswamy. In that suit jointly filed, Muthuswami was not examined to prove the mortgage deed and hence decree of permanent injunction was refused on a finding that the respondent wife and her children were in possession of the suit house on the basis of the alleged settlement in village panchayat which was reached for resolving family dispute between Muthuswami Naidu - the husband and his wife the respondent.

On the other side, learned counsel appearing for the respondent wife and her children supported the judgment of the High Court by contending that the former suit was for permanent injunction on the basis of right claimed by Muthuswami Naidu as owner of suit house with competence to execute a mortgage deed in favour of Chinnaswamy plaintiff No.2 in that suit. The suit for injunction substantially was based on the claim of ownership of the suit house by the mortgagor and the right

to remain in undisturbed possession by the mortgagee. It is, therefore, contended that the issue of title was directly and substantially in issue in the former suit. Alternatively, it is argued that doctrine of constructive res judicata in accordance with Explanation IV to section 11 of the Civil Procedure Code clearly barred the subsequent suit filed by the purchaser from Muthuswami. Reliance is placed on AIR 1966 SC 1061 and 1997 (2) SCC 552.

The main legal question that requires decision is whether the judgment in the former suit directly or constructively operates as res judicata in the subsequent suits which have given rise to these appeals.

The undisputed facts are that the house in suit was initially allotted to the mother of Muthuswami by Madurai Mills Co-operative Housing Society. After the death of his mother, Muthuswami as son inherited the right in the house. The house was in possession of the family of Muthuswami. According to the case of the respondent wife, Muthuswami was a spendthrift and had wayward habits. As pleaded in the former suit, differences and family disputes arose between Muthuswami and her. In the year 1971, a village panchayat was held in which Muthuswami agreed to relinquish his right of ownership in the suit house in favour of his wife and children. However, pursuant to the decision of the panchayat and the commitment made by the husband in the course of panchayat proceedings, no formal document of conveyance came to be executed in favour of the wife.

Instead of honouring the commitment made in the village panchayat, Muthuswami executed the registered deed of mortgage on 3.12.1974 in favour of Chinnaswamy. Muthuswami as the mortgagor and Chinnaswamy as the mortgagee jointly filed the former suit OS No. 843 of 1974 against Alagammal wife of Muthuswami, for seeking a decree of permanent injunction simplicitor. The foundation of the suit as appears from the judgment, was that Muthuswami as the owner of the suit house had executed a mortgage with delivery of possession to Chinnaswamy. The cause of action for the suit seeking mandatory injunction was alleged to have arisen as the wife of Muthuswami was asserting her right to the suit house and interfering with their possession. The aforesaid former suit was resisted by Alagammal mainly on the ground that in the village panchayat her husband had relinquished his right of ownership of the suit house in her favour and their children for their residence. She also denied the existence and validity of the registered mortgage deed.

The issues framed in the former suit have been reproduced above. No specific issue seems to have been framed on title or ownership of the suit house but the issues raised on the existence and validity of the mortgage deed and the fact or otherwise of the alleged settlement pleaded by the defendant in the village panchayat substantially involved decision on claim of right and ownership of the house by the husband. The other issue raised was concerning the dispute as to who was in possession of the suit house.

As is apparent from the judgment in the former suit, Muthuswami, who was claiming to be the owner and the mortgagor, did not enter the witness box either to prove the execution of the mortgage or to deny the case pleaded by his wife that he had relinquished his right in the suit house in the settlement reached in the village panchayat. The suit jointly filed by Muthuswami as owner/mortgagor and Chinnaswamy as mortgagee was dismissed on findings inter alia that

mortgage was not proved and that in village panchayat, a settlement had indeed taken place in favour of wife and children who were in possession. It was also held that the children were necessary parties to the suit and their non-joinder was fatal to the suit. The dismissal of the suit filed by Muthuswami as mortgagor and Chinnaswamy as mortgagee against wife of the former was not appealed against by either of the plaintiffs. The same, therefore, attained finality.

The present cross suits arose when Muthuswami, after obtaining a formal conveyance deed of the house from the housing society on 15.3.1975, executed a registered deed of sale of the suit house on 28.2.1983 in favour of the present appellant.

The present two appeals arise out of the cross suits - the one filed by the purchaser on the basis of registered sale deed in his favour on 28.2.1983, against the wife of Muthuswami and her children. The other suit was filed by wife of Muthuswami and her children seeking injunction against her husband and the present appellant as purchaser from him.

On these above undisputed facts, the main argument advanced by the learned counsel for the appellant is that at the time of filing of the former suit, Muthuswami had neither any transferable title nor any right to execute a mortgage. He became owner of the suit house only on 15.3.1975 when a formal deed of conveyance was executed in his favour by the housing society. It is also submitted that in the former suit, there was no issue of title or ownership of the suit house directly or substantially involved. The findings and the judgment in the former suit against Muthuswami and the alleged mortgagee rested on the grounds of non-proof of mortgage deed, fact of settlement in village panchayat and possession of the house to be with the wife and children. Non-joinder of children as parties to the suit was also additional ground to dismiss the former suit. The present subsequent suit is founded on the registered sale deed executed on 28.2.1983 by Muthuswami after he had obtained a saleable title under formal deed of conveyance from the Housing Society on 15.3.1975.

On the other side, learned counsel appearing for the wife Alagammal and her children supported the judgment on doctrine of res judicata as applied by the High Court to the subsequent suits. He contends that in the issues framed in the former suits, the question of title and ownership of the suit house were substantially involved. In any case, the doctrine of constructive res judicata applies under explanation IV to section 11 of the Code of Civil Procedure to the present case.

Section 11 of the Code which contains the doctrine of res judicata states :-

"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."

[Emphasis added] The main part of section 11 undoubtedly applies. The former suit was jointly filed by Muthuswami as owner and mortgagor with the mortgagee. The subsequent suit is by the appellant who is purchaser from Muthuswami. The present appellant is, therefore, litigating under the same title which Muthuswami had in the suit house.

The next question that arises is whether the issue of ownership and title in the suit house was directly and substantially in issue in the former suit or not. In the subsequent suit undoubtedly the foundation of claim is title acquired by the present appellant under registered sale deed dated 28.2.1983 from Muthuswami.

If we examine the nature of claim and pleadings in the former suit of Muthuswami as mortgagor and plaintiff No. 2 the mortgagee, the suit appears to be based on the alleged right of Muthuswami as the owner to execute the mortgage. The decree of mandatory injunction in the former suit was sought on the ground that Muthuswami could execute a valid mortgage with possession in favour of the mortgagee and defendant wife had no right or title, whatsoever, to interfere with the possession of the plaintiffs. The suit was resisted by the wife Alagammal on the ground that she had been placed in possession of the suit house with her children for their residence on the alleged settlement reached in the village panchayat in the year 1971 in which her husband relinquished his right in the suit house in their favour. True it is, that relinquishment of an immovable property cannot be validly made without a written and registered document. It seems from the conduct of Muthuswami that he had no courage to enter the witness box in the former suit to face the cross-examination on behalf of the wife on the existence of alleged settlement in the village panchayat and relinquishment by him of his right in the suit house. It is apparent that he wanted to wriggle out of that settlement reached in village panchayat. As a first attempt in that direction he executed a mortgage deed to enable the mortgagee to institute a suit against his wife to dispossess her and deprive her of the right in the house which Muthuswami had earlier agreed to grant to her in the village panchayat. Having failed in the joint suit filed by him with his mortgagee, he did not prosecute the litigation any further and preferred no appeal. As a second attempt to deprive his wife and children of right in the house, he executed a registered sale deed in the year 1983 in favour of the present appellant. The aforementioned sale deed was executed after he had obtained a document of conveyance from the housing society and that he could obtain being an heir his late mother who was the original allottee of the house from the housing society. The present subsequent suit has been filed by the present appellant who is purchaser by registered deed dated 28.2.1983 obtained from Muthuswami.

The former suit in which decree of permanent injunction was sought was clearly founded on the claim of Muthuswami as the owner of the suit house to execute a mortgage. The issue of title or ownership of the suit house was thus directly or substantially involved in the former suit.

We find sufficient force in the alternative contention advanced on behalf of wife Alagammal and her children that doctrine of constructive res judicata, as contained in explanation IV to section 11 of the Code certainly, can be invoked against the present appellant, who claims by a purchase from Muthuswami. Explanation IV to section 11 of the Code states :-

"Explanation IV.-Any matter which might and ought to have been made ground defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

In the former suit, respondent Alagammal wife of Muthuswami clearly set up her own right of ownership to the suit house on the basis of settlement and relinquishment of the suit house in her favour by the husband in the village panchayat. Claim of such ownership and title might have been found ineffectual in law, as pursuant to such oral relinquishment in village panchayat, the husband did not execute any formal written and registered document. On the aforesaid plea of wife Alagammal, in the former suit in which she had set up claim of ownership of the suit house on the relinquishment of right by her husband in village panchayat, it was open to her husband Muthuswami and his mortgagee to raise a counter plea that the alleged oral relinquishment in village panchayat was ineffectual in law and conferred no title on her.

In the former suit the wife had claimed to be in possession with her children of the suit house pursuant to the settlement reached with her husband in the village panchayat. In the former suit, in reply to the plea of the wife, it was open to the plaintiffs to alternatively seek a decree of possession on the basis of their title to the suit house.

On the date of former suit, true it is that there was no formal document of conveyance of the suit house executed by the society in favour of Muthuswami. There existed on that date merely a right he had inherited in the house allotted to her late mother. Between an allottee of the house from the housing society and the person merely in occupation as licensee or member of the family, the allottee has a better title. In the former suit, the claim of Muthuswami was as an heir of his late mother who was the allottee of the house and was in possession. As against him, the claim set up by his wife was of an oral relinquishment by Muthuswami in her favour in village panchayat. Between these two competing claims of ownership and right of possession of the suit house, the husband certainly had a better right to remain in possession and, if dispossessed, to claim possession. This ground of seeking possession and permanent injunction was available to Muthuswami against his wife in support of his joint claim with his mortgagee. The aforesaid plea founded on ownership and mortgage having not been raised in the former suit, the doctrine of constructive res judicata under explanation IV to section 11 of the Code is clearly attracted.

We can not prepared to accept the argument advanced on behalf of the above appellant as the successor-in-title of Muthuswami that in the absence of formal deed of conveyance of the suit house by the housing society in favour of Muthuswami, the issue of title to the suit house could neither be raised nor was raised in the former suit. On the examination of case pleaded by the parties in the former suit and the judgment rendered therein we find that the plea of ownership to the suit house was substantially involved for seeking relief of permanent injunction. Undoubtedly, such plea of ownership could and ought to have been raised in the former suit. Therefore, this subsequent suit filed by the present appellant as purchaser from Muthuswami is barred by constructive res judicata and the High Court was right in holding accordingly. See the following observations of this Court in the case of Sulochana Amma v. Narayan Nair, (1994) 2 SCC 14 :-

"(It was) contended that the remedy of injunction is an equitable relief and in equity, the doctrine of res judicata cannot be extended to a decree of a court of limited pecuniary jurisdiction. We find no force in the contention. It is settled law that in a suit for injunction when title is in issue for the purpose of granting injunction, the issue directly and substantially arises in that suit between the parties. When the same issue is put in issue in a later suit based on title between the same parties or their privies in a subsequent suit the decree in the injunction suit equally operates as res judicata."

For the reasons aforesaid, these two appeals preferred by the appellant are dismissed and the judgment of the High Court is upheld.

In the circumstances, we make no order as to costs in these appeals.