

(1992) 07 MAD CK 0043
In the Madras High Court
Case No : S.A. No. 661 of 1982

Natesan (Deceased) and 4 others

APPELLANT

Vs

Ammasi and 2 others

RESPONDENT

Date of Decision : 31-07-1992

Acts Referred:

Citation : (1992) 07 MAD CK 0043

Hon'ble Judges : Thanikkachalam, J

Bench : Single Bench

Advocate : G. Vasudevan for Mr. K. Raman, for the Appellant; M.N. Padmanabhan, for the Respondent

Judgement

Thanikkachalam, J.—The Legal Representatives of the deceased second defendant are appellants herein. The plaintiffs filed O.S. No. 464 of 1977 for permanent injunction restraining the defendants from interfering with their possession and enjoyment of the suit property. The case of the plaintiffs is as under:- The first and second plaintiffs are the sons of the third plaintiff. They are the members of an undivided Hindu Joint Family. The suit site belongs to the first defendant. The superstructure thereon has been put up by the plaintiffs with their own money. The first defendant is now not in India. The second defendant has no manner of right or interest upon the suit property. The first defendant had entrusted the management of the suit property with the third plaintiff and requested the third plaintiff to handover the income therefrom to the second defendant's father. The second defendant is claiming title to the suit site. The second defendant instituted a suit, O.S. No. 1196 of 1973 against the third plaintiff for possession and mesne profits. In O.S. No. 1196 of 1973 an ex parte decree was passed against the third plaintiff. Plaintiffs 1 and 2 are not parties to the above said ex parte decree dated 6.2.1976. The second defendant filed an Execution petition for possession. The plaintiffs 1 and 2 cannot be ejected from the suit site because the superstructure belong to them. The judgment in the prior suit will not be binding upon the plaintiffs 1 and 2. Since the second

defendant is threatening to enter possession, the plaintiffs came forward with the present suit. The third plaintiff died the first defendant remained ex parte. The second defendant filed a written statement.

The case of the second defendant is as under:-

The plaintiff's joint family did not put up the superstructure. This defendant's father was receiving the income from the third plaintiff and the 3rd plaintiff was entrusted with the management of the suit property. Even though the third plaintiff appeared through a counsel in O.S. No. 1196 of 1973, subsequently he remained ex parte, and hence an ex parte decree was passed. The suit property is his ancestral property. It was in the enjoyment and possession of the second defendant and his father. The second defendant's father was leasing out the suit property to the tenants. After the death of his father in the year 1969, the second defendant continued to be in possession and enjoyment of the properties. The second defendant and his predecessors have prescribed the title to the suit property by adverse possession. The second defendant also executed an usufructuary mortgage in respect of the suit land in 1971. The third plaintiff was a lessee under the father of the second defendant on an annual rent of Rs. 200/-. The lease deed was also executed in the year 1968-1969. The third plaintiff filed a petition to set aside the ex parte decree in O.S. No. 1196 of 1973 and the same was dismissed. Hence, the plaintiffs are estopped from filing the present suit for injunction. This suit is also barred by res judicata. The first defendant filed execution petition to obtain possession from the plaintiffs. The third plaintiff instigated plaintiffs 1 and 2 to file this suit. Plaintiffs 1 and 2 have no right of possession. The decree in O.S. No. 1196 of 1973 is binding upon all the plaintiffs. The second defendant alone is in possession and enjoyment of the suit properties. Hence, the suit is liable to be dismissed.

2. The trial court framed as many as 5 issues and one additional issue. The plaintiffs filed 17 documents and the defendants filed 7 documents. The second plaintiff examined himself as P.W. 1. The second defendant examined herself as D.W. 1. One Masi Ayyirapiran was examined as D.W. 2. considering the facts, arising in this case, the trial court dismissed the suit with costs. On appeal, the first appellate court considering the facts arising in this case set aside the judgment and decree rendered by the trial court, decreed the suit as prayed for. It is against this judgment of decree in the second defendant, after his death his legal representatives are in appeal before this Court.

3. The Learned Counsel appearing for the appellants herein submitted as under:-

The third plaintiff is the father of the plaintiffs 1 and 2. They are living in a joint family. The decree obtained against the third plaintiff, who is the father would also binding upon the plaintiffs 1 and 2, who are the sons.

The third plaintiff alone is the lessee in respect of the suit land. Plaintiffs 1 and 2 have no right to be in possession. The decree passed in O.S. No. 1196 of 1973 is binding upon the plaintiffs 1 and 2 also. The second defendant had obtained a

valid decree and the plaintiffs herein cannot prevent the second defendant from executing the decree. According to the plaintiffs they have, already put up a superstructure. If that so, they can claim their right or any other remedy available to them in the execution proceedings. In the presence of the decree in O.S. No. 1196 of 1973, the instant suit filed by the plaintiffs for injunction is not competent. The judgment rendered in O.S. No. 1196 of 1973 would operate as *res judicata* against the plaintiffs. The third plaintiff alone is the lessee and the plaintiffs 1 and 2 happens to be the sons of the third plaintiff, hence, they cannot have any independent existence in claiming the right, It was, therefore, pleaded that the judgment and decree rendered by the first appellate court be set aside and that of the trial court restores.

4. On the other hand, the Learned Counsel appearing for the plaintiffs/respondents herein submitted as under:-

The decree obtained in the earlier suit will not be binding upon the plaintiffs 1 and 2 since they are not parties to the proceedings in O.S. No. 1196 of 1973. The plaintiffs have already put up a superstructure on the suit land. Therefore, they cannot be evicted without resorting to due process of law. The decree obtained in O.S. No. 1196 of 1973 is an *ex parte* decree, and therefore, it cannot be said that the said decree would operate as *res judicata* in order to prove his title, the second defendant should have filed a fresh suit. The plaintiffs 1 and 2 are now in possession and enjoyment of the property. Therefore, they are entitled to the decree for an injunction. It was, therefore, pleaded that the first appellate court was correct in reversing the judgment and decree rendered by the trial court.

5. I have heard the rival submissions.

6. The fact remains that the third plaintiff, who is the father of the plaintiffs 1 and 2 is the lessee in respect of the suit land. The second defendant and his father are the present owners of the suit land. The third plaintiff was inducted into the suit land as lessee on payment of rent of Rs. 200/- per year. He has no authority to put up the superstructure on the land leased to him. After the death of his father, the second defendant claimed title to the suit site and instituted the suit O.S. No. 1196 of 1973 for possession and mesne profits against the third plaintiff. The third plaintiff entered his appearance through a counsel. But, at a later stage he remained *ex parte*. Hence, an *ex parte* decree was passed. The second defendant is now sought to execute the decree obtained in O.S. No. 1196 of 1973. According to the second defendant, the decree obtained in O.S. No. 1196 of 1973 is also binding upon the plaintiffs 1 and 2, because plaintiffs 1 and 2 are the sons of the third plaintiff and all of them are living in a joint family. Therefore, according to the defendant the decree obtained in O.S. No. 1196 of 1973 would operate as *res judicata* against the plaintiffs 1 and 2. A plain reading of a decision rendered by this Court in the case of T.A. Sankaralingam Vs. T.N. Mani and Others, would go to show that even when a person has not been added as defendant in a representative capacity as a joint family Manager and when the

other junior coparceners were not added as parties to a particular suit, it can be deemed that the other members like the plaintiffs 1 and 2 herein are also substantial parties through the manager like the 3rd plaintiff herein. Therefore, in as much as all the plaintiffs are living as the members of the joint family, the decree obtained in O.S. No. 1196 of 1973 against the father (third plaintiff) would also be binding upon plaintiffs 1 and 2. In the suit O.S. No. 1196 of 1973, the third plaintiff entered his appearance through a counsel. But later on he remained ex parte. After the ex parte decree was passed, he filed a petition set aside the same and the said petition was also dismissed. Therefore, the decree rendered in O.S. No. 1196 of 1973 in a lawful decree binding upon the plaintiffs 1 and 2 herein. O.S. No. 1196 of 1973 was filed by the second defendant for the declaration of his title and for possession and mesne profits. The suit was decreed. Therefore, he is entitled to recover the possession from the plaintiffs. Unless the ex parte decree passed in O.S. No. 1196 of 1973 is set aside, the plaintiffs 1 and 2 cannot bypass the said decree, since the same is binding upon them. It was submitted that in the courts below the judgment and decree obtained in O.S. No. 1196 of 1973 were not produced. If the judgment and decree in O.S. No. 1196 of 1973 were not produced, then the defendant cannot successfully plead the principle of res judicata against the plaintiffs 1 and 2. It is an admitted fact that the third plaintiff was the lessee in respect of the suit land. Therefore, the third plaintiff recognised the title of the second defendant and his father over the suit land. Plaintiffs 1 and 2 are the sons of the third plaintiff and they are living in a joint family, hence, the judgment and decree obtained in O.S. No. 1196 of 1973 against the father would also binding upon the sons. The second defendant was attempting to execute a lawful decree obtained against the father which is also binding upon the sons. Therefore, plaintiffs 1 and 2 cannot prevent the second defendant from executing a lawful decree obtained in a court of law. Plaintiffs 1 and 2 state that they have put up the superstructure over the leasehold land and therefore they cannot be evicted. They have not produced any permission granted by the second defendant or his father to put up the superstructure. Therefore, the superstructure was put up without the consent of the landlord. Under such circumstances, if the plaintiffs are entitled to the superstructure or the value thereof they can either remove the same or ask for compensation. Further, the present suit not one to recover the value of superstructure. This can be agitated in the execution proceedings. The execution proceedings validly initiated by the second defendant cannot be stopped indirectly by filing a bare suit for injunction. Therefore, the first appellate court was not correct in granting a permanent injunction in favour of the plaintiffs. In view of the above said discussions, I set aside the judgment and decree rendered by the first appellate court and restore that of the trial court. In the result, the appeal is allowed. The suit is dismissed. However, there will be no order as to costs.