



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 10.10.2017

CORAM

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THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

SECOND APPEAL (MD) No.51 of 2014
and
M.P.(MD).Nos.1 and 2 of 2014

Pandarachamy : Appellant/Respondent/Plaintiff

Vs.

1.Thirumalai Ammal
2.Mayandi

: Respondents/Appellants 1&2/
Defendants 1&2

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree, dated 23.08.2013, made in A.S.No.63 of 2012 on the file of the Principal Sub Judge, Tenkasi, reversing the judgment and decree, dated 18.07.2012, made in O.S.No.198 of 2009 on the file of the Principal District Munsif, Tenkasi.

For appellant ... Mr.J.Bharathan
For respondents Mr.V.M.Balamohan Thambi,
for Mr.S.S.Thesigan

JUDGMENT

The plaintiff, who is the appellant, is the purchaser of the suit property in the capacity of a mortgagee. The suit has been filed for declaration and injunction.

2. The case of the plaintiff is that the suit property originally belonged to one Sadayappa Konar, having acquired the same by his self-earnings. He had left a Will, dated 07.12.1994 and the same came into force on his death on 02.02.1995. As per the said Will, the suit property was bequeathed in favour of his daughter Ramathal children viz., Manimegalai, Thilagavathi and Arunpandian. The father of the legatees was appointed as guardian. Accordingly, after the Will came into force, the said beneficiaries have been in enjoyment of the property and subsequently, they mortgaged the suit property on 07.05.2008 with the plaintiff. In discharge of the mortgage, the suit property was sold in favour of mortgagee / plaintiff herein by virtue of the sale deed dated 20.04.2009. The plaintiff has been in possession of the property in his own capacity from the date of purchase. The second defendant had made a request to the plaintiff to sell the eastern side of the suit property which was refused by him. Enraged by the same, the second defendant along with the first defendant has been attempting to disturb the

peaceful possession of the plaintiff. Hence, the suit was filed.

3. Denying the facts leading to the cause of action of the suit, the defendants contended that the Will, dated 07.12.2004, is not a valid document. It is also contended by the defendants that on the same cause of action, vendors of the plaintiff had filed O.S.No.85 of 1996 which was left to be dismissed for default on 16.03.2001. Suppressing the same, the plaintiff's vendor had filed another suit in O.S.No.1106 of 2004 for declaration and injunction against the first defendant, which was also dismissed for non prosecution on 09.11.2005. The property described in the above said suits and the present suit are one and the same. Therefore, having not taken the leave of the Court to file a fresh suit on the same cause of action, the suit filed as it is by the plaintiff is not maintainable as the same is hit by Order IX Rule 9 of the code of Civil Procedure. It is further stated in the written statement that the first defendant and the mother of the plaintiff's vendors are sisters and there was an oral partition in which the suit property fell to the share of the first defendant - Thirumalai Ammal, who had now sold the same in favour of the second defendant for a valid consideration. As the possession is with the second defendant, the plaintiff is not entitled for any relief and thus, he prayed for dismissal of the suit.

4. Before the trial Court, on the side of the plaintiff, the plaintiff himself was examined as PW1 and another witness was examined as PW2 and Exs.A1 to A12 were marked. On the side of the defendants, the second defendant himself was examined as DW1 and Exs.B1 to B8 were marked.

5. After framing relevant issues, the trial Court upheld the validity of the Will holding that the same is proved in accordance with law and decreed the suit, insofar as the relief of declaration is concerned and dismissed the suit with respect to the relief of injunction. Aggrieved by the same, the defendants had filed A.S.No.63 of 2012. The first appellate Court also found that the Will produced by the plaintiff is true and genuine, however, dismissed the suit on the ground that the suit is not maintainable and the same is barred under Order IX Rule 9 of C.P.C. Aggrieved by the same, the above second appeal has been filed by the plaintiff.

6. At the time of admission, the following substantial questions of law were formulated for consideration:

"1) When the plaintiff alone is precluded from bringing a fresh suit in respect of the same cause of action where his previous suit is dismissed for default under Order 9 Rule 9 of Civil Procedure Code, whether the subsequent suit filed by the successor-in-title of the plaintiff is maintainable?

2) When the terminology used in Section 11 of the Civil Procedure Code bars a fresh suit between the same parties or between parties under whom they



claim, litigating under the same title and when no such terminology is used in Order IX Rule 9 of the Civil Procedure Code, whether the first appellate Court is right in holding that the subsequent suit filed by the successor-in-title is not maintainable in view of the bar under Order 9 Rule 9?

3) Whether the Courts can encroach upon the domain of the legislature and legislate a provision of law which is not available in the statute book?

4) Whether the cause of action, relieves and parties in the earlier suit in O.S.No.85 of 1996 and O.S.No.1106 of 2004 and the present suit in O.S.No.198 of 2009 are same?

5) Whether the first appellate Court is right in applying the principle of *res judicata* under Section 11 of the Civil Procedure Code to the facts of this case?"

7. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents and perused the records carefully.

8. This second appeal is preferred by the plaintiff against the dismissal of the suit. However, the Courts below have concurrently held that the Will produced by the plaintiff is true and valid, and the same is proved as required by law. The suit was rejected only on the ground that the earlier suits filed by the vendors of the plaintiff were on the same cause of action and the property in both the earlier suits and the property in the present suit are one and the same. Hence, the plaintiff cannot maintain the present suit on the same cause of action.

9. As stated in the written statement, there was a dispute between the first defendant and the plaintiff's vendors earlier in point of time. Therefore, O.S.No.85 of 1996 was filed for the reliefs of declaration and permanent injunction. The said suit was dismissed for default. Without restoring the same, after few years, once again the plaintiff's vendors had filed O.S.No.1106 of 2004 against the first defendant, seeking declaration and injunction. The said suit was dismissed for non prosecution. In the meanwhile, there was a mortgage in favour of the plaintiff as per Ex.A4. In the process of redemption of the mortgage, the property itself was sold to the mortgagee, who is the plaintiff herein, on 20.04.2009 under Ex.A6. The plaintiff also claims to be in possession of the same from the date of purchase.

10. The only question that arises for consideration is whether the plaintiff is precluded from filing the present suit when the suit filed by his vendors were dismissed for default on the same cause of action, under Order IX Rule 9 of C.P.C.?

<https://hcservices.ecourts.gov.in/hcservices/>

11. For ready reference, Order IX Rule 9 of C.P.C. is extracted



hereunder:

"Decree against the plaintiff by default bars

fresh suit: (1) where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceedings with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party."

12. The basic requirement of Order IX Rule 9 is that the cause of action in the subsequent suit must be the same as that of the previous suit. The ingredients for claiming reliefs in two suit are also relevant. However, the bar under Order IX Rule 9 C.P.C. depends on the cause of action relating to the suit. The cause of action is not defined in any statute. The cause of action implies a right to sue. The material facts, which are imperative for a plaintiff to plead and prove, constitute the cause of action. In other words, the cause of action is a bundle of facts. The plaintiff is expected to plead every fact and to substantiate the same to succeed in his suit. In the absence of any cause of action, the suit will be rejected. The rejection of the plaint under Order VII Rule 11 of C.P.C. also is for want of cause of action. Therefore, before rejecting the present suit under Order XI Rule 9, the cause of action pleaded by the plaintiff has to be examined.

13. The cause of action pleaded has no relation whatsoever to the averments that may be made in the written statement by the defendant. The set of facts, giving rise to the cause of action, refers only to the grounds set forth in the plaint for the purpose of seeking a relief from the Court of law. Therefore, so far as there is a cause of action, a suit is maintainable. But, whether the suit is maintainable again and again on the same cause of action, is what is barred under Order IX Rule 9 of C.P.C.

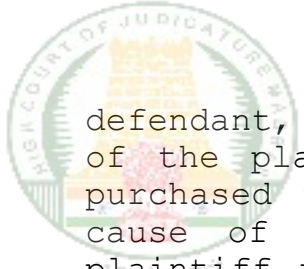
14. In 2001 (2) SCC 294 (Rajasthan High Court Advocates Association Vs. Union of India and others), the Hon'ble Supreme Court has held that that the expression of "cause of action" has acquired a judicially settled meaning. In the restricted sense, the "cause of action" means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means a necessary condition for the maintenance of the suit including not only infraction of the right, but infraction coupled with the right itself. Compendiously, the expression means every fact which would be necessary for the plaintiff to prove, if



traversed, in order to support his right to the judgment of the Court. It is further stated in the very same judgment that it was left to be determined in each individual case as to where the cause of action arises.

14a. To apply the bar under Order 9 Rule 9, the Plaintiff must be the same and cause of action must be identical. Dismissal of the earlier suit only precludes a fresh suit on the same cause of action to find out whether the second suit is on the same cause of action. The test may be whether the same evidence would support the reliefs in both the suits. Albeit, this test may not be conclusive. The cause of action in the Plaintiff's right in law of the facts by which he must prove the right what would constitute cause of action in each case in the right of infringement and not the ground or origin of the infringement that constitute cause of action. Therefore, what would constitute cause of action in a suit would always depend upon the particular facts of the case, as per Judgment of Hon'ble Supreme Court in **Suraj Rattan Thirani and others Vs. Azamabad Tea co. Ltd and others** reported in **AIR 1965 SC 295**.

"In this the first submission was that the rule which spoke of the "plaintiff" being precluded from bringing a fresh suit created merely a personal bar against the plaintiff in the first suit and that in the absence of words referring to the representatives of the plaintiff or those claiming under the plaintiff as in s. 11 or s.47 of the Civil Procedure Code, the bar was not attracted to cases where the subsequent suit was by the heirs and assigns of that plaintiff. In support of this submission Mr. Desai invited our attention to the observations of Das J. in Gopi Ram v. Jagannath Singh(1) where this argument was characterised as a weighty one and examined elaborately. Though the learned Judge decided this matter on quite a different line of reasoning, he referred to various earlier decisions which appeared to him to favour the view submitted to us by Mr. Desai and expressed his hesitation in rejecting that construction. We are not however impressed by the argument that the ban imposed by O. IX. R. 9 creates merely a personal bar or estoppel against the particular plaintiff suing on the same cause of action and leaves the matter at large for those claiming under him. Beyond the absence in O. IX. R. 9 of the words referring "to those claiming under the plaintiff" there is nothing to warrant this argument. It has neither principle, nor logic to commend it. It is not easy to comprehend how A who had no



defendant, who is none other than the maternal aunt of the vendors of the plaintiff. The plaintiff, who was only a mortgagee, has purchased the property in discharge of the debt. Therefore, the cause of action to maintain the present suit, so far as the plaintiff is concerned, is the mortgage deed dated 07.05.2008 under Ex.A4 and the sale in his favour under Ex.A6, dated 20.04.2009. The plaintiff also is not aware of the previous suits filed and abandoned by his vendors. The cause of action for the present suit is only the mortgage and subsequent sale. Thus, the cause of action must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. The plaintiff also in the plaint has pleaded that the first defendant along with the second defendant has been trying to interfere with the possession of the plaintiff by creating fraudulent document. This is a cause of action pleaded by the plaintiff.

16. In **1989 (2) SCC 163 (A.B.C.Laminart Private Limited Vs. A.P. Agencies, Salem)**, the Hon'ble Supreme Court in paragraph No.12 has held as follows;

"12.A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But, it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

17. As per the above decision, the cause of action for the present suit is the act of the first defendant disturbing the possession of the plaintiff along with the second defendant and attempting to create fraudulent document. The said act done by the first defendant has also been proved by the plaintiff by producing Ex.A12, dated 26.11.2008. It is a sale deed executed by the first defendant in favour of the second defendant. It is not stated what was the necessity for executing a sale in favour of the second defendant, who is the son of the first defendant and also a rectification deed under Ex.B5.



18. In 2017 (4) CTC 779 (Guruvammal and others Vs. Alagammal and another), a learned Single Judge of this Court has held in Paragraph Nos.41 and 42 as follows:

41. Under Order IX Rule 9 C.P.C., emphasis has been given on "in respect of the same cause of action". As per the decisions in G. Alagarsamy (cited supra and Ranjith Ammal (cited supra), the law decided by the Hon'ble Supreme Court and followed by this Court is to the effect that the bar created under Order IX Rule 9 C.P.C. is also applicable to the legal representatives of the plaintiff, who instituted for former suit, which has been dismissed for default. It is not in dispute that the present plaintiffs are the legal representatives of the deceased Ramasamy Thevar, who was the plaintiff in the earlier suit and the said suit was dismissed for default.

42. Now, the question relates to "cause of action". A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But, it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

19. In the very same judgment, in paragraph No.45, the burden of proof is discussed. It is specifically stated that when the defendant raised a plea that they are entitled for the defence under Order IX Rule 9 C.P.C., a duty is cast upon the defendant to prove the said plea. In other words, the burden of proving that the suit is barred by Order IX Rule 9 is cast upon the defendants and the duty is cast on them to prove that the former suit and the present suit are arising out of the same cause of action and the suit properties are the one and the same. Though it is alleged by the defendants that the cause of action is one and the same, as discussed earlier, the cause of action so far as the plaintiff is concerned itself arose only in the year 2008, whereas the earlier suits have been dismissed for default in the year 1996 and 2004 respectively.



20. The cause of action also has been taken to mean that a particular act on the part of the defendant which gives the plaintiff his cause of complaint, or the subject matter of grievance founding the action and not merely the technical cause of action. Though the properties in the earlier suit and the present suit are one and the same, by no stretch of imagination, it can be stated that the present suit filed by the plaintiff is on the same cause of action, as it is clearly demonstrated by the plaintiff that the cause of action for the present suit is subsequent to the dismissal of the earlier suits.

21. In view of the aforesaid legal principles, the inevitable conclusion is that there is an independent cause of action for the present suit which would not attract the bar under Order IX Rule 9 C.P.C. Hence, the suit is maintainable and the judgment of the first appellate Court is liable to be set aside.

22. In the result, this second appeal is allowed and the judgment and decree of the first appellate Court is set aside and the judgment and decree of the trial Court is restored. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CO)

/True Copy/

Sub Assistant Registrar

To

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2. The Principal District Munsif, Tenkasi.

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