

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.11.2019

PRONOUNCED ON : 28.02.2020

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.87 of 2006

and

CMP.No.1444 of 2006

1. S.Palaniappan
2. N.Ramasamy
3. K.C.Muniappan
4. K.Chinnusamy

... Appellants/Appellants/
plaintiffs

Vs.

1. Nagarajan
2. The Tamilnadu Electricity Board,
Rep.by its Superintending Engineer,
Gobichettipalayam Electricity
Distribution Circle,
Gobichettipalayam, Erode District.
3. The Junior Engineer (Town)
Operation and Maintenance,
Tamilnadu Electricity Board,
Bhavani

4. Gobi

... Respondents/Respondents/
Defendants

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the judgment and the decree dated 18.04.2005 made in A.S.No.80 of 2005 on the file of the Principal District Court, Erode confirming the judgment and decree dated 31.08.2001 made in O.S.No.544 of 1997 on the file of the First Additional District Munsif Court, Erode.

For Appellants : Mr.N.Manoharan
For Respondents : Mr.I.C.Vasudevan for R4
: R1 - Notice Dispensed with
: R2 & R3 Set Exparte

JUDGMENT

This second appeal has been filed by the appellants/plaintiffs against the judgment and decree passed by the Principal District Judge, Erode in A.S.No.80 of 2005 dated 18.04.2005 confirming the judgment and decree passed by the First Additional District Munsif Court, Erode in O.S.No.544 of 1997 dated 31.08.2001.

2. The appellants herein had filed a suit in O.S.No.544 of 1997 on the file of the First Additional District Munsif, Erode to restrain the defendants 1 and 4 from trespassing in to the suit property or interfering with the possession and enjoyment of the suit property by means of permanent injunction and to direct the defendants 2 and 3 to disconnect service No.418, Kalingarayanpalayam Distribution by means of mandatory injunction, which was already given in the name of the first defendant. The learned First Additional District Munsif, Erode by the judgment dated 31.08.2001 had dismissed the said suit with costs. Aggrieved by the same, the plaintiffs had filed an appeal in A.S.No.80 of 2004 on the file of the Principal District Judge, Erode. The learned Principal District Judge by the judgment dated 18.04.2005 had dismissed the said appeal with costs and thereby, confirmed the judgment and decree passed by the trial court. Feeling further aggrieved, the plaintiffs have filed the present second appeal.

3. For the sake of convenience, the parties are referred to as described before the trial court.

4. The averments made in the plaint are in brief as follows:

The plaintiffs had purchased the suit property as vacant site under a registered sale deed dated 14.09.1992 for valuable consideration of Rs.1,35,512/-. Ever since, the date of purchase, the plaintiffs are in possession and enjoyment of the suit property. The Patta, Chitta and Adangal stands in the name of the plaintiffs. The plaintiffs have been paying the kist to the Government. Since the suit property is a vacant site, with an intention to utilise the same, the plaintiffs proposed to

start a service station along with the first defendant about one year back. Hence, the plaintiffs had put up a small room on the north eastern corner of the suit vacant site and got electricity service connection in the name of the first defendant on 03.01.1997 and the service connection Number is 418 of Kalingarayanpalayam Distribution. Moreover, the plaintiffs had put up a thatched shed in the suit vacant site for keeping the building materials for the proposed construction and also for shelter to the watch man. Subsequently, they dropped the proposal to start a service station and hence, the first defendant demanded the plaintiffs to sold the suit property to him so as to enable him to start some other business independently. The plaintiffs have not accepted the same and on the contrary, they requested the first defendant to sign in the application for name transfer of the aforesaid service connection or if he is not willing for such course for disconnection of the service connection. The first defendant, however assured for disconnection, but, failed to apply for the same even despite of repeated demands made by the plaintiffs. Hence, the plaintiffs approached the defendants 2 and 3 and made requests to disconnect the aforesaid service connection, but, they informed the plaintiffs that since the service connection stands in the name of the first defendant, the same can be disconnected only at his request. Due to misunderstanding between the plaintiffs and the first defendant in all aspects, taking advantage of the said enmity, he wants to give troubles to the plaintiffs. Infact on 11.12.1997, the plaintiffs engaged some masons to put up the compound wall in the suit properties and at that time, the first defendant came with rowdies and made attempt to trespass into the suit properties and also attempted to prevent the plaintiffs from putting up the compound wall. The first defendant had no right over the suit properties and hence the plaintiffs were constrained to file the above suit against the defendants 1 to 3. Subsequently, the plaintiffs impleaded the fourth defendant as a party.

5. The averments made in the written statement and additional written statements filed by the first respondent are in brief as follows:

5(a) The plaintiffs, one Kannammal and one Krishnamoorthi have colluded to cheat and defraud one Jaya. The said Jaya as the Proprietrix of a firm known as M/s.Jayalakshmi Floorings at Ammapet in Salem was engaged by one Murugaiyan for laying the flooring of a hospital at Sathyamangalam. The said Murugaiyan was the contractor for construction of hospital at Sathyamangalam. The labour charges for laying mosaic flooring was agreed at Rs.15,000/-. The said Jaya on completion of the flooring at the hospital was unable to collect the labour

charges of Rs.15,000/- from the contractor Murugaiyan. The aforesaid Kannammal stood as surety for contractor Murugaiyan for prompt payment of the labour charges. Hence, the said Jaya had filed a suit in O.S.No.1453 of 1986 on the file of the District Munsif, Salem against the said Murugaiyan and his surety Kannammal on 01.09.1986 for the labour charges of Rs.15,000/-and subsequent interest thereon. The suit was decreed on 03.11.1987 by the District Munsif of Salem. Even during the pendency of the said suit, the property of the Kannammal was attached on 28.03.1987. After the suit in O.S.No.1453 of 1986 was decreed, the decree was got transferred to the court of District Munsif, Erode for execution as the attached property was within the jurisdiction of the said court. The attached property, that is the suit property herein was brought to sale in E.P.R.No.144 of 1988. The first defendant was the successful bidder in the court auction held on 14.06.1989 and thereafter, he took possession of the suit property through Court on 14.03.1990.

5(b) Anticipating the court proceedings by the said Jaya for realising the aforesaid amount, the said Kannammal had fraudulently executed an agreement in favour of one Krishnamurthi. Thereafter, the said Kannammal instructed the said Krishnamurthi to file a suit and accordingly, he filed a suit in O.S.No.232 of 1986 on the file of the Sub Court, Erode for the relief of specific performance of the said agreement. In the said suit, the said Kannammal did not contest and subsequently an ex-parte decree was passed and E.P.R.No.38 of 1987 was filed and in that EP also the said Kannammal remained exparte and accordingly, the sale deed was executed in favour of the said Krishnamurthi. Subsequently, he executed a sale deed dated 14.09.1992 in favour of the plaintiffs and based on the said sale deed, the plaintiffs are claiming right and also the possession of the suit property.

5(c) The Plaintiffs did not take possession of the suit property because already the first defendant had purchased the property through court auction and he took possession on 14.03.1990 itself and thereafter he constructed a shed in the suit property and got electric service connection on 13.01.1997 for the said shed. The fact remains so, the plaintiffs had filed a suit in O.S.No.1333 of 1992 on the file of the District Munsif, Erode for the relief for permanent injunction to restrain the first defendant, the said Jaya and Kannammal from interfering with their alleged possession and enjoyment of the suit property. The said suit was contested by the first defendant. When the said suit came up for trial, the plaintiffs remained absent and consequently, the suit was dismissed for default. After dismissal of the said suit, the first defendant

had sold the property to one Gobi on 16.06.1997 along with service connection No.418 of Kalingarayanpalayam Distribution and put the purchaser R.Gobi (fourth defendant) in possession of the suit property. Ever since 16.06.1997, the said Gobi (fourth defendant) is in possession of the suit property on his own right. Therefore, the allegations made in the plaint are totally false. It was only, the fourth defendant has put up a compound wall, but the plaintiffs are laying false claim. The fourth respondent is using the suit property for his dyeing work and therefore he prayed to dismiss the suit.

6. The averments made in the written statement filed by the third defendant and adopted by the second defendant are in brief as follows:

It is true that the service connection No.418 of Kalingarayanpalayam Distribution was sanctioned in favour of the first defendant at RSF No.84/97 in Mettunasavampalayam village for general purpose on 03.01.1997 based on the ownership certificate issued by the Village Administrative Officer of M.N.Palayam Village. The first defendant has been regularly paying the consumption charges and hence the service connection is alive. The plaintiffs are strangers to the said service connection and hence, the request of the plaintiffs to disconnect the service connection was rejected. Therefore, the defendants 2 and 3 prayed to dismiss the suit.

7. Though the fourth defendant had filed a separate written statement and additional written statement, he virtually adopted the averments made in the written statement and additional written statement filed by the first defendant.

8. Based on the aforesaid pleadings, the learned first Additional District Munsif, Erode had framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, the first plaintiff was examined as P.W.1 and one more witness was examined as P.W.2. Exhibits A.1 to A.11 were marked on the side of the plaintiffs. On the side of the defendants, the fourth defendant was examined as D.W.1 and the first defendant was examined as D.W.2 and three more witnesses were examined as D.W.3 to D.W.5. Exs.B1 to B.33 were marked on the side of the defendants.

9. The learned first Additional District Munsif, Erode, after considering the materials placed before him found that the plaintiffs failed to prove that they got valid title over the suit property and also failed to prove that they are in possession of the suit property. He further found that the first defendant got valid title over the suit property and he got

service connection in his name and he sold the suit property along with the service connection to the fourth defendant for valuable consideration. So, the fourth defendant has become owner of the suit property and he only in possession of the suit property. Therefore, the plaintiffs are not entitled to the relief of permanent injunction and mandatory injunction as prayed for. Accordingly, he dismissed the suit with costs. Aggrieved by the same, the plaintiffs had filed an appeal in A.S.No.80 of 2004 on the file of the Principal District Judge, Erode. The learned Principal District Judge, Erode had dismissed the said appeal with costs and thereby confirmed the judgment and decree passed by the trial court. Feeling further aggrieved, the plaintiffs have filed the present second appeal.

10. This Court at the time of admitting the second appeal has formulated the following substantial questions of law:

"1) Whether the Courts below are correct in law in applying the principle of Resjudicata for dismissing the present suit for permanent injunction on the ground that the earlier suit for permanent injunction in O.S.No.1333 of 1992 filed by the plaintiffs herein were dismissed for default on 04.07.1994, especially when both the suits are based upon two different cause of actions?

2) Whether the principle of Resjudicata will apply to the facts of the present case, in the absence of any adjudication on merits in the earlier suit especially when the expression "heard and finally decided" occurring in Section 11 CPC contemplates application of mind and final adjudication by a competent court on the same issue, in respect of the same property between the same properties?"

11. Heard Mr.N.Manoharan, the learned counsel for the appellants/plaintiffs and Mr.I.C.Vasudevan, the learned counsel for the fourth respondent/fourth defendant.

12. Substantial Questions of Law 1 and 2:-

The learned counsel for the appellants/plaintiffs has submitted that the Courts below failed to consider the oral and documentary evidence in a proper perspective and erroneously rejected the claim of the plaintiffs. He further submitted that the previous suit in O.S.No.1333 of 1992 was filed for the relief of permanent injunction only and the same was dismissed for default on 04.07.1992 and the present suit was filed on different cause of action. He further submitted that the oral and documentary evidence adduced by the plaintiffs would

establish that the vendor of the plaintiffs namely Krishnamurthi had purchased the property in the court auction sale and he took possession through court and subsequently he sold the property to the plaintiffs for valuable consideration and also handed over possession and therefore, he prayed to allow the second appeal and set aside the judgment and decree of the courts below and decree the suit as prayed for.

13. Per Contra, the learned counsel for the fourth defendant has submitted that the plaintiffs have not come with clean hands. He further submitted that they have suppressed the previous proceedings and hence they are not entitled to get any relief on the principle of equity. He further submitted that the plaintiffs have filed the previous suit in O.S.No.1333 of 1992 for the relief of permanent injunction and the same was dismissed. The plaintiffs have filed the present suit on the same set facts and hence, the cause of action for both the suits are one and the same and as such, they are not entitled to file the present suit. He further submitted that in the previous suit i.e., in O.S.No.1331 of 1992, though the relief for permanent injunction was asked, the main issue involved in that case was with regard to title and therefore the principle of Resjudicata will apply. He further submitted that the trial court after taking into consideration of the aforesaid facts had rightly dismissed the plaintiffs suit and the same has been confirmed by the first appellate court and in the factual concurrent findings, this Court cannot interfere and therefore he prayed to dismiss the second appeal.

14. Ex.B.5 (Sale Certificate) shows that the first defendant was the successful bidder in Court Auction sale held in EP.144 of 1998 on the file of the first Additional District Munsif, Erode. It also shows that after confirmation of sale, a sale certificate was issued in his favour on 21.08.1989. Ex.B6 shows that in pursuance of the aforesaid sale certificate, possession was given to the first respondent on 28.03.1990 by a Court Ameen. Exs.B12 to B33 (Kist Receipt, Professional Tax Receipt TNEB receipts, Chitta Extract, etc.,) would show that in pursuance of the ExB6, the first defendant has been in possession and enjoyment of the suit property. Ex.B8 would show that the first defendant had sold the suit property including the said service connection to the fourth defendant on 10.07.1997 and thereafter he only in possession of the suit property. That being so, the contentions of the plaintiffs that they purchased the suit property from one Krishnamurthi on 14.09.1992 and the possession was handed over to them on the same day cannot be accepted. Further, the first defendant had purchased the property in the court auction and

that being so, the contentions of the plaintiffs that the plaintiffs and the first defendant have entered into an agreement for starting a service station in the suit property and only in pursuance of the said agreement, the electric service connection was obtained in the name of the first defendant on 03.01.1997 are all appears to be false.

15. Exs.B1 to B4 and B7 would show that the plaintiffs had filed a suit in O.S.No.1333 of 1992 against the first defendant herein and three others claiming that they purchased the suit property from one Krishnamurthi (D4 in that suit) and he in turn purchased the suit property in Court auction on 14.06.1989. They further stated that the defendants therein have no manner of right over the suit property and they should be restrained by means of permanent injunction from interfering with their possession and enjoyment of the suit property. In that suit, the first defendant herein was arrayed as first defendant and he contested the said suit by filing written statement and when the said suit was came up for final hearing on 07.07.1994, the counsel who was appearing for the plaintiffs reported no instructions and hence the plaintiffs were called absent and consequently the suit was dismissed for default.

16. At this juncture, it would be relevant to refer to Order IX Rules 8 and 9 of Code of Civil Procedure, 1908 which reads thus :

"8. Procedure where defendant only appears"

"Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

9. Decree against 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 proceeding with the suit.

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

17. From the reading of the aforesaid provisions of law it is clear that as per Rule 8 of Order IX of CPC, where the defendant appears and the plaintiff does not appear when the suit is called for hearing, the court shall make an order that the suit should be dismissed, unless the defendant admits the claim, or part thereof, in such a case, the court shall pass a decree against the defendant upon such admission, and where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder. It is also clear that where a suit is wholly or partly dismissed under Rule 8 of Order IX of CPC, the plaintiff shall be precluded bringing a fresh suit in respect of the same cause of action. But, he may apply for an order to set the dismissal aside.

18. In this case, as already pointed out that the first defendant contested the said suit by filing written statement, but, when the said suit came for final hearing, the plaintiffs did not appear and consequently the suit was dismissed for default and therefore, it has to be presumed that the said suit was dismissed under Order 9 Rule 8 of CPC. In such a case, as per Order 9 Rule 9(1) of CPC, the plaintiffs are precluded from filing a fresh suit in respect of the same cause of action, but, they may apply for an order to set the dismissal aside. The plaintiffs have not filed any application under Order 9 Rule 9 of CPC to set aside the order of dismissal.

19. Though the plaintiffs contended that a fresh cause of action arises for filing the present suit they totally suppressed the earlier suit in their plaint. They have not pleaded in their plaint that the present suit has been filed on different cause of action. Further it is well settled that a cause of action is a bundle of facts which are required to be pleaded and proved for obtaining relief claimed in the suit. In this case, already, the plaintiffs had filed a suit in O.S.No.1333 of 1992 on the same set of facts. The only difference in this suit is that they have pleaded false averments as if they entered an agreement with the first defendant for running a service station and in pursuance of the same electric service connection was obtained in the name of the

first defendant. There is no evidence for the said agreement.

20. It is also relevant to refer to the decision of a Division of this Court in Rajammal and Another Vs. Sellani Ammal (1998) 1 MLJ 251 wherein it is held that it is well settled that the judgment by consent or default is as effective an estoppel between the parties as a Judgment whereby the court exercise its mind on a contested case. Therefore, the principle of Estoppel also will apply.

21. Even if it is assumed that the principle of Resjudicata may not apply in strict sense on the ground that the previous suit ie., O.S.No.1333 of 1992 was dismissed not on merits, the suit is hit by the provisions of order 9 Rule 9 (1) of CPC and also on the Principle of Estoppel. Therefore, this Court does not find any merit in the second appeal. Accordingly, the substantial questions of law are answered against the plaintiffs.

22. In the result, the second appeal is dismissed. Consequently, connected miscellaneous petition is closed. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

Vv

To

1. The Principal District Judge,
Erode.
2. The First Additional District Munsif
Erode
3. The Superintending Engineer,
The Tamilnadu Electricity Board,
Gobichettipalayam Electricity
Distribution Circle,
Gobichettipalayam, Erode District.

10/11

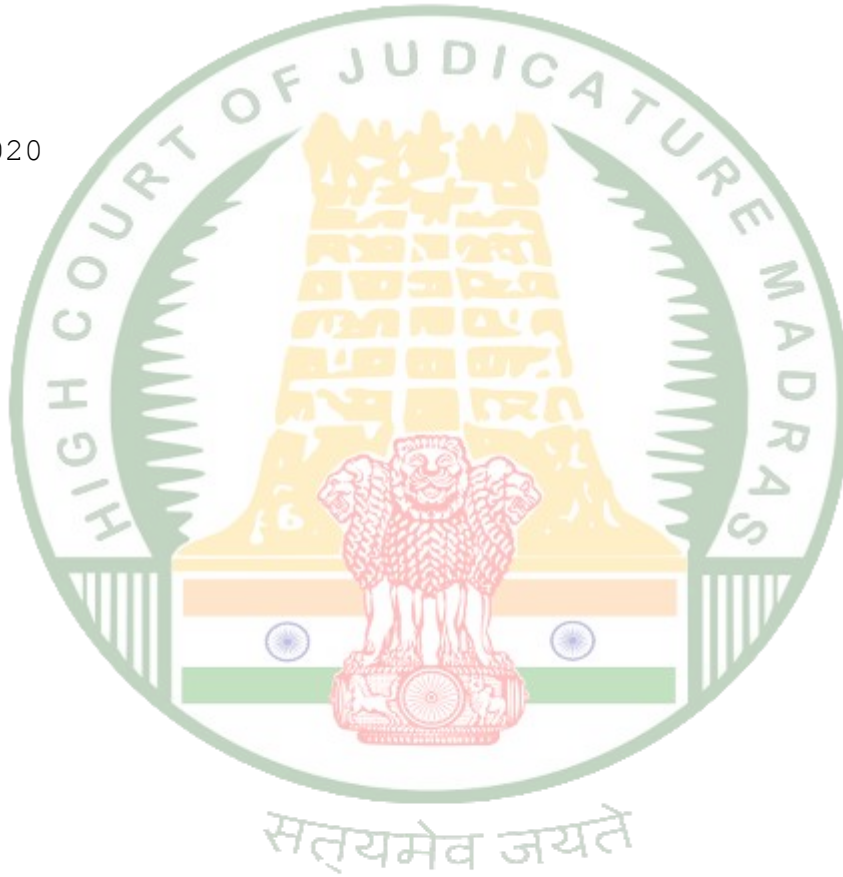
4. The Junior Engineer (Town)
Operation and Maintenance,
Tamilnadu Electricity Board,
Bhavani

5. The Section Officer, VR Section,
High Court, Madras.

+1 cc to Mr.N.Manokaran Advocate sr17976

S.A.No.87 of 2006

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