



S.A.No.1366 of 1997

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 26.04.2023

CORAM

THE HON'BLE MR.JUSTICE P.VELMURUGAN

S.A.No.1366 of 1997

and

C.M.P.No.13523 of 1997

- 1.Devadasan (died)
- 2.John (died)
- 3.Robinson
- 4.Selvaraj
- 5.Justin Inbaraj (died)
- 6.Jagathalet
- 7.Thangaleela
- 8.Jelin Prabu
- 9.Jelin Rispa
- 10.Jelin Jeevila

**(Appellants 6 to 10 are brought on record as
Legal Heirs of the deceased first appellant vide
order dated 12.12.2022 in M.P(MD)Nos.1 to 3 of 2010)**

- 11.Vel John Raj
- 12.Vel John Bright
- 13.Vel John Kumar
- 14.Thangavijaya
- 15.Thanga Jenilet
- 16.Amala Pushpam
- 17.Anish J.P.Vel (minor)
- 18.Apisha J.P.Vel (minor)
- 19.Algin J.P.Vel (minor)

**(A17 to A19 through their mother & Guardian
the 16th appellant)**



S.A.No.1366 of 1997

**(Appellants 11 to 19 are brought on record as
Legal Heirs of the deceased second appellant vide
order dated 12.12.2022 in M.P(MD)Nos.4 to 6 of 2010)**

20.Thangalet
21.Latha Dafini
22.Jestus Jebasingh
23.Jestus Ezhil Singh

**(Appellants 20 to 23 are brought on record as
Legal Heirs of the deceased fifth appellant vide
order dated 12.12.2022 in M.P(MD)Nos.7 to 9 of 2010)**

... Appellants

-VS-

1.Rusell Nayagam (died)
2.Rathina Bai
3.Pelirasal Nayagam (died)
4.Richerd Sen Ebinayagam
5.Gladis Sugi Aanibel
6.Sobilatha Abaranam
7.Sudhamani Nayagam

**(R3 to R7 are brought on record as Legal Heirs of
the deceased first respondent vide
court order dated 20.02.2023 made in
CMP(MD)Nos.10 to 12 of 2010)**

**(R3 died and R4 to R7, who are already on record,
are recorded as Legal Heirs of the deceased
R3 vide order dated 20.02.2023 made in
CMP(MD)Nos.10 to 12 of 2010)**

..Respondents



S.A.No.1366 of 1997

PRAYER: Second Appeal filed under Section 100 Code of Civil Procedure, against the Judgment and Decree dated 30.01.1996 made in A.S.No.27 of 1993 on the file of the Sub-Judge, Padmanabapuram reversing the Judgment and decree dated 27.01.1993 in O.S.No.415 of 1979 on the file of the Principal District Munsif Court, Padmanabapuram.

For Appellants ... Mr.R.T.Arivukumar

For Respondents ... Mr.S.Kadarkarai (for R5 to R7)

JUDGMENT

The first respondent/plaintiff has filed the suit in O.S.No.415 of 1979, on the file of the Principal District Munsif, Padmanabapuram for declaration against the appellants/defendants and the second respondent/second defendant. The trial Court, after trial, dismissed the suit. Challenging the said Judgment and Decree passed by the trial Court, the first respondent/plaintiff has filed the appeal in A.S.No.27 of 1993, on the file of the Sub-Court, Padmanabapuram. The first appellate Court, after hearing the appeal, allowed the appeal and decreed the suit. Challenging the Judgment and Decree passed by the first appellate Court, the appellants/defendants 3 to 7 have filed the present second appeal before this Court, raising the following substantial questions of law:-



WEB COPY



S.A.No.1366 of 1997

“1) Whether the lower appellate Court failed to note that Ex.A5 is not valid in law since the Will is not probated under the Indian Succession Act?

2) Whether the lower appellate Court erred in holding that the dismissal of the suit in O.S.No.408/1979 marked as Ex.A6 is a bar to put the defence of the appellant in the present suit filed by the defendants?

3) Whether the lower appellate Court failed to note that Order 9 Rule 9 C.P.C only prohibits filing of a fresh suit and the dismissal of the suit for default is not res judicata?

4) Whether the lower appellate Court failed to note that the plaintiff had not identified the suit property, since the Commissioner has not located and identified the property with reference to the documents?

5) Whether the lower appellate Court failed to note that Ex.B1, the order passed by the settlement authorities is binding on the plaintiff and the parties to the suit are in joint possession of the property?

6) Whether the lower appellate Court failed to note that the plaintiff ought to have filed the suit for partition since the order passed by the settlement authorities is still in force?”



S.A.No.1366 of 1997

WEB COPY

2. The specific case of the first respondent/plaintiff is that the suit property originally belonged to Perunthottathu Veedu, Veeyanur Desam. A member of the above said house sold the plaint schedule property and the western portion in favour of the father of the first respondent/plaintiff and his two brothers by way of a registered sale deed, dated 29.09.1097, Malayala Era (later referred to as M.E), which is equal to 11.04.1922. On the date of sale deed, the suit property was outstanding of 'Oththi' executed by the vendor. The above-said sale deed was a recital to redeem the Oththi. The father of the first respondent/plaintiff and his two brothers filed a suit in O.S.No.989 of 1120 (M.E) (which is equal to 1945) for redemption against the mortgages. The said suit was decreed in favour of the father of the first respondent/plaintiff. In that suit, he got delivery of the suit property through Court on 04.12.1954. The father of the first respondent/plaintiff and his two brothers were in possession and enjoyment of the plaint schedule property. The paternal uncle of the first respondent/plaintiff, by name, Alagiya Nayagam died as a Bachelor. His right devolved upon his two brothers only i.e., the father of the first respondent/plaintiff and his brother, by name, Rathina Nayagam. The father of the first respondent/plaintiff and his brother together partitioned the property including the plaint schedule property by a registered



S.A.No.1366 of 1997

WEB COPY

partition deed, dated 13.05.1964, by which, the suit property was allotted to the father of the first respondent/plaintiff as item No.6 in 'A' schedule and the western portion was allotted to his brother. Thus, the suit property was obtained by the father of the first respondent/plaintiff and he was in possession and enjoyment of his property till his death. After his death, the suit property devolved upon the first respondent/plaintiff through a registered 'Will' executed by his father on 18.01.1969. Therefore, the first respondent/plaintiff got title and possession over the suit property and he was enjoying the same.

3. It is the further case of the first respondent/plaintiff that north of the suit property is a Marukal of Kattukulam, which lies on the east of the suit property. The said Marukal was in existence for a very long time from time immemorial. Now, the said Marukal was silted. So, the appellants/defendants and others have levelled the same and planted coconut trees over the same. Except the first respondent/plaintiff, no other person got any right and title and possession over the suit property from 04.12.1954. Even if the appellants or any other persons have got any manner of title at any time in the past, they lost their title and the first respondent/plaintiff and their predecessor were continuous in possession.



S.A.No.1366 of 1997

WEB COPY

Therefore, they prescribed title by adverse possession against the appellants/defendants and their predecessor in title. The possession of the father of the first respondent/plaintiff and his brothers are adverse from the date of Court delivery i.e., on 04.12.1954. Thus, the first respondent/plaintiff has perfected title by adverse possession. While so, in re-survey and settlement, joint patta was issued to the appellants/defendants along with the first respondent/plaintiff. Hence, the first respondent/plaintiff approached the re-settlement authorities and got his name removed. But the appellants preferred an appeal and it was allowed by the Assistant Settlement Officer, by his order, dated 15.02.1979. Taking advantage of the said order, the appellants attempted to disturb the possession of the first respondent/plaintiff. The order of the Assistant Settlement Officer has caused a cloud on the title of the first respondent/plaintiff. Hence, the first respondent/plaintiff has filed the present suit for declaration declaring his title and possession over the plaint schedule property and also seeking decree for permanent injunction.

4.The case of the original defendant/Nallathampy Nadar is that the predecessor of the appellants is not aware of the sale deed, dated



S.A.No.1366 of 1997

WEB COPY

29.08.1097 M.E and also they are not aware of the partition deed. The first respondent/plaintiff is not entitled to the share as claimed by him under alleged Will, dated 18.01.1969. The first respondent/plaintiff is not entitled to the whole of the suit property and he is not in possession of entire suit property. The first respondent/plaintiff has to prove his case, but there is no material to show that he is entitled for declaration. There is no Marukal as stated in his plaint. Even though there is existence of coconut trees on the north, the right claimed by the first respondent/plaintiff exclusively for the suit property, had denied. The delivery said to have been effected on 04.12.1954 was not bought on the notice of the appellant/defendant and his predecessor in title. The first respondent/plaintiff did not get any title by adverse possession. The joint patta was issued in settlement only in conformity with the prior title of the parties. The settlement will not confer any title to any one against their own title. The first respondent/plaintiff has no cause of action to file the suit.

5. It is the further case of the original defendant that the plaint schedule property comprised in Old S.No.1291/1, which is correlated to R.S.No.278/1, having an extent of 32½ Ares originally belonged to three



S.A.No.1366 of 1997

brothers, namely, Ponnumuthu, Pichai alias Abraham and Kumaraswamy alias Isravel, who were the sons of Kutty Nadar and they got patta in their joint names in the old settlement. While so, Pichai alias Abraham died leaving the original defendant in the suit as only legal heir to his $1/3^{\text{rd}}$ share in the plaint schedule property. Kumaraswamy alias Isravel died, leaving three sons, namely, Azhakanayagam, Selvanayagam (father of the first respondent/plaintiff) and Ratenanayagam each having $1/3^{\text{rd}}$ share in $1/3^{\text{rd}}$ share viz., each entitled to $1/9^{\text{th}}$ share in the suit schedule property. Among them, Azhakanayagam died issueless and his share devolved upon other two surviving brothers. Thus, they become entitled to $3/18^{\text{th}}$ share, which means $1/6^{\text{th}}$ share each in the suit property. Selvanayagam died leaving two sons, namely, Gnananayagam and the first respondent/plaintiff each having $1/12$ share. As per the Will said to have been executed by Selvanayagam, his $1/6^{\text{th}}$ share in the suit property is obtained by Russel Nayagam, the first respondent/plaintiff in the suit. Ponnumuthu, son of Kutty gave his $1/3^{\text{rd}}$ share in the suit property to his son Sundaram, from whom, the first respondent/plaintiff and his brother Gnananayagam appears to have got right under some documents. The original defendant is entitled to $1/3^{\text{rd}}$ share in the suit property as the sole heir of his father Pichai alias Abraham. In the re-settlement, patta was



S.A.No.1366 of 1997

granted accordingly. Therefore, the parties are enjoying their share and the original defendant had already filed a suit in O.S.No.408 of 1979 for partition of his 1/3rd share. The claim of the first respondent/plaintiff for declaration of his title to the suit property and injunction, are not sustainable.

6. While admitting the second appeal, this Court, considering the facts and circumstances of the case, formulated the following substantial questions of law:-

“1) Whether the dismissal of the earlier suit in O.S.No.408 of 1979 marked as Ex.A6 constitutes *res-judicata* to the present suit?

2) Whether the dismissal of the suit under Order 9 Rule 9 C.P.C bars the institution of this suit?”

7. Though the trial Court dismissed the suit, the first appellate Court allowed the appeal and decreed the suit. The first respondent/plaintiff has established his case that how the predecessor subsequently had derived the title.



S.A.No.1366 of 1997

WEB COPY

8. The learned counsel for the appellants/defendants 3 to 7 would submit that the first respondent/plaintiff was claiming right over the property on the basis of the sale deed executed by his father, which was marked as Ex.A5. The parties are Christians and hence, the provision of Hindu Succession Act would not apply. The first respondent/plaintiff has not produced any documents to show that the above said Will was probated under the said Act. Hence, Ex.A5 is not valid. The lower appellate Court failed to consider the fact and allowed the appeal, which is perverse. Though the pleadings are not clearly stated, since it is a question of law, it can be raised at any stage even without pleadings. The dismissal of the suit in O.S.No.408 of 1979, on the file of the District Munsif, Padamanabapuram is not a bar to take defence in the present suit. The said suit was dismissed for default. If the suit filed by the first respondent/plaintiff was dismissed for default, it may be a bar to bring fresh suit in respect of the same cause of action and the dismissal of the suit under Order 9 Rule 8 of C.P.C will not be a bar, since the first respondent/plaintiff claimed the same as a defence in the suit filed by the third parties. The dismissal of the suit under Order 9 Rule 8 C.P.C is not *res judicata* as contemplated under Section 11 of C.P.C. Therefore,



S.A.No.1366 of 1997

WEB COPY

finding of the first appellate Court that the earlier suit is barred by *res-judicata*, is not correct.

9. The learned counsel for the appellants would further submit that the first respondent/plaintiff has not proved the identity of the suit property in connection with Exs.A1, A2, A4 and A5. The first appellate Court has not considered the fact that Exs.A1, A2, A4 and A5 are binding on the defendants, since they are not parties to that documents. The respondents, who applied for Commission, after the remand, did not ask for identification and location of the property comprised in Ex.A3. Even though a specific issue was raised by the appellants before the first appellate Court to identify and locate the properties covered under Exs.A3, A1, A2, A4 and A5 under additional issue No.1, he deliberately omitted to ask for identification of earlier property, which was sold away. The Commissioner was asked to locate only the property covered by Exs.A2, A4 and A5, which have no effect to answer Issue Nos.1 and 2 and the additional Issue No.1. The report of the Commissioner under Point No.5 that the property covered by Ex.A2 delivery list in O.S.No. 989/1120 M.E and Ex.A4 and A5 is lying to the west of Kattukulam. So, it can be safely stated that Exs.A2, A4 and A5 properties are one and the



S.A.No.1366 of 1997

WEB COPY

same, immaterial and found whether it is the same property conveyed under Ex.A3 sale deed. Thus, the first respondent/plaintiff has failed to comply with the specific directions in the remand order in the matter of establishing his title to the suit property, which is wrongly described with motives. Therefore, the first respondent/plaintiff has not properly identified the property and has not established his case, as he is entitled for declaration. Though the trial Court rightly dismissed the suit, the first appellate Court erroneously allowed the appeal and decreed the suit, which warrants interference.

10. The learned counsel for the appellants would further submit that the plaint schedule comprised of Old S.No.1291/1 which is correlated to R.S.No.278/1 having an extent of 32½ Ares originally belonged to three brothers, namely, Ponnumuthu, Pichai alias Abraham and Kumaraswamy alias Isravel, who were the sons of Kutty Nadar and they got Thandaper 1071 in their joint names in the old settlement. While so, Pichai alias Abraham died leaving the original defendant in the suit as his only legal heir to his 1/3rd share in the plaint schedule property. Kumaraswamy alias Isravel died later, leaving behind his three sons, namely, Azhakanayagam, Selvanayagam (father of the first



S.A.No.1366 of 1997

WEB COPY

respondent/plaintiff) and Ratenanayagam, each were having $1/3^{\text{rd}}$ share in $1/3$ share. Out of the suit property, they are entitled to $1/9$ share. Among them, Azhakanayagam died issueless and his share devolved upon other two surviving brothers. Thus, they are entitled $1/6^{\text{th}}$ share in the suit property. Selvanayagam died, leaving behind his two sons, namely, Gnananayagam and the first respondent/plaintiff, each having $1/12$ share. But as per the Will said to have been executed by Selvanayagam, his $1/6^{\text{th}}$ share in the suit property is obtained by Russel Nayagam, the first respondent/plaintiff in the suit. Ponnumuthu, son of Kutty gave his $1/3^{\text{rd}}$ share in the suit property to his son Sundaram, from whom, the first respondent/plaintiff and his brother Gnananayagam got right under some document. Thus, the original defendant is entitled to $1/3^{\text{rd}}$ share in the suit property as the sole heir. Hence, the learned counsel prays that the second appeal is liable to be allowed and the Judgment and Decree passed by the first appellate Court is liable to be set aside.

11. The learned counsel for the respondents 5 to 7 would submit that the suit property devolved upon the first respondent/plaintiff as per the registered Will executed by his father on 18.01.1969. Thus, the first respondent/plaintiff got title and possession over the plaint schedule



S.A.No.1366 of 1997

property and he is enjoying the same and the northern side of the plaint schedule property is Marukal of Kattukulam, which lies on the east of the suit property. The Marukal was in existence for a very long time from time immemorial. Now, the Marukal was silted. So, the appellants/defendants and others have levelled the same and planted coconut trees over the same. This was admitted by the appellants. The Advocate Commissioner also found that except the first respondent/plaintiff, no other person has got any title over the suit property. In the year, 1964, the suit schedule property was allotted to the father of the first respondent/plaintiff under a partition deed and he was enjoying the property. Therefore, the first respondent/plaintiff has got right in the suit property by adverse possession also. Since the name is wrongly mentioned in the settlement and the joint patta issued to the appellants, they are taking advantage of the same and claiming right over the same. From 1964, the father of the appellants was enjoying and later, he executed Will in favour of the first respondent/plaintiff in the year of 1969 and the entry made in the joint patta only came to know at a later point of time. Therefore, the first respondent/plaintiff and his predecessor was in title over and above the statutory period and the appellants have not established the identification of the property.



S.A.No.1366 of 1997

WEB COPY

Though the trial Court dismissed the suit, the first appellate Court had rightly appreciated the oral and documentary evidence and allowed the appeal.

12. Heard the learned counsel appearing for the appellants and the learned counsel appearing for the respondents 5 to 7 and perused the materials available on records.

13. Though the earlier suit in O.S.No.408 of 1979, Ex.A6 would not operate as *res-judicata*, because, the said suit was dismissed for default without giving any findings by answering any of the issue involved in that suit. Subsequently, the plaintiff in that suit should have taken steps to restore the suit and he cannot file the fresh suit on the very same cause of action. Therefore, the suit is not strictly operates as *res-judicata*, since it was not finally disposed of on merits, after framing the issues on disputed facts between both the parties. However, Order 9 Rule 9 C.P.C clearly shows that once the suit is dismissed for default, the person is barred from filing any new suit on the very same cause of action. However, in this case, the first respondent/plaintiff has come forward with the specific case and he has also proved the title of his



S.A.No.1366 of 1997

WEB COPY

father and subsequently, his entitlement of the property. Though the trial Court had failed to appreciate the evidence, the first appellate Court has rightly reappreciated the evidence and found that though previously this case was remitted back for deciding the appeal and after remand, they have taken the additional evidence and recorded and thereafter, the first appellate Court found that the first respondent/plaintiff has proved his case and whatever the names found in the settlement register, that will not bind the predecessors in title of the first respondent/plaintiff and his father. Since the plaint in O.S.No.408 of 1979 marked as Ex.A6 shows that the first defendant in the present suit filed earlier suit in O.S.No.408 of 1979, which was dismissed for default and the Judgment Decree were marked as Exs.A10 and A11, which shows that the suit was not finally decided on merits. Therefore, the earlier suit in O.S.No.408 of 1979 would not operate as *res-judicata* in the present suit. Further, the dismissal of the earlier suit was not hit by Order 9 Rule 9 C.P.C in filing a fresh suit because the first defendant herein filed earlier suit in O.S.No. 408 of 1979 for partition of his share, which was dismissed for default, whereas, the present suit is filed by the plaintiff herein and the defendant in the earlier suit for declaration and permanent injunction. Therefore, the present suit is not hit by Order 9 Rule 9 C.P.C. However, the first



S.A.No.1366 of 1997

WEB COPY

respondent/plaintiff has established his independent right and title over the property. There is no merit in the second appeal.

14. Further, after the appeal was remitted, the suit was dismissed and subsequently, the first respondent/plaintiff filed the appeal and the appeal was allowed. Hence, the present second appeal. The suit property was identified and handed over to the first respondent/plaintiff. Earlier, there was a dispute regarding identification. After remand back, the Commissioner has also inspected the property and identified the property. The suit filed by the defendants in O.S.No.408 of 1979 was dismissed and he did not take steps to restore the suit. Therefore, he is precluded under Order 9 Rule 9 C.P.C to raise the said claim in the present suit. Therefore, the second respondent/defendant cannot ask for partition and she has not filed the second appeal, as she has been shown as the 2nd respondent. A, B, C shown in the Commissioner's report and plan are belonging to the first respondent/plaintiff. Therefore, there is no dispute regarding the identification of the property. Though the trial Court had dismissed the suit based on the fact that they could not identify the suit property, the first appellate Court, based on the report of the Commissioner and other documentary evidence clearly found that there



S.A.No.1366 of 1997

WEB COPY

is no dispute regarding identification of the property. In view of the above fact, there is no merit in the second appeal and hence, the second appeal is liable to be dismissed.

15. In the result, the Second Appeal fails and the same stands **dismissed**. No costs. Consequently, connected miscellaneous petition is closed.

26.04.2023

NCC : Yes/No
Index : Yes/No
Internet: Yes
skn

To:

- 1.The Sub-Judge, Padmanabapuram.
- 2.The Principal District Munsif Court,
Padmanabapuram.
- 3.The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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S.A.No.1366 of 1997

P.VELMURUGAN, J.

skn

S.A.No.1366 of 1997
and
C.M.P.No.13523 of 1997

26.04.2023