

SA(MD)No.581 of 2024

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 18.10.2024

CORAM:

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

SA(MD)No.581 of 2024
and
CMP(MD)No.13138 of 2024

1.S.Athilakshmi

2.R.Kalavathi

.. Appellants

v.

1.Manickavalli

2.Vetriselvi

3.Kuppayi

4.K.John

5.Parasakthi

6.Lakshmi

7.Saraswathi

8.Pandithurai



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9.Rajapandi

10.A.R.A.Ajmalkhan

.. Respondents

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code to set aside the judgment and decree passed in A.S.No.40 of 2021 on the file of the Additional Sub Court, Palani, dated 09.07.2024, confirming the judgment and decree passed in O.S.No.273 of 2011, dated 14.11.2019, on the file of the District Munsif Court, Palani.

For Appellants : Mr.M.P.Senthil

JUDGMENT

The respondents 1 & 2 / plaintiffs have filed a suit in O.S.No.273 of 2011 before the District Munsif Court, Palani, for declaration, mandatory injunction and to cancel the documents dated 17.02.2011, 13.11.2008. The suit was decreed by judgment and decree dated 14.11.2019. Challenging the same, the appellants / defendants 3 & 4 have filed an appeal in A.S.No.40 of 2021 before the Additional Sub Court, Palani and the appeal was also dismissed.



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2.As against the concurrent findings of the Courts below, the appellants / defendants 3 & 4 have filed this instant second appeal.

3.According to the plaintiffs, the suit schedule property is an agricultural property to an extent of 56 cents in S.No.196/2, Ayakudi Village, Palani Taluk. The property originally belonged to one Palaniappan @ Palanisamban. He had four sons, namely, Kannisamban, Ramasamy Samban, Chinna Ramasamy Samban and Karupannan. Of these sons, Chinna Ramasamy Samban died in the year 1948 as a bachelor and therefore, the suit property along with other properties were partitioned among the other legal heirs of Palaniappan, by way of a registered partition deed dated 25.08.1957 [Ex.A2]. In the partition, the suit property was allotted to Ramasamy Samban. After Ramasamy Samban, his wife and sons [Periya Arumugam and Chinna Arumugam] inherited the property. Chinna Arumugam sold his share to the first defendant / Periya Arumugam's wife. The first defendant; her husband, Periya Arumugam; and their son have executed a power deed in favour of one



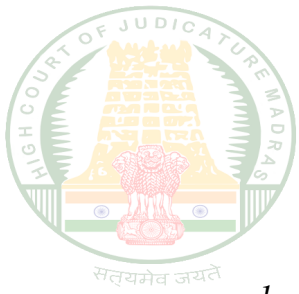
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Kalyanasundaram on 02.01.1987 [Ex.A4], who, in turn, has sold the property to the plaintiffs on 11.09.1987 vide Ex.A5.

4.The appellants claim that the plaintiffs have already filed a suit in OS.No.1225 of 2004 as against the first defendant for declaration and injunction before the District Munsif Court, Palani. The said suit was dismissed for default in the year 2007. Without restoring the same, the plaintiffs have filed the present suit, which is hit by the principle of *res judicata*, however, both the Courts below have entertained the same. The appellants further claim that they are the bonafide purchasers, who purchased the property by way of a registered sale deed from the first defendant.

5.Heard the learned Counsel appearing for the appellants and perused the materials placed on record.

6.This second appeal has not been admitted so far and the following substantial questions of law have been raised in the second appeal:-



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"1. Have not the courts below committed an error in not adverting that the present suit in OS No. 273 of 2011 filed by Respondents 1 and 2 as plaintiffs itself is barred by the embargo provided under Order 9 Rule 9 of the CPC, which clearly precludes Respondents 1 and 2 from initiating suit for the very same cause of action?

2. Whether the Courts below are right in law in decreeing the suit mechanically accepting the version of the respondents even without adverting that the very suit now filed by the Respondents 1 and 2 in OS No. 273 of 2011 is based on illusory cause of action and there is absolutely no disclosure in the plaint with regard to the filing of the earlier suit in OS No. 1225 of 2004 and dismissal under Ex. B2?

3. Whether the judgment and decree of the courts below is vitiated in not adverting that the Respondents 1 and 2 as plaintiffs was not in possession of the suit properties from the year 1987 and the same has been fortified by the fact that not even an iota of document was produced on the part of the respondents 1 and 2 to substantiate the mutation of revenue records from the year 1987 till the filing of the suit in OS No. 273 of 2011 for the past more than 27 years?

4. Have not the courts below proceeded on mere surmises and conjectures, even without considering that there is absolutely no allegations in the plaint, relating to the date of dispossession of respondents 1 and 2 from the suit schedule property in order to seek a relief of recovery of possession, especially having filed the earlier suit for



declaration and injunction in OS No. 1225 of 2004 as early as the year 2007 in Ex. B2?

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5. Have not the courts below erred in law in not adverting that the sale deed executed under Ex. A5 itself is a sham and nominal document which came to the knowledge of the 3rd Respondent only under the suit in OS No. 1225 of 2004 and the sale deed marked as Ex. A5 itself has not been acted upon and possession has not been handed over to the alleged purchasers?"

Questions of Law (1) & (2):-

7.The main contention of the appellants is that OS.No.273 of 2011, out of which the present second appeal has arisen, is barred by the application of Order IX Rule 9 CPC, because OS.No.1225 of 2004 was filed by the plaintiffs against the defendants and that suit was dismissed for default due to non-appearance of the plaintiffs.

8.To answer the above questions, it is pertinent to refer to Order IX CPC, which deals with "Appearance of parties and consequence of non-appearance". Under this Order, Rule 8 deals with situations where the



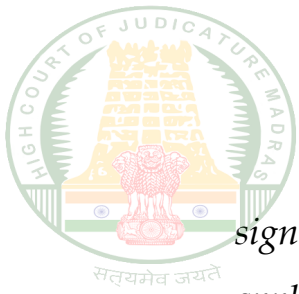
defendant appears, but the plaintiff does not appear when the suit is called for hearing. This Rule provides that in such a situation the suit shall be dismissed for default. Further, Rule 9 lays out the consequences of such a dismissal for default. It provides for the following:

“ – (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.”

9.From the above provision, it is clear that when a suit is dismissed for non-appearance of the plaintiff under Rule 8, the plaintiffs are barred from bringing a new suit in respect of the same cause of action. This rule is a facet of the principle of *Res Judicata*.

10.The Hon'ble Supreme Court in *Ganesh Prasad v. Rajeshwar Prasad* [2023 SCC OnLine SC 256] has explained the scope of the above Rule as under:-

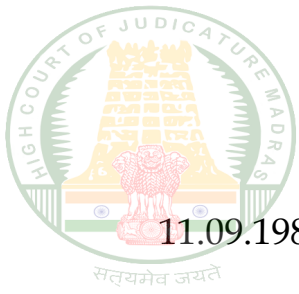
“52. Order IX Rule 9 bars fresh suit in respect of the same cause of action in case the earlier suit was dismissed as indicated in Order IX Rule 8 of the CPC. The term “same cause of action” assumes



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significance in as much as the bar under Order IX Rule 8 of the CPC applies to a later suit only in respect of the very same cause of action. In case the cause of action in the later suit was altogether different, which has nothing to do with the cause of action in the earlier suit, the statutory bar has no application to such later suits. It was only with a view to curb the tendency of filing multiple suits, on the basis of the very same cause of action, successively even after the dismissal of the earlier suit that such a provision has been introduced. It was not the intention of the Legislature to bar the subsequent suits between the parties and the same was evident by the qualifying words, "same cause of action".

11.From the above precedent, it is clear that the most important factor to consider is whether the same cause of action is involved in both suits. The facts of this case make it clear that this rule does not bar the filing of OS.No.273 of 2011, out of which the present second appeal has arisen. In OS.No. 1225 of 2004, the relief asked for was only declaration and mandatory injunction against the defendants. This suit mentions the dates out of which the cause of action arose as 21.01.1987, 11.09.1987, 20.09.2004 and 25.09.2004. On the other hand, the present suit in OS.No.273 of 2011 mentions the dates out of which the cause of action arose as 12.08.1987 and



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11.09.1987. It also asks for the reliefs of declaration, re-possession, permanent injunction and also pleads for cancellation of sale deed executed on 13.11.2008 by the first defendant to the appellants and for cancellation of settlement deed dated 17.02.2011 executed by the first defendant in favour of the second defendant.

12.From the above reading of the facts, it is clear that when OS.No. 1225 of 2004 was filed, the above instruments in question were not executed and there were no claims that the first defendant had encroached on the suit property in April 2011 with the help of the defendants 2 to 4. The Courts below have rightly noted that the cause of action in both suits are different and hence, the objection under Order IX Rule 9 CPC is not sustainable.

13.The classic definition of the expression 'cause of action' is the one provided by Lord Justice Brett in *Jay Cook v. Henry S. Gill* reported in (1873) LR 8 CP 107 as under:

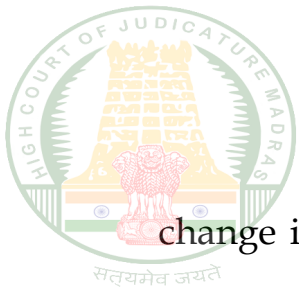


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“Cause of action has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed, – every fact which the defendant would have a right to traverse.”

14. In *Suraj Ratan Thirani & Others vs The Azamabad Tea Co. & Others* [1965 AIR 295], the Hon'ble Supreme Court noted that cause of action is the bundle of facts upon which relief is claimed and if in addition to the facts alleged in first suit, additional facts are alleged and further relief is sought on their basis, then the entire nature of the suit is changed and it cannot be said to be a suit based on the same cause of action.

15. Applying the principle enunciated in the above precedents, it is clear that additional facts have been alleged and the nature of the suit itself has been transformed in OS.No.273 of 2011. Therefore, Order IX Rule 9 CPC does not bar the filing of subsequent suit just because the plaintiffs and defendants are the same persons. Rather, what is required is the same cause of action with the intention of re-agitating the issue. When there is a



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change in the cause of action, it cannot be said that the subsequent suit is barred by the principle of *res judicata*. These substantial questions of law are answered in the above terms.

Questions of Law (3) & (4):-

16.From the facts, it is clear that the plaintiffs obtained title to the suit property vide registered document dated 11.09.1987 [Ex.A5]. The validity of the General Power of Attorney dated 02.01.1987 has been examined in detail by the Courts below and it has been opined that the scope of the same extended to selling the suit property. Even if the said scope of power of attorney was exceeded, the defendants have taken no action to challenge the same and have in fact impliedly ratified the actions of the power holder.

17.It is clear from the proceedings of the Courts below that the plaintiffs have in fact alleged that the defendants were in possession of the suit property since April, 2011 and had encroached upon the same. A reading of the judgment of the trial Court also shows that the first defendant in the suit raised the defence of adverse possession and in fact,



some relatives of the defendants, who were examined, have testified that the first defendant was indeed in enjoyment of the suit property.

18. In *Re P. Periasami (Dead) By LRs v. P. Periathambi and Others* [1995 SCC (6) 523], the Hon'ble Supreme Court held thus:-

"Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property."

19. In *Maria Margadia Sequeria Fernandes & Others v. Erasmo Jack De Sequeria (D) Tr.Lrs. & Others* [AIR 2012 SUPREME COURT 1727], the Hon'ble Supreme Court has held as follows:-

"67. In an action for recovery of possession of immovable property, or for protecting possession thereof, upon the legal title to the property being established, the possession or occupation of the property by a person other than the holder of the legal title will be presumed to have been under and in subordination to the legal title, and it will be for the person resisting a claim for recovery of possession or claiming a right to continue in possession, to establish that he has such a right. To put it differently, wherever pleadings and documents establish title to a particular property and possession is in question, it will be for the



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person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in possession.”

20.Considering the totality of the above facts and position of law, it is clear the plaintiffs were justified in seeking the relief of recovery of possession, having established their title over the suit property. The defendants have miserably failed to justify the basis of their title or provide reasons as to why their possession should continue. Therefore, it is clear that the Courts below have taken the right approach and granted the relief of recovery of possession. These questions of law is answered in the above terms.

Question of Law (5):-

21.Even assuming that the appellants came to know about Ex.A5 only when OS.No.1225 of 2004 was filed, they have not taken any steps regarding the same till 2011, when the suit in question was filed. Moreover, Ex.A5 is a registered instrument executed on 13.11.2008 and its validity has not been questioned till now. The appellants have slept over the issue and



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as such, they cannot now claim they were unaware of the instrument in question.

22.In *Manjit Singh & Another v. Darshana Devi & Others* [2024 INSC 895], the Hon'ble Supreme Court has observed that a person cannot claim to be a bonafide purchaser, merely because he obtained the property through a registered instrument, but must make due inquiries in respect of the same.

23.The appellants have failed to check encumbrances upon the suit property at the time of the alleged purchase and now claim that they are bonafide purchasers. The same is not liable to be accepted and this question of law is accordingly answered.

24.All the substantial questions of law raised by the appellants have been answered against them and as such, this Court is not inclined to entertain this second appeal.



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Accordingly, this second appeal stands dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Index	:	Yes / No	18.10.2024
NCC	:	Yes / No	
Internet	:	Yes	
vrn/gk			

To

- 1.The Additional Subordinate Judge,
Palani.
- 2.The District Munsif,
Palani.
- 3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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