

(2011) 09 MAD CK 0005

In the Madras High Court

Case No : S.A. No. 909 of 2011 and M.P. No. 1 of 2011

Karunakaran, Murugan, Vellachi @ Lakshmi and Kannan

APPELLANT

Vs

Senthamarai

RESPONDENT

Date of Decision : 28-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 8, Order 9 Rule 9

Citation : (2012) 1 CTC 531

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Advocate : T. Gandhi, for the Appellant;

Final Decision : Dismissed

Judgement

The Honourable Mr. Justice R.S. Ramanathan

1. The unsuccessful defendants in O.S. No. 281 of 2001

on the file of the I Additional District Munsif Court, Ulundurpet, are the appellants.

2. The respondent/ plaintiff filed the suit for declaration and recovery of possession of the suit property from the 4th defendant. The respondent/

plaintiff filed the suit stating that the suit property was assigned to him by the Government under the assignment order dated 30.12.1993 and ever

since the date of assignment, he was in possession and enjoyment of the same. The father of the defendants 1 and 2 and husband of the 3rd

defendant Periyasamy challenged the assignment order in favour of the plaintiff/ respondent and that was rejected by the Revenue Divisional

Officer after enquiry. Even thereafter the father of the defendants 1 and 2 Periyasamy along with one Subburayalu attempted to interfere with the

plaintiff's possession and enjoyment, he filed the suit in O.S.No.833 of 1995 and

obtained interim order and thereafter the said Periyasamy did not interfere and the case was not prosecuted further. After the death of Periyasamy, when the plaintiff/ respondent had gone to Bangalore to eke out his livelihood, the defendants 1 and 2 entered into the suit property and put the 4th respondent in possession of the property and therefore the suit was filed for declaration and for recovery of possession.

3. The appellants/ defendants contested the suit denying the factum of assignment in favour of the respondent/ plaintiff and contended that the suit property was purchased by Periyasamy the father of the appellants 1 and 2 and husband of the 3rd appellant under an un registered sale deed dated 16.5.1992 from Subburayalu and from the date of purchase, the said Periyasamy was in possession and enjoyment and the 4th defendant is

a Dobi and he was allowed to enjoy the property by the defendants 1 to 3 and the present suit is barred by res judicata as the earlier suit in

O.S.No.833 of 1995 was allowed to be dismissed for default and patta in respect of the suit property was given in favour of Subburayalu and that would also prove that the respondent/ plaintiff cannot claim the ownership of the property.

4. The 4th appellant/4th defendant also filed a separate statement accepting the statement of the appellants 1 to 3.

5. The trial Court decreed the suit holding that the earlier suit O.S.No.833 of 1995 will not operate as res judicata as it was not decided on merits

and as per Ex. A1, the suit property was assigned in favour of the respondent/ plaintiff and Ex. A4 would also prove the possession of the

respondent/ plaintiff and the appellants claimed to have purchased the property from Subburayalu and that sale was an unregistered one and no

title passed under the said document and it was also not proved how Subburayalu got the property and held that the respondent/ plaintiff proved

her title and therefore she is entitled to declaration and recovery of possession.

6. The lower appellate Court also confirmed the Judgement and Decree of the trial Court holding that O.S.No.833 of 1995 cannot operate as res

judicata as the appellants were not parties to the suit and the respondent/ plaintiff was given the property by assignment by the Government as

evidenced by Ex. A1 and the appellants/ defendants failed to prove their title to the suit property and therefore they cannot claim any right in the

suit property and they have also admitted that they have not received patta from the revenue officials in respect of the property which was under

the enjoyment and no proof was adduced by the appellants that the assignment in favour of the respondent/ plaintiff was cancelled and as the

property was assigned in favour of the respondent/ plaintiff, she is entitled to the relief of declaration and as the appellants have no title to the

property and are found to be in possession of the property, they are liable to be evicted and dismissed the appeal. Hence the Second Appeal.

7. The Learned Counsel for the appellants submitted that both the Courts erred in holding that the present suit filed by the respondent/ plaintiff is

not barred by dismissal of O.S.No.833 of 1995 without properly appreciating the provisions of Order 9 Rule 9 of CPC. He further submitted that

admittedly O.S.No.833 of 1995 was filed against Periyasamy the father of the appellants 1 and 2 and one Subburayalu and the said suit was filed

for declaration and injunction and that suit was dismissed for default and therefore as per the provisions of Order 9 Rule 9 of CPC another suit on

the same cause of action is not maintainable and this was not properly appreciated by the Courts below. He further submitted that the appellants

examined their vendor Subburayalu and he has given evidence about the handing over of property to the appellants 1 to 3 and the Village

Administrative Officer was examined and he also admitted that patta in respect of the suit property was given in favour of the appellants and the

documents Exs. X-1, X-2 and X-3 would also prove that patta was issued in the name of the appellants and the Commissioner's report also

corroborates the case of the appellants and would prove that the appellants are in possession of the property by paying house tax and therefore the

Courts below ought to have held that the respondent/ plaintiff is not entitled to the decree of declaration and injunction. He further submitted that

admittedly the suit property is a Grama Natham and Grama Natham cannot be assigned and admittedly patta was granted in favour of the

appellants and therefore the respondent/ plaintiff is not entitled to the declaration and recovery of possession.

8. On the basis of the above submissions, the following substantial questions of law are framed:

(1) Whether the present suit is barred under Order 9 Rule 9 of CPC having regard to the dismissal of O.S.No.833 of 1995 ?

(2) Whether the Courts below were right in declaring the right of the respondent/ plaintiff when the revenue records are in the name of Subburayalu

the predecessor in title of the appellants ?

(3) Whether the respondent/ plaintiff is entitled to the relief of declaration when the assignment Ex. A1 will not relate to the suit property and

Grama Natham cannot be assigned by the Government ?

9. It is the case of the respondent/ plaintiff that under Ex. A1 the property was assigned by the Government to him and ever since the date of

assignment he is in possession and enjoyment of the property. It is also alleged that the appellants challenged the assignment by filing before the

Revenue Divisional Officer and that was also dismissed. Though the respondent/ plaintiff did not produce the order passed by the Revenue

Divisional Officer dismissing the appeal filed by the father of the appellants 1 and 2 challenging the order Ex. A1, Ex. A1 would prove that the suit

property was assigned by the Government in favour of the respondent/ plaintiff and Exs. A4, A5 and A6 would also prove that the respondent/

plaintiff is in possession of the suit property by paying the house tax. The objection of the appellants was that in respect of the same property

O.S.No.833 of 1995 was filed by the respondent/ plaintiff against Periyasamy and Subburayalu who are the predecessor in title of the appellants

and that suit was allowed to be dismissed for non-prosecution and the application was filed under Order 9 Rule 9 of CPC to restore the same and

the same was also dismissed as evidenced by Exs.B3 and B4 and therefore the suit is barred under Order 9 Rule 9 of CPC. No doubt as per

Order 9 Rule 9 of CPC, When a suit was dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same

cause of action. Under Order 9 Rule 8 of CPC, 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. It is seen from Exs.B3 and B4, O.S.No.833 of 1995 was dismissed due to the

default of the plaintiff in appearing before the Court and application was filed to restore the suit and the same was also dismissed. Further, it is

stated by the appellants in Para 5 of the written statement that when the suit was posted for hearing one of the defendants Periyasamy died and

application was filed to implead the appellants 1 to 3 and others as Legal

Representatives of the deceased Periyasamy and that application was also dismissed and thereafter O.S.No.833 of 1995 was dismissed. Therefore, it is not made clear whether O.S.No.833 of 1995 was dismissed for non-prosecution or was dismissed as abated. Under Order 9 Rule 8 of CPC only when the suit was dismissed due to the absence of the plaintiff and when the defendant appeared and in that circumstances, the Court dismissed the suit for non-prosecution, a fresh suit is prohibited under Order 9 Rule 9 of CPC, in respect of the same cause of action. Therefore, in the absence of any proof that earlier suit O.S.No.833 of 1995 and the present suit are based on the same cause of action the bar under Order 9 Rule 9 of CPC will not come into effect. Admittedly, the plaint in O.S.No.833 of 1995 was not marked by the appellants to prove that O.S.No.833 of 1995 was filed on the same cause of action as stated in the present suit. Therefore, in the absence of any proof that the present suit was filed on the same cause of action as stated in the suit O.S.No.833 of 1995 the bar under Order 9 Rule 9 of CPC will not come into operation, even assuming that the earlier suit was dismissed for non-prosecution by the plaintiff after the appearance of the defendants. Hence, the substantial question of law No.1 is answered against the appellants.

10. It is submitted by the Learned Counsel for the appellants that Exs.X-1 to X-4 and B6 and B7 would prove that the appellants are in possession of the property and patta was issued in favour of the appellants. The Village Administrative Officer was examined as DW4 and he admitted that as per revenue records one " Vh;!!; " of property was assigned in favour of the respondent/ plaintiff and he was also put in possession of that property. He further submitted that the property which was assigned to the respondent/ plaintiff under Ex. A1 was in Survey No.111/2 and later it was reclassified as 172/6 and the total extent is 24 cents and the patta No.308 was issued in favour of three persons. He further submitted that in the patta X-2, the extent of property owned and enjoyed by three persons was not mentioned and it cannot be stated whether the property covered under X-2 was originally owned by Subburayalu. Further, the patta will not confer title and when the property was assigned by the Government in favour of the respondent/ plaintiff and the same was not disputed, the Government cannot give patta in respect of the same property

and the appellants cannot claim any title to the suit property under the patta alleged to have been given by the Government. As the respondent/

plaintiff is the assignee holder from the Government, he is entitled to declaration and recovery of possession and this aspect was rightly considered

by the Courts below and the suit was decreed. Hence, the substantial questions of law No.2 and 3 are answered against the appellants and the

Second Appeal is dismissed.

11. In the result, the Judgement and Decree of the Courts below are confirmed and the Second Appeal is dismissed. Consequently, the connected

Miscellaneous Petition is closed.