

(1949) 02 MAD CK 0029
In the Madras High Court

Miss Revathi by Next Friend and Guardian S. Parthasarathy	APPELLANT
Vs	
M. Venkataraman and Another	RESPONDENT

Date of Decision : 18-02-1949

Acts Referred:

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

Citation : (1949) 2 MLJ 594

Hon'ble Judges : P.V. Rajamannar, C.J

Bench : Division Bench

Judgement

P.V. Rajamannar, C.J.—This is an application by the owner of premises bearing municipal door No. 91, Mowbrays Road, Alwarpet, for

the issue of a writ of certiorari to quash the order of the Chief Judge of the Court of Small Causes in H. R. A. No. 264 of 1948, dated 24th

August, 1948. That appeal arose out of an application filed by the petitioner before the Rent Controller, Madras, for eviction of the first

respondent from the premises on the ground that he had committed default in the payment of the rent for January, 1947. One of the main pleas of

the respondent was that the application was not maintainable because of the dismissal of a prior application made by the petitioner to the Rent

Controller on 5th June, 1947. On that date, neither the petitioner nor her Advocate was present when the application was called, and therefore the

petition was dismissed for default. The respondent also raised other pleas on the merits. The Rent Controller by his order dated 29th January,

1948, passed an order for eviction of the respondent. He found that the respondent committed default in payment of the rent for January, 1947.

He overruled the objection as to the maintainability of the application, because the prior application had not been judicially decided on the merits.

There was an appeal by the respondent to the Court of Small Causes at Madras. The learned Chief Judge agreed with the Rent Controller on the merits that the respondent had committed default in paying the rent for January. He, however, considered that the objection of the respondent to the maintainability of the application was well founded. Relying mainly upon the provisions of Sub-section (4) of Section 12 and Section 10 of the Act, he held that the present application was barred by reason of the dismissal of the prior application.

2. Section 10 of the Act runs thus:

The Controller shall summarily reject any application under Sub-section (a) or under Sub-section (3) of Section 7 which raises substantially the same issues as have been finally decided in a former proceeding under this Act or under the corresponding provisions of the Madras House Rent Control Order, 1945, or the Madras Non-Residential Rent Control Order, 1945, between the same parties or between parties under whom they or any of them claim.

Sub-section (4) of Section 12 is as follows:

The decision of the appellate authority and subject only to such decision, an order of the Controller shall be final and shall not be liable to be called in question in any Court of Jaw whether "n suit or other proceeding or by way of appeal or revision.

Mr. V.K. Thiruvengkatachari, the learned Counsel for the petitioner, contended that neither provision has the effect of operating as a bar to the present application. The words "" finally decided "" in Section 10, clearly imply that the prior application should have been decided on the merits.

Without an adjudication on the merits an issue cannot be said to have been finally decided. He relied upon the catena of decisions relating to the corresponding provision in the CPC where it has been held that a decree of dismissal passed in a suit on default of appearance of the plaintiff does not operate as res judicata u/s II, Civil Procedure Code, or any other general principle. We agree with this contention. The words "" finally decided are words found in section II of the CPC and we do not see why the judicial interpretation of the words in the CPC should not apply in construing the same words in the Rent Control Act

3. Under the provisions of the Civil Procedure Code, when a suit is dismissed for

the default of appearance of the plaintiff, a fresh suit on the same cause of action is barred. That is because of the specific provision of Order 9, Rule 9. This provision must be construed along with the provision made in Order 9 for setting aside dismissals for default of appearance. In the absence of a provision similar to the provision of Order 9, Rule 9, Civil Procedure Code, there is no authority to compel us to hold that there is a general and universal rule of procedure, according to which once a suit or a petition is dismissed for default of appearance of the plaintiff or the petitioner, a subsequent suit or petition shall not be entertained claiming the same relief and based on the same cause of action. On the other hand, the decision of the Calcutta High Court, in *Shailabala Dasee v. Gobardhandas Ladsaria* ILR (1934) 6a Cal. 15 lends support to the contrary view. In that case, a suit filed on the Original Side of that Court was dismissed for non-prosecution under the provisions of Rule 36 of Chapter X of the Rules on the Original Side. It was held that in the absence of any rule forbidding the bringing of a fresh suit, the plaintiff whose suit had been so dismissed was at liberty to bring a fresh suit. Mr. P. Somasundaram, learned Counsel for the respondent, urged upon us that this decision was based upon the practice obtaining on the Original Side of the Calcutta High Court, which again was based on the practice of the Supreme Court in England. It is true, no doubt, that the learned Judges, in discussing the question and in referring to the authorities in England, advert to the practice obtaining in England and on the Original Side of that High Court. But the principle of that decision is not to be found in the rule of practice, but in the general rule that in the absence of any provision, either in the general adjetival law or in the rules of a Court preventing a plaintiff from proceeding with a suit in the circumstances above-mentioned, the later suit could not be held to be not maintainable. Just as Mr. Somasundaram pressed before us it appears that it was pressed before the learned Judges there, that the result of this decision would be that a plaintiff, if he so chooses, might use the procedure of the Court as an instrument of oppression and that he might indulge in a succession of suits and thus harass his opponent. But the learned Judges, while sympathising with the hardship of such a contingency, nevertheless came to the conclusion that the subsequent suit was maintainable in law. As the

learned Judges there point out, we hasten also to point out that it is highly desirable that a rule corresponding to Order 9, Rule 9 and possibly provisions also corresponding to Order 9, Rules 8 and 13 should be made under Madras Act XV of 1946, or as we pointed out on another occasion, some of the salutary rules of procedure contained in the CPC might be made applicable to the procedure under Madras Act XV of 1946.

4. This case, however, must be decided on the present state of the law, and in the absence of a provision corresponding to Order 9, Rule 9 of the Code of Civil Procedure, we have no alternative but to hold that the present application for eviction was sustainable in spite of the dismissal for default of the prior application

5. Mr. Somasundaram relied considerably on the provision of Sub-section (4) of Section 12. In our opinion, that provision does not help the respondent for two reasons. For one thing, the order of the Controller of which a finality is laid down in that provision must be an order on the merits. Secondly, that provision only declares that the order of the Controller, and if there is an appeal, the decision of the appellate authority, shall be final in the sense that it shall not be liable to be called in question in a suit or other proceeding or challenged by way of appeal or revision. The petitioner strictly is not doing any of the things prohibited by that provision. He is not actually calling in question the prior order of the Rent

Controller. He has filed another substantive application. That application must be heard and decided, unless it is barred under the provisions of

Section 10 of the Act and therefore has to be summarily rejected. As we hold, that Section 10 does not apply to the present case, it follows that

the application was maintainable.

6. Another contention raised by Mr. Somasundaram, a contention which did not find favour with the appellate authority, was based upon Sub-section (6) of Section 7 which is also as follows:

Where an application under Sub-section (2) or Sub-section (3) for evicting a tenant has been rejected by the Controller, the tenancy shall subject

to the provisions of this Act be deemed to continue on the same terms and conditions as before and shall not be terminable by the landlord except

on one or more of the grounds mentioned in Sub-section (2) or Sub-section (3).

The short answer to this contention is that the provisions of this sub-section apply only to a case where an application has been "" rejected "" by the

Controller. The circumstances under which an application has to be rejected are found set out in Sub-section (2) and Sub-section (3). Under Sub-

section (2) which is material for the purpose of this petition, if the Controller is not satisfied that any of the grounds alleged by the landlord existed,

then he shall make an order "" rejecting "" the application. There is a similar provision in Sub-section (3). In this case, it cannot be said that the prior

application was rejected because the Controller was not satisfied as to the existence of one or other grounds set out in Sub-section (2) of Section

7. The Controller never went into the merits at all. We cannot, therefore, accept this contention of Mr. Somasundaram.

7. Nor is there any substance in the argument that there has been an acquiescence in the order of the appellate authority by reason of the delay in

filing the application for a writ of certiorari. The appellate order was made on 24th August, 1948, but it appears that it was only on 1st December

that a certified copy of the order was obtained, and the application was made in December, 1948. It cannot be said that there has been any delay,

nor is there any proof of conduct which would justify this Court to hold that the petitioner has lost her rights by laches or acquiescence.

8 Finally, Mr. Somasundaram pointed out that he raised specifically in his counter-affidavit a plea of estoppel in paragraph 5 and also adduced

evidence on that plea, but the Rent Controller failed to give a finding on it. He made it a ground of complaint in his memorandum of appeal to the

Court of Small Causes but that Court also did not deal with that point. It is true that the appellate order does not refer to this plea, though it was

made a specific ground of appeal.

9. For the reasons set out above, the order of the learned Judge of the Court of Small Causes is vitiated by a clear error apparent on the face of

the record and has to be quashed. As already mentioned, one of the points which arose for decision in the appeal has not been heard and decided

by the appellate authority and the appeal may have to be heard afresh on that point.

10. As the petitioner has substantially succeeded in the application, the first respondent will pay her the costs of this application.