

**CIVIL APPEAL NO(S). 6424/2019
(ARISING FROM SLP(C) No. 6330/2018)**

MAYANDI

APPELLANT(S)

VERSUS

PANDARACHAMY & ANR.

RESPONDENT(S)

O R D E R

1. Leave granted.

2. The judgment and decree passed by the High Court is liable to be set aside on the short and singular ground that in the previous suit i.e. Original Suit No.85/1996 a similar relief was prayed by Pechimuthu S/o. Arumgasamy Thevar, Minor Manimegalai D/o. Pechimuthu, Thilagavathi (Minor) D/o. Pechimuthu and Arul Pandian (Minor) D/o. Pechimuthu. Prayer was made for declaration of title and for permanent injunction on the basis of Will dated 05.12.2004 executed by Sadaiyappa Konar which became operative on his death on 20.02.1995. O.S. No.85 of 1996 was filed in which following prayer was made:-

"A. declaring the plaintiffs 2 to 4 is title to the plaint 1st schedule property.

B. granting the consequential relief of permanent prohibitory injunction restraining the defendants from disturbing the plaintiffs title, possession and enjoyment of the plaint 1st schedule property.

C. granting permanent prohibitory injunction restraining the defendants from sub letting the 2nd schedule house without the written permission of the plaintiff.

D. awarding the costs of this suit to the plaintiffs."

3. It was on the basis of the Will, Civil Suit No.85/1996 was filed. It was dismissed vide order dated 16.03.2001, when the counsel for the plaintiffs was absent and the counsel for the defendants was present in the Court.

4. Plaintiff Nos.2, 3 and 4 filed the second suit i.e. Suit No.1106/2004 against the defendants. The prayer was made for permanent injunction on the basis of the Will only. After filing of the suit, Respondent No.1 purchased the property from the original plaintiffs.

5. The High has decreed the suit of the plaintiffs by the impugned judgment and decree, while allowing the second appeal.

6. After hearing learned counsel for the parties, it is apparent from the order of dismissal of the prior suit that it was dismissed under the provisions of Order IX Rule 8 of the CPC as the counsel for defendants was present and counsel for the plaintiffs was absent. In view of the provisions contained in Order IX Rule 9 decree against plaintiffs by default bars fresh suit. Order IX Rule 9 is extracted hereunder:-

"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."

7. In view of the aforesaid, High Court erred in law in holding that the subsequent suit was based on different cause of action, as such it was maintainable. The impugned judgment and order is patently illegal. Thus, it is set aside and the suit is ordered to be dismissed as it was not maintainable. The purchaser is sailing in the same boat as that of the original plaintiffs, he cannot be said to be having better rights than the original plaintiffs.

8. The appeal is, accordingly, allowed.

9. Pending application(s), if any, shall stand disposed of.

.....J.
[ARUN MISHRA]

.....J.
[M.R. SHAH]

NEW DELHI;
AUGUST 19, 2019.

**S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S**

Petition(s) for Special Leave to Appeal (C) No(s). 6330/2018

(Arising out of impugned final judgment and order dated 10-10-2017 in SAMD No. 51/2014 passed by the High Court of Judicature at Madras at Madurai)

MAYANDI

PETITIONER(S)

VERSUS

PANDARACHAMY & ANR.

RESPONDENT(S)

(IA No. 33847/2018 - EXEMPTION FROM FILING O.T.)

Date : 19-08-2019 These matters were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ARUN MISHRA
HON'BLE MR. JUSTICE M.R. SHAH

For Petitioner(s) Mr. Abhinav Ramkrishna, AOR

For Respondent(s) Mr. Parijat Kishore, AOR
(Appearance slip not given)

UPON hearing the counsel the Court made the following
O R D E R

Leave granted.

The appeal is allowed in terms of the signed order.

(NARENDRA PRASAD)
COURT MASTER

(JAGDISH CHANDER)
COURT MASTER

(Signed order is placed on the file)