

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.09.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No. 252 of 2014

1.Chitra ..1st Appellant/1st Respondent/1st Petitioner
2.Mythili ..2nd Appellant/2nd Respondent/2nd Petitioner
3.Sumathi (insane) ..3rd Appellant/3rd Respondent/3rd Petitioner
Rep by her Guardian and next friend
and Mother 1st Appellant Chitra

Vs.

1.Rajan ..1st Respondent/Appellant/1st Defendant
2.Kalaimaran ..2nd Respondent/4th Respondent/2nd Defendant
3.Ramadosh ..3rd Respondent/5th Respondent/3rd Defendant

(R2 & R3 remained Exparte Notice Dispensed with)

Prayer: Memorandum of Second Appeal filed under Section. 100 of C.P.C. against the judgment and decree passed in A.S.No.13 of 2011 dated 17.09.2013 on the file of the Court of Principal Sub-Ordinate Judge, Mayiladuthurai in reversing the judgment and decree passed in O.S.No. 136 of 2003 dated 04.09.2010 on the file of the Court of District Munsif, Sirkali.

For Appellants : Mr. A.Muthukumar

For Respondents: Mr.S.Sounthar for R1

R2 & R3 set Ex-parte

J U D G M E N T

The plaintiffs in O.S.No. 136 of 2003 who succeeded in obtaining a decree for partition of their 1/3rd share in the suit property on the decree being reversed by the first Appellate Court in A.S.No.13 of 2011 have come forward with this second appeal.

2. The suit was laid by the plaintiffs claiming that the suit properties belonged to one Vellaichamy Servai, who died in the year 1978 leaving behind three sons namely, Rajendran,

husband of the first plaintiff and the father of the plaintiffs 2 and 3, Rajan / first defendant and Ramadoss / third defendant. One of the sons namely, Rajendran died in the year 1999. According to the plaintiffs, on the death of Vellaichamy Servai, his three sons namely, Rajendran and the defendants 1 and 3 are entitled to 1/3rd share each. On the death of Rajendran in the year 1999, the 1/3rd share devolved on the plaintiffs. Hence, the suit.

3. The suit was resisted by the defendants contending that the defendants have perfected title by Ouster. It was also the case of the defendants that a partition took place between Vellaichamy Servai and his three sons on 25.03.1975 under a registered instrument, the suit property was not included in the said partition. The non-inclusion, according to the defendants is because the property was in exclusive enjoyment of the first defendant. It was further contended that ever since the date of said partition in the year 1975, the first defendant has been in possession and enjoyment of the property and therefore, the plaintiffs have lost their rights. It is also claimed that the plaintiffs 2 and 3 along with their deceased brother had filed a suit in O.S.No.63 of 1995 claiming share in the other properties that was subject matter of partition deed dated 25.03.1975. The suit property was not included in the suit. Hence, the present suit is barred under Order 2 Rule 2 of the Code of Civil procedure. A plea of non-joinder of necessary parties was also taken in as much as the suit property forms part of the Samudayam land in which there are about 48 joint Pattadars.

4. The Trial Court, upon consideration of the evidence, rejected the plea regarding non-joinder on the ground that though the Patta was joint, each of the joint Pattadars were shown to be in enjoyment of the specific extents therefore, the other joint Pattadars are not necessary parties to the present suit. The plea regarding Ouster was rejected by the Trial Court on the ground the cause of action for the present suit itself arose only on the death of Rajendran, since the property was held by Vellaichamy as his self acquisition and the plaintiffs, who are wife and children get a right to sue only after the death of Rajendran. The Trial Court came to the conclusion that the plea of the Ouster cannot be sustained. On the plea bar under Order 2 Rule 2, the Trial Court concluded since the property was not available for partition during the life time of Rajendran and the earlier suit namely, O.S.No.63 of 1995 was filed even during the life time of Rajendran, the present suit cannot be held to be barred under Order 2 Rule 2. On the said conclusions, the Trial Court decreed the suit. Aggrieved, the defendants preferred an appeal in A.S.No.13 of 2011 on the file of the Sub-Court, Mayiladuthurai.

5. The learned Sub-Ordinate judge rejected the plea of the defendants regarding non-joinder of necessary parties. He, however, accepted the claim that the suit is barred under Order 2 Rule 2. On the conclusion that the suit is barred under Order 2 Rule 2, the Appellate Court did not go into the question of Ouster. Having held that the suit is barred under Order 2 Rule 2, the learned Sub-Ordinate Judge allowed the appeal and dismissed the suit. Aggrieved, the plaintiffs are on appeal.

6. The following questions of law were framed at the time of admission:-

"i) When the other sharer viz., 3rd defendant was not a party to earlier suit, O.S.No.53 of 1995 whether the lower Appellate Court erred in law in holding that the present suit for partition is barred under Order 2 Rule 2 of C.P.C.?

ii) Whether the principles of Order 2 Rule 2 of C.P.C, could be invoked when a copy of plaint in earlier suit was not produced and marked?

iii) When the causes of action for two suits are different whether the lower Appellate Court erred in law in holding that the present suit is barred under Order 2 Rule 2 of C.P.C.?"

7. I have heard Mr.A.Muthukumar, learned counsel appearing for the appellants and Mr.S.Sounthar, learned counsel appearing for the first respondent.

8. All the three question of law relates to the bar Order 2 Rule 2. Order 2 Rule 2 reads as follows:-

"2. Suit to include the whole claim- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim- Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several relief. - A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.- For the purposes of this rule an

obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

In order to invoke Order 2 Rule 2, the defendants have to plead and prove that the plaintiffs had a substantive right to sue for partition on the date of initiation of the earlier suit namely, O.S.No.63 of 1995.

9. Mr.A.Muthukumar, learned counsel appearing for the appellants would contend that the suit property was not available for partition on the date when the earlier suit was filed. Since the suit property was considered to be a separate property of Vellaichamy Servai and on his death it would devolve on his Class - I heirs under Section 8 of the Hindu Succession Act, the plaintiffs, who are the Class - I heirs of one of the sons Rajendran did not have right to seek partition during the life time of Rajendran. Therefore, according to Mr.A.Muthukumar, the cause of action for the present suit had arisen only on the death of Rajendran in 1999 and hence, the non-inclusion of the property in the earlier suit for partition would not amount to waiver of the right under Order 2 Rule 2 of the Code of Civil Procedure.

10. Contending contra, Mr.S.Sounthar, learned counsel appearing for the respondents would submit that the plaint does not expressly aver that the suit property was considered to be separate property of Vellaichamy Servai. He would also submit the fact that the property was not included in the earlier partition that took place on 25.03.1975 would show that the property was not in enjoyment of Vellaichamy Servai but it was in possession of the first defendant. He would also contend that the lower Appellate Court should have upheld the claim of the first defendant on the ground of Ouster. I have considered the rival submissions.

11. As already stated, the bar under Order 2 Rule 2 of the Code of Civil procedure can be invoked only if it is shown that the plaintiff in the earlier suit had the right to sue for partition on the date of institution of the earlier suit. Two circumstances militate against the contentions of the defendants regarding the bar under Order 2 Rule 2 of the Code of Civil Procedure. Admittedly, the suit property was not a part of the properties that were divided in the partition till 25.03.1975. Therefore, the necessary conclusion is that the property was treated as a separate property of Vellaichamy Servai. Once it is held to be the separate property of Vellaichamy Servai, who died in the year 1978 leaving behind three sons, his sons would inherit under Section 8 of the Hindu Succession Act and it will be their separate property. As it is their separate property,

the Class - I heirs of the sons will not get a right to seek partition during their life time. Therefore, the cause of action for the present plaintiffs to sue for partition arose only on the death of Rajendran in 1999. Admittedly, the earlier suit was filed 1995. Therefore, on the date of the filing of the earlier suit, the plaintiff did not have a cause of action to sue for partition of the property subject matter of the present suit. Yet another fact is that the first plaintiff was not a party to the earlier suit, she gets a right only after the death of Rajendran. Apart from the above, it is seen from the records that the defendants have not produced the plaint in the earlier suit and the judgment therein. Unless the pleadings are produced, one cannot test as to whether the suit is barred Order 2 Rule 2 of the Code of Civil Procedure. In view of the above, the questions of law framed are answered in favour of the appellants.

12. As regards the plea of Ouster, I do not think the said plea could be entertained. I had already concluded that the right of plaintiffs to sue accrued only in the year 1999. The suit has been filed in 2003. Just almost 4 years after the death of Rajendran. Hence, there cannot be Ouster of the plaintiffs by the first defendant. The claim of the first defendant that he was in enjoyment of the property to the exclusion of others has not been proved. The second appeal is therefore allowed. The judgment and decree of the lower Appellate Court are liable to be set aside and they are accordingly set aside, the judgment and decree of the Trial Court are restored. However, in view of the relationship between the parties, there will be no order as to costs.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

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To:-

1.The Principal Sub-Ordinate Judge,
Mayiladuthurai.

2.The District Munsif Court,
Sirkali.

+1 CC to Mr.A.Muthukumar, Advocate sr 83070.

+1 CC to Mr.S.Sounthar, Advocate sr 82985

S.A.No. 252 of 2014

PPA(CO)

SP(03/03/2020)