



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 21.08.2019  
Pronounced On: 30.10.2019  
CORAM

WEB COPY

**THE HONOURABLE MRS. JUSTICE R. THARANI**

S.A. (MD)No.886 of 2009

1.Ayyathal  
2.Muthukannu  
3.Krishnamoorthy  
4.Narayanan (Died)  
5.N.Ramesh  
6.Indira

.. Appellants

(Appellants 5 and 6 brought on record as the legal heirs of the deceased<sup>4th</sup> appellant, vide Court order dated 02.04.2013 made in M.P. (MD)Nos.1 to 3 of 2013 in S.A.(MD)No.886 of 2009 by RSRJ)

Vs.

1.Jeyandiran (Died)  
2.Jeyaprakash  
3.J.Ganesan  
4.J.Narayanamoorthy

.. Respondents

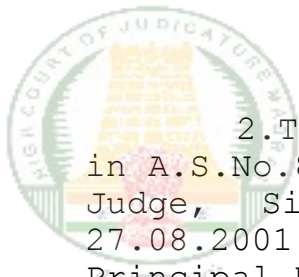
(Respondents 3 and 4 brought on record as the legal heirs of the deceased<sup>1st</sup> respondent, vide Court order dated 02.04.2013 made in M.P.(MD)Nos.4 to 6 of 2013 in S.A.(MD)No.886 of 2009 by RSRJ)

**Prayer :**Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the Judgment and Decree passed in A.S.No.86 of 2001 dated 28.11.2007 on the file of the learned Sub Judge, Sivagangai confirming the Judgment and Decree dated 27.08.2001 passed in O.S.No.167 of 1998 on the file of the learned Principal District Munsif, Manamadurai.

|                         |                      |
|-------------------------|----------------------|
| For Appellants          | : Mr.S.Natarajan     |
| For Respondent No.2     | : Mr.S.Parthasarathy |
| For Respondents 3 and 4 | : No Appearance      |
| For Respondent No.1     | : Died               |

**JUDGMENT**

Heard the learned counsel on both the side.



2.This appeal is filed against the judgment and decree passed in A.S.No.86 of 2001 dated 28.11.2007 on the file of the learned Sub Judge, Sivagangai confirming the Judgment and Decree dated 27.08.2001 passed in O.S.No.167 of 1998 on the file of the learned Principal District Munsif, Manamadurai.

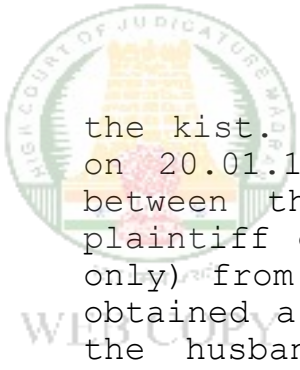
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3.The appellants herein are the defendants and the respondents herein are the plaintiffs in the suit. The respondents have filed a suit in O.S.No.167 of 1998 before the learned District Munsif, Sivagangai for a prayer of 2/6<sup>th</sup> share in the schedule properties. The trial Court decreed the suit. Against which, the appellants herein filed an appeal in A.S.No.86 of 2001 before the learned Sub Judge, Sivagangai. The learned Sub Judge dismissed the appeal by confirming the Judgment and Decree of the trial Court. Against the dismissal of the first appeal, the appellants have filed this second appeal.

4.The case of the plaintiffs is that the the plaintiffs and the defendants are sisters and brothers and the suit property belong to the maternal grandmother Ponnammal. Ponnammal died in the year 1978. After her demise, Lakshmi Ammal, mother of the defendants was enjoying the property till 1985. After the demise of Lakshmi Ammal, the first defendant was enjoying the property, after giving the share of the plaintiffs in the yield. Subsequently the first defendant was claiming the property as his own and refusing to give share to the plaintiffs. The first defendant obtained patta in his individual name and the first plaintiff filed an appeal against the issuance of patta but he was directed to seek remedy through civil Court. The plaintiffs filed a suit in O.S.No.344 of 1990 and as the first defendant agreed to give the share to the plaintiffs, the plaintiffs filed a memo as "settled out of the Court". Subsequently the first defendant refused to give the share of the plaintiffs and the plaintiffs filed this suit for 2/6<sup>th</sup> share in the schedule properties.

5.The brief substance of the written statement filed by the defendants is as follows:

Earlier the defendants 2 and 3 and the first plaintiff herein filed a suit in O.S.No.344 of 1990. The second plaintiff and the first defendant herein were the defendants in that suit. This second plaintiff accepted the case of the defendants in that suit. After the suit was taken up for trial, the plaintiffs agreed that the first defendant can enjoy the property as his individual property and on that basis, the plaintiffs made an endorsement as "settled out of the Court" and the plaintiffs were estopped under Order IX Rule 9 of CPC. The properties of the father are not included in the suit. The suit property belong to Ponnammal and the first defendant was maintaining her. On 15.09.1977, Ponnammal gifted the property to the first defendant through an unregistered document and handed over possession. The first defendant is enjoying the property by paying



the kist. The first defendant obtained patta during the UDR scheme on 20.01.1984. The properties of the father was already divided between the plaintiffs and the defendants 2 and 3. The first plaintiff obtained a loan of Rs.13,000/- (Rupees Thirteen Thousand only) from the husband of the first defendant. The second plaintiff obtained a loan of Rs.15,000/- (Rupees Fifteen Thousand only) from the husband of the first defendant. When the first defendant demanded for return of the loan, they joined together and filed this case.

6.On the above said pleadings, the following issues were framed:

- “(i) வாதிக்கு அவர்கள் கோரும் ல் 2 பாகம் கிடைக்கக்கூடியதா ?
- (ii) வழக்கும் எஸ்டாப்பல் தோஷத்தால் தடைப்பட்டுள்ளதா ?
- (iii) வழக்கும் Bad for partial partition என்ற குற்றத்திற்கு உள்ளாகியிருக்கிறதா ?
- (ஈ) வாதிக்கு கிடைக்கக்கூடிய இதர பரிகாரங்கள் யாது ?”

7.On the side of the plaintiffs, one witness was examined as P.W.1 and two documents were marked as Exs.A1 and A2 and on the side of the defendants, four witnesses were examined as D.W.1 to D.W.4 and 15 documents were marked as Exs.B1 to B15. After considering the evidences and arguments, the trial Court decreed the suit. Against which, the appellants herein preferred an appeal in A.S.No.86 of 2001.

8.The grounds of appeal in A.S.No.86 of 2001 is as follows:

When O.S.No.344 of 2009 was dismissed as settled out of Court, the plaintiffs are estopped under Order IX Rule 9 of CPC and Order II Rule 2 of CPC. As the plaintiffs themselves have filed a memo that the matter was settled out of the Court, the judgment of the Court is a judgment on compromise and a new case cannot be filed on the same cause of action. The trial Court failed to consider that the defendants were in enjoyment of the property for more than 10 years and the trial Court failed to consider that based on the patta and receipts, the first defendant has proved adverse possession.

9.On the abovesaid pleadings, the following issues were framed:

- “(i)இம்மேல்முறையீடு அனுமதிக்கத்தக்கதா கீழமை நீதிமன்றத்தின் தீர்ப்பும் தீர்ப்பாணையும் ரத்து செய்யத்தக்கதா ?
- (ii) வேறு எந்த வகை பரிகாரம் ?”

10.The first appellate Court dismissed the appeal by confirming the judgment and decree passed by the trial Court. Aggrieved by the judgment and decree, the appellants herein have preferred this second appeal.

11.In the grounds of second appeal, it is stated that the Courts below have not properly considered the provisions of Order II Rule 4 of CPC and Order IX Rule 9 of CPC and that the suit is barred under Order IX Rule 9 of CPC. Already regarding the same property,



there was a suit in O.S.No.344 of 1990 in which it has been agreed that the first defendant has right and possession of the suit property. The second defendant in the previous suit who is the second plaintiff in the present suit has adopted the written statement of the first defendant. The Courts below ought to have rejected the plaint on the point of estoppel since the earlier case was settled outside the Court, Section 115 of CPC is not applicable. Since there was no "intentionally caused or permitted another person to behave" as stipulated in the section, the suit is bad for seeking partial partition. The Courts below have failed to see that the possession by defendants is admitted. Eventhough the settlement deed dated 15.09.1977, is unregistered, it could be relied upon for proving possession and possessory title. The conclusion of the Court below that the possession by the first defendant is not an exclusive possession is not based on any material.

12.This Court by order dated 13.10.2009, has admitted the second appeal and has framed the following substantial questions of law, which are as follows:

"(i) Whether the Courts below are wrong in not holding that the suit is barred by estoppel when the earlier suit was dismissed for non prosecution under Order IX Rule 9 of Civil Procedure Code ?

(ii) When the possession by the first defendant for more than statutory period has been admitted and also proved by the defendants documents, whether the Courts below are right in holding that the defendant has not established their prescriptive title ?

(iii) Whether the suit for partition is liable to be dismissed under Order II Rule 2 of the Civil Procedure Code for not including the whole of the properties of the family ?"

Issue No.(i) :

13.On the side of the appellants, it is stated that the present suit is barred under Order IX Rule 5 of CPC as the earlier suit was already dismissed. It is stated that after the suit in O.S.No.344 of 1990 was dismissed as "settled out of the Court", the plaintiffs have filed the present suit for the same prayer regarding the same properties. The respondents did not take any steps to set aside the earlier decree. Unless a permission was granted for filing a fresh suit, the plaintiffs cannot file a fresh suit, as no new cause of action was claimed by the plaintiffs.

14.The learned counsel appearing for the appellants relied on the judgment passed by the Hon'ble Supreme Court in the case of **Hulas Rai Baij Nath v. Firm K.B. Bass and Co.**, reported in **AIR 1968 SUPREME COURT CASES 111**, which reads as follows:

"The language of Order XXIII, Rule 1, sub Rule (1), gives an unqualified right to a plaintiff to withdraw from a suit and, if no permission to file a fresh suit

is sought under sub-Rule (2) of that Rule, the



plaintiff becomes liable for such costs as the Court may award and becomes precluded from instituting any fresh suit in respect of that subject matter under sub-Rule (3) of that Rule."

15. On the side of the appellants, it is stated that the plaintiffs abandoned the earlier suit and he cannot claim any relief on the same cause of action and that this suit is not maintainable under Order XXIII Rule 1 of CPC wherein it states as follows:

"At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim.

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rule 1 to 14 Order XXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court"

16. Order XXIII Rule 1A illustrates as follows:

"Where a suit is withdrawn or abandoned by a plaintiff under **Rule 1**, and a defendant applies to be transposed as a plaintiff under **Rule 10 of Order 1**, the Court shall, in considering such application, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants."

17. Order XXIII Rule 3 explains as follows:

"Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, in writing and signed by the parties or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not "the subject-matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit."

18. Order XXIII Rule 3A provides as follows:

"No suit shall lie to set aside a decree on the ground that the compromise on which the decree is passed was not lawful."

19. On the side of the appellants, it is stated that a new suit for the same relief is not maintainable. In support of his contention, the judgment passed by this Court in the case of **the**



**moderator, the Church of South India v. Rt. Rev. Dr. J.A.D., Jebachandran** reported in **2014(4) CTC 555**, which reads as follows:

"when a suit is abandoned or part of claim is abandoned or when suit is withdrawn or part of claim is withdrawn without permission of Court, plaintiff shall be precluded from instituting any fresh suit in respect of such part of claim."

20.The learned counsel appearing for the appellants relied on the judgment passed by the Hon'ble Supreme Court in the case of **Ranganayakamma and another v. K.S.Prakash (Dead) by Lrs and others** reported in **(2008) 15 SUPREME COURT CASES 673**, which reads as follows:

"Unless fraud was proved, they could not have got rid of the same. The said decree has been acted upon. Pursuant to or in furtherance of the said decree, ten sale deeds have been executed..... Some "give and take" was necessary for the purpose of arriving at a settlement."

21.On the side of the appellants, it is stated that there is no necessity for an agreement to be in writing. The party or the counsel who made an endorsement is not questioned and the plea raised by the plaintiffs is estopped by the Judgment. The learned counsel appearing for the appellants relied on the judgment passed by the Hon'ble Supreme Court in the case of **Rajinder Singh and another v. Pushpa Devi Bhagat and others** reported in **AIR 2004 DELHI 228**, which reads as follows:

"46.Over the years, the jurisprudential basis of the authority of counsel has not changed in law and the factual position also remains the same. Under the circumstances, I have no reason to doubt that learned counsel for the respondents acted on behalf of his clients, on instructions (whether implied or express) and in their best interest. The authority of learned counsel was not shown to have been countermanded by the respondents.

48.On these facts, I think the only reasonable inference that can be drawn is that the learned counsel appearing before the learned Civil Judge did so on the authority given to him by the respondents and he made the statement that he did on the instructions of and on the authority given to him by the respondents."

22.The learned counsel appearing for the appellants relied on the judgment passed by the Hon'ble Supreme Court in the case of **Byram Pestonji Gariwala v. Union Bank of India** reported in **(1992) 1 SUPREME COURT CASES 31**, which reads as follows:



"40. Accordingly, we are of the view that the words 'in writing and signed by the parties', inserted by the C.P.C. (Amendment) Act, 1976, must necessarily mean, to borrow the language of Order III rule 1 C.P.C.:

"any appearance application or act in or to any court, required or authorized by law to be made or done by a party in such court, may except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader, appearing, applying or acting as the case may be, on his behalf:

Provided that any such appearance shall, if the court so directs, be made by the party in person". (emphasis supplied)

41. In the present case, the notice issued under Order XXI rule 22 was personally served on the defendant, but he did not appear or show cause why the decree should not be executed. The notice was accordingly made absolute by Order dated 23.1.1990 and leave was granted to the plaintiff to execute the decree. The decree passed by the High Court on 18.6.1984 in terms of the compromise was a valid decree and it constituted res judicata. As stated by this Court in *Shankar Sitaram Sontakke & Anr. v. Balkrishna Sitaram Son- takke & Ors.*, AIR 1954 SC 352:-

"..... It is well settled that a consent decree is as binding upon the parties thereto as a decree passed by invitum. The compromise having been found not to be vitiated by fraud, misrepresentation, misunderstanding or mistake, the decree passed thereon has the binding force of 'res judicata'." (Page 355)

42. *S.R. Das, C.J., in Sailendra Narayan Bhanja Deo v. The State of Orissa*, AIR 1956 SC 346, states:

".... a judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the court exercises its mind on a contested case ..... ". (Page 351)

43. A judgment by consent is intended to stop litigation between the parties just as much as a judgment resulting from a decision of the court at



the end of a long drawn out fight. A compromise decree creates an estoppel by judgment. As stated by Spencer-Bower & Turner in Res Judicata Second Edition, page 37:

"Any judgment or order which in other respects answers to the description of a res judicata is nonetheless so because it was made in pursuance of the consent and agreement of the parties .... Accordingly, judgments, orders, and awards by consent have always been held no less efficacious as estoppels than other judgments, orders or decisions, though doubts have been occasionally expressed whether, strictly, the foundation of the estoppel in such cases is not representation by conduct, rather than res judicata ..... ".

See also Mohanlal Goenka v. Benoy Kishna Mukherjee & Ors., AIR 1953 SC 65.

44.The consent decree made on 18.6.1984 remained unchal- langed. None questioned it. The appellant never raised any doubt as to its validity or genuineness. He had no case that the decree was vitiated by fraud or misrepresentation or his counsel lacked authority to enter into a compromise on his behalf. Nevertheless, after six years he questioned its validity by means of chamber summons. This was an unsuccess- ful challenge by reason of delay, estoppel or res judicata, and was rightly so held by the High Court."

23.On the side of the plaintiffs, it is stated that there is no prayer to set aside the earlier decree. A consent decree is equivalent to a contested decree. On the side of the appellants, it is stated that under Order XXVI Rule 3A CPC, there cannot be two decrees, when the parties are the same and the matter in issue is the same. It is stated that D.W.2 to D.W.4 had accepted that they received Rs.10,000/- (Rupees Ten Thousand only) each from the first defendant as per the compromise settlement and that possession is with the first defendant for the past 10 years and that the second plaintiff and the first defendant filed the same written statement in the earlier suit and if at all there should be a claim, they can claim only Rs.10,000/- (Rupees Ten Thousand only) and not anything else.

24.On the side of the respondents, it is stated that the earlier suit was filed for partition and that the second plaintiff herein seek for partition in both the suits. The first plaintiff in this suit was the second plaintiff in the earlier suit. The second

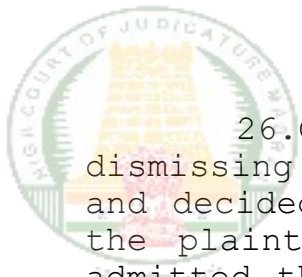


plaintiff in this suit was the second defendant in the earlier suit. The property belong to Ponnammal and Lakshmi Ammal was the only daughter of Ponnammal and that Lakshmi Ammal had six issues, namely the plaintiffs 1 and 2 and the defendants 1 to 4. The plaintiffs claim that they inherit the property of Ponnammal under the Hindu Succession Act. During the pendency of the earlier suit, the first defendant accepted to partition the property and the plaintiffs withdraw the earlier suit and filed a memo that "the case is settled out of the Court." Afterwards the first defendant refused to partition the property and the plaintiff was constrained to file the present case. The facts regarding the earlier case was clearly narrated in this case. The stand of the first defendant is that she alone can have the property and that there was no room for negotiations. The claim of the first defendant is that she got a settlement deed from her grandmother, Ponnammal. But no such document was produced. When no such document was filed, the Court can come to a conclusion that the property is available for partition. Even if such a document is produced, the document will be affected under Section 70 of the Registration Act r/w. Section 75 of the Stamp Act and under Section 122 of the Transfer of Property Act.

25. On the side of the respondents, it is stated that mere recording of a memo cannot be termed as a compromise decree. The Court can just record a memo and that a memo is only an intimation to the Court. Section 11 of the CPC is applicable only when the Court gave a finding in the earlier suit. The learned counsel appearing for the respondents relied on the judgment passed by this Court in the case of **Lee Chengalvaraya Naicker Trust, Rep. By its Chairman v. S. Shanmugam and others**, reported in (2014) 5 MLJ 872, which reads as follows:

"In the instant case on hand, since an order dated 03.04.2014 was passed by the learned Single Judge (on the memo filed by the respondents 5, 6, 8, 9 and 10), without providing an opportunity to the appellants to project their version of the case and consequently, had affected their valuable rights, in law..... On a careful consideration of respective contentions and in view of the fact that the appellants were not provided with an opportunity to file a reply to the memo dated 03.04.2014, then, this Court, without going into the merits and demerits of the matter and also not delving deep into the subject matter in issues, comes to an inevitable conclusion that the appellants have been deprived of an opportunity to project their version of the case/stand and on this simple ground alone, this Court is left with no option but to interfere with the order dated 03.04.2014 passed in the memo in A.Nos.2021 & 2022 of 2013, in C.S.No.242

of 2013 by the learned Single Judge."



26. On the side of the respondents, it is stated that dismissing a suit "as settled out the Court" is not a matter heard and decided by the Court. Under Order IX Rule 8 of CPC, even though the plaintiffs did not make their appearance when the defendants admitted the claim, the Court can decree the case upto the part of such admission or the Court can dismiss the case for non prosecution. The earlier suit in O.S.No.344 of 1990 was not dismissed for default. Hence, Order IX Rule 8 of CPC is not applicable.

27. Order XXIII Rule 1A of CPC is applicable only when the plaintiff abandoned the suit or withdraw the suit and that the plaintiff has not abandoned or withdraw the suit. The plaintiff never abandoned their rights.

28. The learned counsel appearing for the respondents relied on the judgment passed by this Court in the case of **Shanmugasundaram v. Janagarajan**, reported in **1975 MLJ 363**, which reads as follows:

*"It is clear from the above two Supreme Court decision that there cannot be any res judicata if the former suit had been dismissed as settled out of Court. The Court below has correctly appreciated the facts and has held that the suit is not barred by res judicata. There is absolutely no question of jurisdiction involved in the civil revision petition for me to interfere with the decision arrived at by the Court below."*

29. The learned counsel appearing for the respondents relied on the judgment passed by this Court in the case of **Pandarachamy v. Thirumalai Ammal and others**, reported in **2018(1) MWN (Civil) 697**, which reads as follows:

*"Bar to institute fresh suit- Applicability-Basic Requirement of Order 9, Rule 9 is that cause of action in subsequent suit must be same as that of previous suit - Bar under Code depends on cause of action relating to suit - Dismissal of earlier suit only precludes fresh suit on same cause of action."*

30. On the side of the respondents, it is stated that the recording of soc in the earlier suit, cannot act as a res judicata for filing a new suit. the learned counsel appearing for the respondents relied on the judgment passed by the Hon'ble Supreme Court in the case of **M/s.A.A.Associates v. Prem Goel and others**, reported in **AIR 2002 DELHI 142**, which reads as follows:

*"Section 11- Res judicata-earlier decree passed in terms of compromise-there was no adjudication of*



rights - strict principle of Section 11 would not come into play"

31.On the side of the respondents, it is stated that even a compromise decree cannot be taken as a res judicata. The learned counsel appearing for the respondents relied on the judgment passed by this Court in the case of **E.Ramu and 2 others v. E.Krishnan and 4 others**, reported in **2010 (1) CTC 392**, which reads as follows:

"Res judicata- compromise decree and res judicata- Court merely grants approval to contract between parties in case of compromise decree and does nothing more except to satisfy itself whether such contract is lawful within meaning of explanation to Order 23, Rule 3 - hence, compromise decree does not operate as res judicata."

32.The learned counsel appearing for the respondents relied on the judgment passed by this Court in the case of **Maria Francis (Died) and others v. M.Varghese**, reported in **2017 1 LW 70**, which reads as follows:

"10.With regard to the first submission on the question of maintainability of the suit for partition on the ground of bar under Order IX, Rule 9 C.P.C., the arguments of the learned counsel for the appellants is not sustainable in view of the position that the bar under Order IX, Rule 9 C.P.C. is not applicable in a case where the suit is for partition. Since the suit for partition only brings about severance of status and the cause of action continues till there is actual partition, the provision, namely, the bar under Order IX, Rule 9 C.P.C., was held to be inapplicable in several decisions of this Court.

11.The following case laws are cited on the side of the respondent.

(1) Ramasesha Iyer v. C.V.Ramanujachariar reported in AIR 1935 Madras 458.

(2) Asha Sharma v. Amar Nath reported in AIR 2003 HP 32.

(3) V.Ponramu v. B.Usharani and 3 others reported in (2009) 1 MLJ 126.

Balamani and another v. S.Balasundaram reported in (2009) 4 MLJ 218. "

33.On the side of the respondents, it is stated that Order 9 Rule 19 is not applicable to partition suits as the cause of action is a continuous one till the joint family status is not severed. The learned counsel appearing for the respondents relied on the judgment passed by this Court in the case of **Balamani and another v.**



**S.Balasundaram**, reported in **(2009) 4 MLJ 218**, which reads as follows:

*"As such, both the decisions would high-light and spot light the fact that in a partition suit, the cause of action is a continuing one and hence, Order 9 Rule 9 of CPC cannot be pressed into service."*

34.The learned counsel appearing for the respondents relied on the judgment passed by this Court in the case of **V. Ponramu v. B.Usharani and 3 others**, reported in **(2009) 1 MLJ 126**, which reads as follows:

*"Partition is nothing but severance of joint status.....Unless and until joint ownership is severed, it cannot be said that partition had taken place in the family. A suit for partition stands in an altogether different footing, inasmuch as even a defendant can file an application to transpose himself as plaintiff.*

*'The question next arises whether the plaintiff' should have given liberty to file a fresh suit under Order 23 Rule 1, Civil Procedure Code. So far as a suit for partition or a suit for redemption is concerned, it is axiomatic that, when the plaintiff withdraws his suit, he will be entitled to file a fresh suit as the cause of action is a recurring cause of action. Even if the plaintiff is not granted permission, Order 23 Rule 2, Civil Procedure Code, he will nevertheless have a right to file a suit for partition at any time he pleases'"*

35.The second defendant in his case has deposed that she was given Rs.10,000/- towards her share. There is no such pleadings in her written statement. The only pleadings in the written statement was that there was a demand for repayment of the loan which was the reason for the plaintiff to file this suit. When there is no pleadings, the evidence cannot be considered. The payment received by the second defendant was not reported in the earlier suit. On the side of the appellant, it is stated that only after the dismissal of the suit, the defendants 2 and 3 were said to have been given Rs.10,000/- each and that in their evidence they admitted that no such amount was given to the plaintiffs.

36.The learned counsel appearing for the respondents relied on the judgment passed by this Court in the case of **Chelladurai v. Minor Aravind rep. By Guardian**, reported in **(2009) 1 MLJ 782**, which reads as follows:

*"Everything depends upon cause of action and in case the subsequent cause of action arose from a totally different bunch of facts, such suit cannot be axed*



by taking shelter to the provision of Order 9 Rule 9"

37.The learned counsel appearing for the respondents relied on the judgment passed by the Hon'ble Supreme Court in the case of **Annasaheb and others v. Vilas and others**, reported in **AIR 1995 SUPREME COURT 895**, which reads as follows:

"The mere fact that one of the coparceners is not in joint possession does not mean that he has been ousted. The possession of the family property by a member of the family cannot be adverse to the other members but must be held to be on behalf of himself and other members..... the right of the plaintiff to file suit for partition had arisen after the Act has come into force and regrant was made by the Collector under sub Section (1) of S.5."

38.The learned counsel appearing for the respondents relied on the judgment passed by this Court in the case of **S.Ganesan v. Bharathirajan**, reported in **(2009) 6 MLJ 489**, which reads as follows:

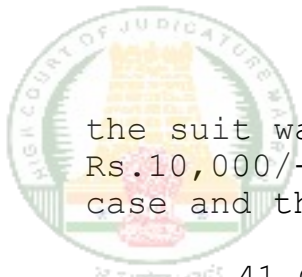
"Specific clause in settlement deed- Plea based upon title and adverse possession cannot come together"

39.The learned counsel appearing for the respondents relied on the judgment passed by this Court in the case of **Ganapathi Iyer and another v. Sundaramurthy and others**, reported in **(2000) II MLJ 365**, which reads as follows:

"It is settled law that to constitute ouster, there must be evidence of open assertion of hostile title coupled with exclusive possession and enjoyment by one of them to the knowledge of all the other co-heirs.

'It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession.'"

40.On the side of the respondents, it is stated that it was the first defendant who make the plaintiffs to believe that the matter would be amicably settled. An estoppel is an admission, or something which the law treats as equivalent to an admission, of so high and conclusive a nature that any one who is affected by it is not permitted to contradict it. A memo as "settled out of the Court" cannot put an end to the litigation. In furtherance of the earlier suit, a sum of Rs.10,000/- (Rupees Ten Thousand only) was said to have been handed over to the second defendant which proves that a memo as settled out of Court was not conclusive. If the dismissal of



the suit was conclusive, the first defendant had no necessary to pay Rs.10,000/- (Rupees Ten Thousand only) after the dismissal of the case and that there is no question of estoppel by conduct.

41. On the side of the appellant, it is stated that a consent decree in O.S.No.344 of 1990 is an estoppel for the present suit and the wordings stated in Ex.A2 is "தீர்ந்து விட்டதாக" that means the matter was already settled and that the suit was dismissed. A memo cannot be recorded without giving an opportunity to the other side. A memo was filed by the plaintiffs themselves and they cannot question the same. When a suit was dismissed by the Court as settled our of the Court, another suit for the same relief is not maintainable.

42. The learned counsel appearing for the appellants relied on the judgment passed by the Hon'ble Supreme Court in the case of **P.T.Thomas v. Thomas Job**, reported in (2005) 6 SUPREME COURT CASES 478, which is reads as follows:

"In Sailendra Narayan Bhanja Deo vs. The State of Orissa, AIR 1956 SUPREME COURT 346, the Constitution Bench held as follows:

A Judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the court exercises its mind on a contested case. (South American and Mexican Co., Ex. Parte Bank of England, In re & Kinch v. Walcott),

In South American and Mexican Co., exp Bank of England, In re, it has been held that a judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case. Upholding the judgment of Vaughan Williams, J Lord Herschell said at page 50 :-

"The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action."

To the like effect are the following observations of the Judicial Committee in 'Kinch v. Walcott', (AC at p. 493):-

"First of all their Lordships are clear that in relation to this plea of estoppel it is of no advantage to the appellant that the order in the libel



action which is said to raise it was a consent order. For such a purpose an order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the Court made otherwise than by consent and not discharged on appeal."

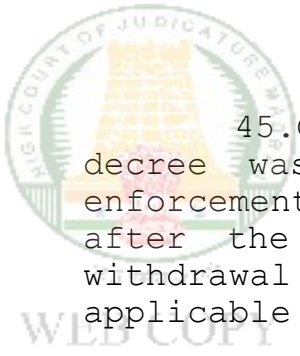
26. The same principle has been followed by the High Courts in India in a number of reported decisions. Reference need only be made to the cases of 'Secy. Of State v. Ateendranath Das', 63 Cal 550 at p. 558 (E) ; - ' Bhaishanker v. Moraji', 36 Bom 283 (F) and 'Raja Kumara Venkata Perumal Raja Bahadur', v. Thatha Ramasamy Chetty', 35 Mad 75 (G). In the Calcutta case after referring to the English decisions the High Court observed as follows :

"On this authority it becomes absolutely clear that the consent order is as effective as an order passed on contest, not only with reference to the conclusion arrived at in the previous suit but also with regard to every step in the process of reasoning on which the said conclusion is founded. When we say "every step in the reasoning" we mean the findings on the essential facts on which the judgment or the ultimate conclusion was founded. In other words the finding which it was necessary to arrive at for the purpose of sustaining the judgment in the particular case will operate as estoppel by judgment."

43. On the side of the appellants, it is stated that D.W.2, D.W.3 and D.W.4 admitted the settlement of amount paid on the basis of the compromise decree and it is not open for the respondents to take a stand as if compromise was not effected. Fresh suit is barred as the matter was already settled and the same issue cannot be agitated again and again.

44. The learned counsel appearing for the appellants relied on the judgment passed by this Court in the case of **A.L. Abul Kalam Azad v. A.L. Jawaharlal**, reported in **2019 (2) CTC 481**, which is reads as follows:

*"Further, the suit filed by the appellant in O.S.No.3 of 2011 for partition also is not maintainable, as the property in O.S.No.3 of 2011 is same in O.S.No.18 of 2005 filed by him in respect of A schedule property therein. Hence, the same issue cannot be agitated by filing O.S.No.3 of 2011, and therefore, the prayer for partition is also not maintainable. After the compromise decree, the said suit in O.S.No.18 of 2005 was withdrawn."*



45.On the side of the respondents, it is stated that no decree was passed by the Court and there is no question of enforcement and that the settlement was said to have been done only after the withdrawal of the earlier suit and not before the withdrawal of the suit and that Section XXIII Rule 23 of CPC is not applicable to the present case.

46.On the side of the respondents, it is stated that D.W.3 had clearly deposed that she was given amount only after the withdrawal of the earlier suit. D.W.2 has deposed that “இந்த வழக்கு போட்ட பிறகு சமாதனமாகி அக்காளுக்கு 10000த்தை கொடுத்துவிட்டு அதாவது எனக்கு என் தங்கை அய்யத்தாள் ரூ.10000த்தை கொடுத்துவிட்டு அய்யத்தாளை சொத்தை வைத்துக்கொள்ளவேண்டும் என்று முடிவு செய்தோம்.” D.W.4 has deposed that “ஊரில் பழைய வழக்கு போட்ட பிறகு நடந்த பஞ்சாயத்தில்தான் நானும் என் சகோதரர்களும் எங்களுக்குள்ள உரிமையை அய்யத்தாளுக்கு விட்டுக் கொடுத்தோம் முத்துக்கண்ணு 10000த்தை வாங்கிக்கொண்டுதான் அவருக்குண்டான உரிமையை விட்டுக்கொடுத்தார்”. It is further stated that D.W.2 to D.W.4 have admitted that no amount was given to the plaintiff and that Rs.10,000/- was handed over to the second defendant only after the withdrawal of the suit.

47.From the evidence of D.W.2, it is clear that D.W.2 was given some amount after the case was dismissed as settled out of the Court. The evidence of D.W.2 to D.W.3 clearly reveals that no such amount was paid to the plaintiff. What are the terms of the compromise is not clearly stated in the written statement. The plaintiff had not participated in the panchayat. Except the oral evidence of D.W.2 and D.W.3, no evidence is produced on the side of the defendants to prove that the plaintiffs relinquished their right over the property. The earlier suit was dismissed not on merits but only on recording a memo. Mere recording of a memo cannot be treated as a compromise decree. When there is no decree, there is no necessary to take steps to set aside the decree. No compromise petition was filed before the Court and there is no order as to the terms of the compromise to form a part of the decree. In the above circumstances, this suit is not barred under Order XXIII Rule 3A of CPC.

Issue No.(ii):

48.On the side of the appellants, it is stated that the first defendant is in enjoyment of the property for more than the statutory period and the same was admitted by the plaintiffs and also proved by the defendants side documents and that both the lower Courts have failed to consider this and failed to consider that the right of the defendants was established by prescriptive title.

49.On the side of the respondents, it is stated that there is a presumption that all the Hindu families are joint families unless otherwise proved. The possession of one member of the joint family is presumed to be the possession of the entire joint family. If the possession of the defendants is an adverse possession against the



plaintiffs, there is no necessity for first defendant to give Rs.10,000/- to the second defendant. The defendants failed to prove that their possession was adverse to the plaintiffs.

50. Admittedly the first defendant is in possession of the property. The first defendant claim title through an unregistered settlement deed but failed to produce the settlement deed. Since the plaintiffs and the defendants belongs to the same family, the possession of one of the family member is presumed to be that of the entire family. When the possession of the first defendant becomes adverse against the plaintiffs is not stated in the written statement, the first defendant failed to prove that his possession in the property is adverse to the plaintiffs. Hence, this question is not maintainable.

Issue No.(iii):

51. On the side of the appellant, it is stated that the property of the father is not included in this case and the suit is bad for partial partition.

52. On the side of the respondents, it is stated that the property that belong to the father was already divided between the sisters and brothers and D.W.2 has admitted that the property belong to the father was already partitioned and the oral partition was reduced into writing and that partition took place during the lifetime of Lakshmi Ammal.

53. Admittedly the original owner of the property was Ponnammal. The settlement deed alleged to have been executed by Ponnammal was not produced. Lakshmi Ammal was the daughter of Ponnammal. The property of the father was already divided among the brothers during the lifetime of Lakshmi Ammal which is admitted by the defendants. If the settlement memo put an end to the litigation, there was no necessity for the defendants to give Rs.10,000/- towards the share of the second defendant. In the above circumstances, there is no question of partial partition. Hence, it is decided that this question is not maintainable.

54. In the above circumstances, this **Second Appeal** is **dismissed** by confirming the judgment and decree passed in A.S.No.86 of 2001 dated 28.11.2007 on the file of the learned Sub Judge, Sivagangai confirming the Judgment and Decree dated 27.08.2001 passed in O.S.No.167 of 1998 on the file of the learned Principal District Munsif, Manamadurai. No Costs.

Sd/-

Assistant Registrar ( )

// True Copy //

Sub Assistant Registrar(CS)



**S.A.(MD)No.886 of 2009**

1.The Sub Judge, Sivagangai.

2.The Principal District Munsif, Manamadurai.

3.The V.R.Section,  
Madurai Bench of Madras High Court,  
Madurai.(2 copies)

+1 CC to Mr.S.NATARAJAN, Advocate ( SR-95198[F] dated 31/10/2019 )

+1 CC to Mr.S.PARTHASARATHY, Advocate ( SR-94985[F]dated  
30/10/2019 )

S.A.(MD)No.886 of 2009  
**30.10.2019**

VB(02.01.2020) 18P 7C