



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 26.07.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.557 of 2013

and

M.P. (MD)No.1 of 2013

WEB COPY

1.R.Francis Xavier

2.R.George

3.Micheal Antony Charles

... Appellants / Appellants /
Defendants 2 to 4

Vs

Maria Jothi Valarmathi

... Respondent/Respondent/Plaintiff

Prayer: Second appeal filed under Section 100 of C.P.C., against the judgment and decree passed in A.S.No.31 of 2012 on the file of the Additional Subordinate Judge, Nagercoil, dated 05.02.2013 modifying the judgment and decree passed in O.S.No.121 of 2006 on the file of the Principal District Munsif Court, Nagercoil, dated 24.01.2012.

For Appellants

: Mr.M.P.Senthil

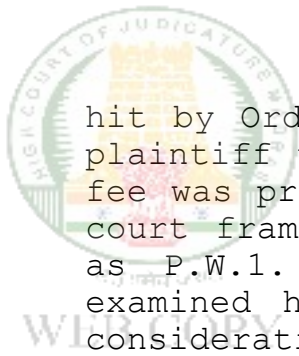
For Respondent

: Mr.D.Christenson Jugunu

JUDGMENT

The defendants 2 to 4 in O.S.No.121 of 2006 on the file of the Principal District Munsif Court, Nagercoil are the appellants in this second appeal.

2. The suit was filed by the respondent herein for partition and separate possession of her 1/6th share over the suit property. The suit property was purchased by the plaintiff's father who passed away in the year 1973. The first defendant was the plaintiff's mother, while the other defendants were her brothers. The parties are Christians and governed by the Indian Succession Act. As per the personal law, the first defendant as a widow became entitled to 1/3rd share in the suit property. The plaintiff and D2 to D4 became entitled to the remaining 2/3rd share. The mother's 1/3rd share was settled in favour of the sons vide settlement deed dated 28.01.2004. Claiming her 1/6th share, the partition suit came to be filed. During the pendency of the suit, the mother / first defendant passed away. But she filed written statement controverting the plaint averments. The defendants raised very many defences. They contended that the plaintiff had executed a deed of relinquishment dated 08.09.1997 and therefore, she had no claim over the suit property. The plaintiff had earlier filed O.S.No.98 of 2005 questioning the settlement deed. The said suit was dismissed. The plaintiff ought to have sought the relief of partition in the earlier suit itself. Having failed to do so, the subsequent suit is



hit by Order 2 Rule 2 of C.P.C. They would also contend that the plaintiff was not in possession of the suit property and the court fee was properly paid. Based on the divergent pleadings, the trial court framed the necessary issues. The plaintiff examined himself as P.W.1. Ex.A1 to Ex.A8 were marked. The second defendant examined himself as D.W.1. Ex.B1 to Ex.B15 were marked. After consideration of the evidence on record, the trial court by judgment and decree dated 24.01.2012 granted preliminary decree holding that the plaintiff is entitled to 1/6th share over the suit property. Aggrieved by the same, the defendants 2 to 4 filed A.S.No.31 of 2012 before the Principal Sub Court, Nagercoil. By the impugned judgment and decree dated 05.02.2013, the first appellate court confirmed the decision of the trial court and dismissed the appeal. Challenging the same, this second appeal came to be filed.

3. The second appeal was admitted on 10.09.2013 on the following substantial questions of law:-

- "1. Whether the suit filed by the respondent / plaintiff is hit by Order 2 Rule 2 of C.P.C?
2. Whether Ex.B1-document is admissible in evidence?
3. Whether the judgment and decree passed by the trial court is valid in law?"

4. The learned counsel appearing for the appellants reiterated the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial questions of law in favour of the appellants and set aside the impugned judgment and decree and dismiss the suit in *toto*.

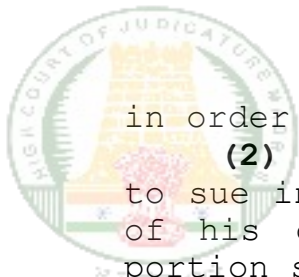
5. Per contra, the learned counsel appearing for the respondent submitted that the impugned judgment and decree do not call for any interference.

6. I carefully considered the rival contentions and went through the evidence on record.

7. There is no dispute regarding the relationship among the parties. There is also no dispute that the suit properties were purchased by the plaintiff's father. The plaintiff's attempt to question the settlement deed executed by her mother settling her 1/3rd share in the suit property ended in vain. Now the only point for determination is whether the plaintiff is entitled to 1/6th share in the suit property. The 1st substantial question of law is whether the present suit was hit by Order 2 Rule 2 of C.P.C. Order 2 Rule 2 of C.P.C is 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 reliefs- 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.

8. Only if the defendants can show that the present suit is anchored on the cause of action which was basis for filing the earlier suit, then, they can invoke Order 2 Rule 2 of C.P.C. The scope of Order 2 Rule 2 of C.P.C was explained by the Hon'ble Supreme Court in the decision reported in **2015 (11) SCC 12 (Inbasegaran v. S. Natarajan)**, as follows:-

"23. In the case of Deva Ram vs. Ishwar Chand, (1995) 6 SCC 733, this Court, considering its various earlier decisions, observed as under:-

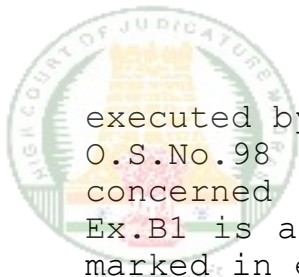
"14. What the rule, therefore, requires is the unity of all claims based on the same cause of action in one suit. It does not contemplate unity of distinct and separate causes of action. If, therefore, the subsequent suit is based on a different cause of action, the rule will not operate as a bar. (See Arjun Lal Gupta v. Mriganka Mohan Sur, (1974) 2 SCC 586; State of M.P. v. State of Maharashtra, (1977) 2 SCC 288; Kewal Singh v. B. Lajwanti, (1980) 1 SCC 290).

15. In Sidramappa v. Rajashetty, (1970) 1 SCC 186, it was laid down that if the cause of action on the basis of which the previous suit was brought, does not form the foundation of the subsequent suit and in the earlier suit the plaintiff could not have claimed the relief which he sought in the subsequent suit, the latter [pic]namely, the subsequent suit, will not be barred by the rule contained in Order 2 Rule 2, CPC."

9. In O.S.No.98 of 2005 on the file of the Principal Sub Court, Nagercoil, the plaintiff had challenged the settlement deed dated 28.01.2004 executed by the first defendant. In the present suit, the plaintiff is only claiming her 1/6th share in the suit property. Thus, the cause of action for both the suits are entirely different. When there is no identity of the cause of action between the suits, the question of invoking Order 2 Rule 2 of C.P.C will not arise at all. The 1st substantial question of law is answered against the appellants.

10. The defendants would claim that in view of Ex.B1, dated 08.09.1977, the plaintiff cannot maintain the present suit for

<https://hccservices.tn.gov.in/Eservices/> is the certified copy of the relinquishment deed



executed by the plaintiff. The said document was marked as Ex.B10 in O.S.No.98 of 2005. The certified copy was issued by the court concerned and the same was marked as Ex.B1 in the present suit. Ex.B1 is an unregistered document. Of-course, it was allowed to be marked in evidence. The courts below declined to give effect to the said document. I cannot fault the approach adopted by the courts below. While executing the deed of release or relinquishment, the executant is giving up his or her share in the subject matter of the document in favour of the remaining co-sharers. Therefore, it is a compulsorily registrable document as per Section 17 of the Registration Act, 1908. Dealing with an un-registered deed of exchange, the Hon'ble Supreme Court in the decision reported in **(2018) 7 SCC 646 (Shyam Narayan Prasad Vs. Krishna Prasad & Ors.,)** held as follows:-

"19. Section 49 of the Registration Act, 1908 provides for the effect of non-registration of the document which is as under:

"49. Effect of non-registration of documents required to be registered.-No document required by section 17 {or by any provision of the Transfer of Property Act, 1882 (4 of 1882)}, to be registered shall-

(a) affect any immovable property comprised therein, or

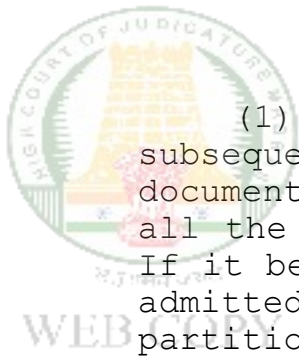
(b) confer any power to adopt, or

(c) Be received as evidence of any transaction affecting such property or conferring such power, Unless it has been registered:"

20. Section 17(i)(b) of the Registration Act mandates that any document which has the effect of creating and taking away the rights in respect of an immovable property must be registered and Section 49 of the Registration Act imposes bar on the admissibility of an unregistered document and deals with the documents that are required to be registered under Section 17 of the Registration Act. Since, the deed of exchange has the effect of creating and taking away the rights in respect of an immovable property, namely, RCC building, it requires registration under Section 17. Since the deed of exchange has not been registered, it cannot be taken into account to the extent of the transfer of an immovable property.

21. In *Roshan Singh & Ors. v. Zile Singh & Ors.* 1988 (2) SCR 1106, this Court was considering the admissibility of an unregistered partition deed. It was held thus:

".....Section 17(i)(b) lays down that a document for which registration is compulsory should, by its own force, operate or purport to operate to create or declare some right in immovable property. Two propositions must therefore flow:



(1) A partition may be affected orally; but if it is subsequently reduced into a form of a document and that document purports by itself to effect a division and embodies all the terms of bargain, it will be necessary to register it. If it be not registered, S.49 of the Act will prevent its being admitted in evidence. Secondary evidence of the factum of partition will not be admissible by reason of S.91 of the Evidence Act, 1872." (emphasis supplied)

22. It is clear from the above judgment that the best evidence of the contents of the document is the document itself and as required under Section 91 of the Evidence Act the document itself has to be produced to prove its contents. But having regard to Section 49 of the Registration Act, any document which is not registered as required under law, would be inadmissible in evidence and cannot, therefore, be produced and proved under Section 91 of the Evidence Act. Since Exhibit P2 is an unregistered document, it is inadmissible in evidence and as such it can neither be proved under Section 91 of the Evidence Act nor any oral evidence can be given to prove its contents. Therefore, the High Court has rightly discarded the exchange deed at Exhibit P2."

11.A learned Judge of this Court in the decision reported in **(2011) 2 MWN (Civil)** (Vasanthamma v. Gunasekaran) held as follows :

"13.In a decision rendered by me in *Kaliyappan v. Kulanthaivelu*, 2011 (1) LW 189 where an unstamped Partition Agreement Deed was produced before the Court and the Court below rejected the contention that there was an agreement in the partition agreement that the property to be divided on a future date and that no partition takes place on the date of execution of Partition Agreement. In the said case, the Partition Agreement shows that by virtue of the document, the parties have divided the properties in the presence of witnesses and they got the properties mentioned in A and B schedule. I have recorded the finding therein that the intention of the parties could be gathered from the recitals contained in the agreement. They intended to create right over the properties by virtue of the document itself which is indicated by the recital to the effect that in the presence of witnesses, they have divided the properties. There is no option for this Court except to interpret the said recital that both of them by means of agreement divided the properties. Hence, the document would attract Section 2(15) of the Stamp Act and Section 17(1)(b) of the Registration Act. Finally I have held that the document is liable for stamp duty and compulsorily registrable and hence, it is not admissible in



14.Likewise in this case also, since by means of execution of the document, the Respondent is stated to have released his right over the property. Hence, the document has to be registered and without registration, it could not be admitted in evidence...."

12. Adopting the very same logic, Ex.B1 is also not admissible in evidence. For the purpose of proving that, the plaintiff had given up her right in the suit property. Once Ex.B1 does not have the aforesaid legal effect, then, the irresistible conclusion is that the plaintiff's 1/6th share in the suit property remain intact. The 2nd substantial question of law is also answered against the appellant. In my respectful view, the very framing of the 3rd substantial question of law does not appear to be in order.

13. The impugned judgment and decree is confirmed. I do not find any merit in the second appeal. The second appeal stands dismissed. No cost. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1.The Additional Subordinate Judge, Nagercoil.

2.The Principal District Munsif Court, Nagercoil.

Copy to

The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.M.P.SENTHIL, Advocate (SR-23903[F] dated 26/07/2021)

S.A.(MD)No.557 of 2013

26.07.2021

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