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C.R.P.(MD) No.168 of 2011

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED:20.03.2024

CORAM:

THE HONOURABLE MR. JUSTICE K.K.RAMAKRISHNAN

C.R.P.(MD).No.168 of 2011

S.Gabriel

... Petitioner/1st Respondent/Plaintiff

Vs.

Elias

2. E.Leema Rose

3. E.Joseph Alexander

4. E.Pious

... Respondents 1 to 4/Petitioners/
Defendants 18 to 21

5.S.Maria Rengitham

Maria Glory (Died)

7. George Mary

8. S.Clipose

9.S.Lawrance Mary

10.Maria Lourdu

11. R.Aanee Rajam

12.R.Elgin

Bright Rani (Died)



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Victoriyal (Died)

15.M.Rosari

M.Berkmans

17.M.Maria Rose

18.M.Franciskal

19.M.Paul

20.M.Johnson

21.M.Mangala Rose

22.A.Kala

23.Suja

24.A.Suji

25.Alphone Mary

26.Amala

27.Maria Selvi

... Respondents 5 to 27/Respondents 2 to 24/
Defendants 1 to 17 and 22 to 27

28.L.Aknas

29.A.Amali

30.L.Albert

31.L.Edwitch

32.L.Sahaya Mary



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L.Venanjuse (Died)

34.L.Punitha

35.L.Narchisan

36.L.Rojiga

(Respondents 28 to 36 are brought on record as LR's of the deceased 14th respondent vide Court order dated 11.09.2023 made in M.P(MD).Nos.1 to 3 of 2013 in C.R.P(MD).No.168 of 2011)

37.S.Sahaya Ramula

38.Minor V.Vijo Rashni

(Rep by her mother natural Guardian the 37th Respondent)

(Respondents 37 and 38 are impleaded as Lrs of the deceased R. 33 and 37th Respondent is appointed as a Guardian of the minor 38th Respondent vide Court order dated 04.09.2023 made in M.P(MD).Nos.1 and 2 of 2014 in C.R.P(MD).No.168 of 2011)

39. J.Charles

40.C.Akash

41.C.Akashia

(Respondents 39 to 41 are brought on record as LR's of the deceased 13th Respondent vide Court order dated 07.07.2023 made in C.M.P(MD).Nos.3372, 3373 and 3376 of 2022 in C.R.P(MD).No.168 of 2011)

42.E.Bensigar

43.B.Bewin

44.B.Dicklin



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(Respondents 42 to 44 are brought on record as LR's of the deceased 6th Respondent vide Court order dated 04.09.2023 made in C.M.P(MD).No.4054 of 2022 in C.R.P(MD).No.168 of 2011)

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, praying to call for the records and set aside the order and decretal order, dated 27.08.2010, passed in I.A.No.530 of 2009 in O.S.No.207/2007, pending on the file of the Court of Additional District Munsif at Eraniel.

For Petitioner : Mr.M.Suresh

For Respondents : Mr.C.Kishore for R2

: Mr.S.Suresh Kumar, for R27

: Died - (R1, R16, R13, R14 & R33)

: No appearance
for R4, R5, R7 to R12, R15 to R26

ORDER

The petitioner has filed this Civil Revision Petition to set aside the order and decretal order, dated 27.08.2010, passed in I.A.No.530 of 2009 in O.S.No.207/2007, pending on the file of the Court of Additional District Munsif at Eraniel.



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2.The Civil Revision petitioner is the plaintiff in O.S.No.207 of 2007 on the file of the Additional District Munsif at Eraniel, Kanyakumari District, who filed a suit seeking partition and separate possession of 1/8 share in respect of the Plaint schedule properties and permanent injunction restraining the defendants from making alienation etc.,

3.In the plaint, it is averred that the petitioner's father namely Soosai Nayagam and his brother Robert Belarmin filed a suit in O.S.Nos. 57 of 1986 and 60 of 1989 on the file of the Subordinate Court, Padmanabhapuram, seeking relief of partition and separate possession of their 1/2 share of the suit schedule properties. Both the suits were tried by the learned Subordinate Judge and the judgment was pronounced without signing it on 25.04.1994. Thereafter, the vigilance enquiry was made on the complaint made by the petitioner's father. Thereafter, the petitioner filed a writ petition in W.P.(MD).No.23820 of 2007, before this Court and the same was disposed of with a direction to return the case bundle in O.S.No.57 of 1986 and O.S.No.60 of 1989 to the Subordinate Court, Padmanabhapuram, from the District Court, Kanyakumari at Nagercoil



and proceed further. Thereafter, the said Soosai Nayagam and Robert Belarmin respectively died on 06.01.2001 and 29.11.2004. Thereafter, the second defendant in O.S.No.57 of 1986 died on 13.06.2001. The legal heirs of the said Francis Mary executed a sale deed, dated 13.11.2007 in favour of one Maria Selvi, who is absolute owner. In the said circumstances, the petitioner filed a present suit in O.S.No.207 of 2007 on the file of the Additional District Munsif, Eraniel, seeking for partition. During the pendency of the suit, the defendants 18 to 21 filed an application in I.A.No.530 of 2009 in O.S.No.207 of 2007 under Section 10 C.P.C., seeking stay of suit stating that the revision petitioner's father already filed a suit for partition claiming half share of the suit schedule properties. The said suit was contested by the present revision petitioner. Earlier, the petitioner's father filed a suit in O.S.No.57 of 1986 and O.S.No.60 of 1989 before the Subordinate Judge, Padmanabhapuram, seeking partition of the suit schedule properties and the learned Subordinate Judge, dismissed the suit, at the time of delivering the judgment, without signing the same. The present suit and the earlier suit were not same cause of action. The plaint in the earlier suit was dismissed as abated and the present suit was filed with different cause of action and hence, there was no merit in the claim of the



petitioner. The learned trial judge, by the impugned fair and decreetal order dated, 27.08.2010 allowed the application. The plea of the petitioner that there is different cause of action is not correct and the parties to the plaint are different parties and specifically considered in Order 22 Rule 9 of C.P.C. The case of the dismissal of the suit is for abated and no fresh suit got on the same cause of action. Hence, the dismissal as abatement according to the learned trial judge is that the suit is still pending. This Court considering the same, by order dated 07.09.2007, in W.P.(MD).No.23820 of 2007, disposed the petition. Challenging the fair and decreetal order dated 27.08.2019, the petitioner filed the present revision.

4.The learned counsel appearing for the petitioner submitted that Section 10 of C.P.C is applicable only to the pending suit. The said suit was not pending. Hence, the order of the learned trial judge to entertain the petition under Section 10 of C.P.C., is not maintainable. Further, the cause of action of the suit arose against different parties to the present suit and earlier suit was not properly considered by the learned trial Judge. Hence, he seeks for the interference in the order passed by the learned trial judge.



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5.Per contra, the learned counsel appearing for the contesting respondents/defendants, submitted that this suit and earlier suit filed by the petitioner's father seeking the same relief of partition against the other co-sharers. The said suit was dismissed as abated. In the said circumstances, as per the Order 22 Rule 9 of C.P.C., without restoring the petition, the present suit has been filed and hence, the petition filed under Section 10 of C.P.C., was correctly entertained by the learned trial Judge.

6.According to the learned counsel for the second respondent, the present application under Section 10 of C.P.C., considering the suit, which was dismissed for abatement, the provision for the restoration of the said suit is still open. There is no final adjudication in the said suit. Therefore, the petition filed under Section 10 of C.P.C., by the plaintiff is maintainable and the learned trial judge correctly passed the order filed by him in I.A.No.530 of 2009 in O.S.No.207 of 2007.

7.This Court considered the rival submission made on either side and also perused the record and the impugned order.



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8.The entire case revolves around consideration of Section 10 of C.P.C., which reads as follows;

Section 10. Stay of suit.

No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in 1[India] have jurisdiction to grant the relief claimed, or in any Court beyond the limits of 1[India] established or continued by 2[the Central Government] and having like jurisdiction, or before 4[the Supreme Court].

Explanation.--The pendency of a suit in a foreign Court does not preclude the Courts in 1[India] from trying a suit founded on the same cause of action.

9.The word incorporated in the section is “the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties” “where such suit is pending” which clearly denotes that the said suit was pending before the



Court. Hence, the same is deemed to be pending. He further stated that as per Order 22 Rule 9 of C.P.C., it is duty of the petitioner herein as legal heirs of the original plaintiff namely the father, to have filed restoration application and without doing the same, he filed a present suit, which is according to them, against Order 22 Rule 9. Hence, the petition under Section 10 of C.P.C., was correctly allowed. This Court is unable to accept the argument of the learned counsel for the respondents for the reason that the failure on the part of the plaintiff to restore the earlier suit upon the death of the father is not a ground to entertain the application under Section 10 of C.P.C. It is adjudicator issue before the present suit at the proper stage.

10.Further, Section 10 of C.P.C., clearly stated that it is pending case. As on date, there is no case pending O.S.Nos.57 of 1986 and 60 of 1989 on the file of the Subordinate Court, Padmanabhapuram.

11.To verify the same, this Court called for the report from the concerned jurisdictional Court and obtained a report stating that the suit was dismissed and the same is extracted hereunder:



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From
Thiru.R.Samuel Benjamin M.A.B.J.,
Subordinate Judge,
Padmanabhapuram.

To
The Hon'ble Principal District Judge,
Kanyakumari at
Nagercoil.

D.No: 201/2024 Dated: 19.03.2024

Honoured Sir,

Sub : Cases -- Civil Cases in O.S.No: 56/1986 on the file of Sub Court,
Padmanabhapuram - present stage of the case - particulars -
called for - Submitted - Regarding.

Ref: Phone message of the Hon'ble Principal District Judge,
Kanyakumari at Nagercoil.

I am submitting here with the particulars as called for in the reference
cited above

Sl. No.	Case No.	Present Stage
1.	O.S.No. 56/1986	As per suit register Suit Disposed off on: 24.10.1990. இத்தினால் வாதியின் வழக்கு தீர்மானம் செய்திருக்கிறது. இவ்வழக்கில் கண்டுள்ள குற்றத்தைக்காண பருத்திக் கொண்டு சொல்வதற்கான உரிமை பொறுத்து உத்தரவு ஒன்றும் இக்கணம் வந்து வட்டணை செய்யவில்லை தீர்ப்பானது வழங்கப்படுகிறது. (xerox copy of Suit register is enclosed herewith.(i.e) The appeal entry in the suit register (SA 158/95 Order dated: 18.10.2001) is in torned condition.

Yours faithfully,

[Signature]
Subordinate Judge,
Padmanabhapuram.



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11.In view of the above discussion that the suit is not pending, the fair and final decreetal order passed in I.A.No.530 of 2009 in O.S.No.207 of 2007, dated 27.08.2010, by the learned Additional District Munsif at Eraniel, is liable to be set aside.

12.Accordingly, this civil revision petition is allowed by setting aside the fair and decreetal order passed in I.A.No.530 of 2009 in O.S.No.207 of 2007, dated 27.08.2010, by the learned Additional District Munsif at Eraniel. It is open to the respondents to agitate the issue before the Court below at the time of trial.

20.03.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
vsg



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To

1. The Additional District Munsif
at Eraniel.
2. The Section Officer,
VR Section(Records)
Madurai Bench of Madras High Court, Madurai.



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K.K.RAMAKRISHNAN, J.

vsg

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