



C.R.P.(MD)No.2163 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 11.12.2023

PRONOUNCED ON:11.03.2024

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.R.P.(MD)No.2163 of 2023

and

C.M.P.(MD)No.10857 of 2023

1.Viswam @ Viswanathan

2.A.Sethu

3.A.Pandidorai

4.A.Krishnan

: Petitioners/Respondents 5 to 8/
Respondents 4 to 7 / Defendants 4 to 7

5.Vasantha

6.S.Thavamani

7.S.Suresh Kumar

: Petitioners/Respondents 25 to 27 /
Legal heirs of respondent No.5/
Legal heirs of defendnat No.5

Vs.

1.R.Alagarsamy

: Respondent/Petitioner/
Respondent No.20 / 3rd party

A.Sathasivam(died)

A.Annapooranam(died)

A.Somasundaram(died)



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A.Chandran @ Ramachandran (died)

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2.The Village Administrative Officer,

Sivagangai District.

: 2nd Respondent/Respondent No.9/

Respondent No.8 / Defendant No.8

3.S.Jayapal

4.S.Baskaran

5.S.Selvi

6.S.Mohanambal

7.S.Saravanan

: Respondents 3 to 7/Respondents 10 to 14/

Respondents 9 to 13 / legal heirs of the

defendant No.2

8.R.Panchavarnam

9.R.Kalidoss

10.R.Muthu

11.R.Venkatachalam

12.R.Amudha

13.R.Malliga

: Respondents 8 to 13 / Respondents 15 to 20/

Respondents 14 to 19 / legal heirs of

defendant No.3

14.S.Banumathi

15.S.Vijayalakshmi

16.S.Sangeetha

17.Akash Vignesh

: Respondents 14 to 17/Respondents 21 to 24/

Petitioners 2 to 5/Legal heirs of the plaintiff

PRAYER:- Civil Revision Petition is filed under Article 227 of the Constitution of India to strike of the Interlocutory Application in I.A.No. 1 of 2019 in I.A.No.403 of 2010 in O.S.No.68 of 1994, on the file of the learned Sub Judge, Devakottai.



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For Petitioners : Mr.J.Jeyakumaran

For Respondents : Mr.V.Nambi Nachiyar
for Mr.V.Angusamy
for R.1

: R.2 to R.17 – dispensed with

ORDER

The Civil Revision Petition has been filed invoking Article 227 of the Constitution of India seeking orders to strike off the Interlocutory Application in I.A.No.1 of 2019 in I.A.No.403 of 2010 in O.S.No.68 of 1994, on the file of the Subordinate Court, Devakottai.

2. One Sathasivam has filed a suit for partition against Annaporam Ammal and 7 others before the Subordinate Court, Sivagangai and subsequently the suit was transferred to the Subordinate Court, Devakottai and the same was taken on file in O.S.No.68 of 1994. As per the genealogy tree produced by the revision petitioner, it is their case that one Alagu Servai had two wives viz., Kalimuthu Ammal and Annapooram (first defendant), Kalimuthu Ammal had two sons viz.,



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Somasundaram (2nd defendant) and Chandran @ Ramachandran (3rd defendant), that the second wife Annapooram had five sons viz., Viswam @ Viswanathan (4th defendant), Sathasivam (plaintiff), Sethu (5th defendant), Pandidorai (6th defendant) and Krishnan (7th defendant) and that during the pendency of the above proceedings, the plaintiff and some of the defendants had died and their legal representatives were brought on record.

3. The case of the revision petitioners is that the suit in O.S.No.68 of 1994 was decreed in part on 27.10.1994, that a preliminary decree came to be passed in respect of “A” and “B” schedule properties, whereas the suit in respect of “C” schedule property was dismissed, that the legal representatives of the deceased 2nd defendant who are the respondents 7 to 11 in the present revision have preferred an appeal in A.S.(MD)No.38 of 1995, challenging the judgment and decree passed in O.S.No.68 of 1994 before this Court, mainly challenging the decree in respect of “B” schedule property, that the appeal came to be dismissed on 21.11.2011, that the appellants in the first appeal have filed Special Leave Petition before the Hon'ble Supreme Court of India in S.L.P.No. 12570 of 2012 and the same was also dismissed on 30.04.2012, that they



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have also filed a review petition in Review Petition (Civil)No.2547 of 2012 and the same came to be dismissed on 09.01.2013 and that therefore, the decree and the judgment passed in O.S.No.68 of 1994 has attained finality. It is their further case that originally the plaintiff has filed a petition under Order 20 Rule 18 C.P.C., for passing of final decree in I.A.No.403 of 2010, that the trial Court has appointed an Advocate Commissioner on 28.02.2012, that the Advocate Commissioner has inspected the properties and filed his report and plan on 19.08.2016 and that the final decree petition in I.A.No.403 of 2010 is still pending for passing of final decree.

4. It is their further case that the first respondent – Pandi @ Alagarsamy has filed an application in I.A.No.432 of 2012 to implead himself as the respondent in the final decree petition in I.A.No.403 of 2010 and the same was allowed on 09.11.2012, that thereafter, the said Pandi @ Alagarsamy has filed another application in I.A.No.122 of 2013 under Order 20 Rule 18 C.P.C., seeking orders to pass a fresh preliminary decree by modifying the shares and then to pass a final decree, that the said petition in I.A.No.122 of 2013 was dismissed for default on 06.07.2018, that the first respondent without taking any steps for



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restoring the application in I.A.No.122 of 2013, which was dismissed for default, has filed another application in I.A.No.1 of 2019 under Order 20 Rule 18 C.P.C., seeking to pass preliminary decree and to allot a share to him and thereafter to pass preliminary decree.

5. The revision petitioners, by alleging that the first respondent has suppressed the very filing of the earlier petition in I.A.No.122 of 2013 and the dismissal of the same, has filed the present application in I.A.No. 1 of 2019 for the very same relief, that the intention of the first respondent is to drag on the proceedings for another ten years, that he does not have any right in the property and that too was not canvassed by him in the main suit, that since the first respondent was not a party to the Suit, First Appeal, the Special Leave Petition and the Review petition, he does not have any locus standi to file the present application, that since the first respondent was not a party in the earlier proceedings, he cannot enjoy the fruits of the preliminary decree by filing the above application under Order 20 Rule 18 C.P.C., and the very filing of the same would amount to abuse of process of Court and that therefore, the petitioners were constrained to file the present revision to strike off the petition in



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I.A.No.1 of 2019 pending on the file of the Subordinat Court, Devakottai.

6. The case of the first respondent is that his mother Vijayalakshmi is the sister to the parties to the original suit, that the suit properties are the ancestral properties and till now remained as undivided, that the parties have not chosen to implead his mother in the suit proceedings, that the first respondent came to know about the above proceedings only from the Commissioner's visit to the property on 31.03.2012, that since the petitioners' mother is having a share in the suit property as per the Hindu Succession Act, the first respondent being her only son is entitled to get that share in the suit property and that therefore, he was constrained to file the above application to declare that the first respondent is entitled to get a share in the suit property and then to appoint Advocate Commissioner and to pass a final decree on the basis of the report to be filed by the Commissioner.

7. The main contention of the first respondent is that his mother Vijayalakshmi was a co-owner and was having a share in the suit



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properties and that the parties without impleading his mother, have taken the above proceedings.

8. The revision petitioner No.4, who is the 8th respondent in I.A.No. 1 of 2019 now under challenge, has filed a counter statement, wherein he has raised the defence that the first respondent has not shown the year in which his mother had died, that the first respondent, after the death of his mother, ought to have taken steps to safeguard her right in the property within three years after attaining majority or within 12 years from the date of death of his mother, that the first respondent has no right or locus standi to claim partition after 26 years, that the first respondent's mother is not having any share in the suit property, even as per the Hindu Succession Act or Indian Succession Act, that the claim of the first respondent and his mother were lost by the doctrine of ouster and that the above petition has been filed only to drag on the proceedings and thereby preventing the decree holders from realising the fruits of the decree.

9. As rightly contended by the learned Counsel for the revision petitioners, the first respondent's mother or the first respondent, after the



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death of his mother, have not taken any steps to get themselves implicated in the earlier proceedings.

10. It is settled law that in a suit for partition, each and every sharer to the suit property is a necessary party and in case if any sharer is excluded in a suit for partition, the same would be fatal to the suit itself. It is pertinent to note that the fourth revision petitioner in the counter statement has nowhere whispered that the first respondent's mother – Vijayalakshmi is not a co-sharer and she has no connection whatever with the family of the original parties. On the other hand, as already pointed out, they have raised a stand that the first respondent has not taken any action for more than 26 years and that the rights if any, was lost by the doctrine of ouster. As rightly contended by the learned Counsel for the first respondent, the defence taken in the counter statement of the fourth revision petitioner can only be gone into at the enquiry and those pleas by itself cannot be taken as grounds to strike off the petition in I.A.No.1 of 2019 itself.

11. In the revision grounds, the petitioners have taken a main ground that since the first respondent's earlier application in I.A.No.122



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of 2013 filed under Order 20 Rule 18 C.P.C., was dismissed for default, the present application for the very same relief cannot be sustained. The main contention of the revision petitioner is that the first respondent after dismissal of the earlier petition ought to have taken steps for restoring the said petition and he is not entitled to file another application for the very same relief and that too by suppressing the filing and dismissal of the earlier petition.

12. Considering the above, it is clear that the revision petitioners have been attempting to take a technical plea that the subsequent petition in I.A.No.1 of 2019 was clearly barred on account of the statutory bar under Order 9 Rule 9 C.P.C. It is pertinent to note that even if a suit for partition is dismissed for default, there is absolutely no bar for filing subsequent suit for partition and as such, the bar under Order 9 Rule 9 C.P.C., will not apply.

13. A Division Bench of this Court in ***Ramasesha Iyer and another Vs. C.V.Ramanujachariar*** reported in ***AIR 1935 Madras 458***, while considering the effect of dismissal of the earlier suit for default in



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respect of the subsequent suit for partition, has specifically observed as follows:

"The first point is whether the present suit is barred under O. 9, R.9 by reason of the former suit. Cases of a second suit for partition may fall under three classes. (1) Where the former suit ended in a final decree, e.g. 3 Bom. L.R.91(1) distinguished in 10 C.W.N.839 (2), cases where there was a preliminary decree but not a final decree example of this are 1915 All.1(3), 33 Cal. 1101(4) and 1918 Mad.751(5). (3) Cases where the suit was dismissed for default. 28 All.627(6). The case before us falls under the last heading. Following the decisions in 8 All 627(6) and 1926 Mad.1018(7), we hold that the present suit is not barred. The reason is that, even after the dismissal of the former suit, the jointness continues and there is a continuing cause of action."

14. A learned Judge of this Court, in the case of **Rajah v. Maheswara Rao v. Rajah v. Rajeswara Rao** reported in **1967(1) MLJ 175**, has held that the subsequent partition can be filed without getting liberty in the earlier suit and the relevant passage is extracted hereunder:

"The question next arises whether the plaintiff should have liberty to bring a fresh suit under Order 23 rule, 1, Civil Procedure Code. So far as a suit for partition or a suit for



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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, under Order 23 rule, 1, Civil Procedure Code, he will nevertheless have a right to file a suit for partition at any time he pleases."

15. In the case of ***S.Ramasamy Vs. Velappa Gounder (deceased)*** reported in ***(2002)2 MLJ 830***, this Court has observed that the finding of the trial Court that the dismissal of the earlier suit would bar the present is not correct, that the earlier suit was dismissed for default and not on merits and the suit being one for partition, the appellant cannot be barred from filing the present suit.

16. The Hon'ble Supreme Court in the case of ***Vidya Devi @ Vidya Vati (dead) by LRs, Vs. Prem Prakash and Others*** reported in ***1995 AIR SC 1789***, has observed that there is no period of limitation for filing a suit for partition, as a partition is an incident attached to the property and there is always a running cause of action for seeking partition by one of co-sharers and the relevant passages are extracted hereunder:



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“The legislature has not prescribed any period of limitation for filing a suit for partition because partition is an incident attached to the property and there is always a running cause of action for seeking partition by one of the co-sharers if and when he decides not to keep his share joint with other co-sharers. Since the filing of the suit is wholly dependent upon the will of the co-sharer, the period of limitation, specially the date or time from which such period would commence, could not have been possibly provided for by the legislature and, therefore, in this Act also a period of limitation, so far as suits for partition are concerned, has not been prescribed. This, however, does not mean that a co-sharer who is arrayed as a defendant in the suit cannot raise the plea of adverse possession against the co-sharer who has come before the Court as a plaintiff seeking partition of his share in the joint property.

Normally, where the property is joint, co-sharers are the representatives of each another. The co-sharer who might be in possession of the joint property shall be deemed to be in possession on behalf of all the co-sharers. As such, it would be difficult to raise the plea of adverse possession by one co-sharer against the other. But if the co-sharer or the joint owner had been professing hostile title as against other co-sharers openly and to the knowledge of others joint owners, he can, provided the hostile title or possession has continued



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uninterruptedly for the whole period prescribed for recovery of possession, legitimately acquire title by adverse possession and can plead such title in defence to the claim for partition.”

17. Considering the settled legal position referred above, there is absolutely no bar or prohibition for filing second suit for partition, even if the earlier suit for partition was dismissed for default. If that be the legal position, there cannot be any bar or prohibition for filing the second application for final decree. Hence, the present contention of the revision petitioners that the application in I.A.No.1 of 2019 is legally not maintainable, in view of the dismissal of the earlier petition in I.A.No. 122 of 2013, cannot be accepted. Moreover, it is evident from the records that since the amendments were not carried out, the said petition in I.A.No.122 of 2013 was dismissed for default on 06.07.2018. Except the above, the revision petitioners have not canvassed any other reason or ground to strike off the petition in I.A.No.1 of 2019. Hence, this Court concludes that the Civil Revision Petition is devoid of merits and the same is liable to be dismissed.



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18. In the result, the Civil Revision Petition is dismissed.

Consequently, the connected Miscellaneous Petition is also dismissed.

There shall be no order as to costs. Considering the fact that the proceedings are pending from 1994 onwards, the learned trial Judge is directed to conduct enquiry in I.A.No.1 of 2019 and decide the first respondent/petitioner's prayer with respect to the preliminary decree within a period of three months from the date of receipt of a copy of this order and subject to the result of the said decision, to proceed with the final decree proceedings and dispose of the same.

11.03.2024

NCC : Yes : No
Index : Yes : No
Internet : Yes : No
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To

1. The Subordinate Court, Devakottai.
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

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PRE-DELIVERY JUDGMENT MADE IN

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