



S.A.(MD)No.379 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 30.03.2026

DELIVERED ON : 30.04.2026

CORAM:

THE HONOURABLE MR.JUSTICE P.B.BALAJI

S.A.(MD)No.379 of 2017

and

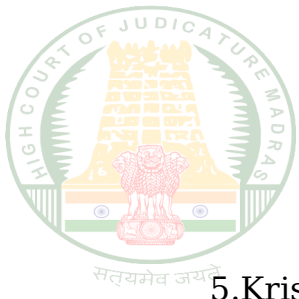
C.M.P.(MD)No.8069 of 2017

- 1.Rethnadhas
- 2.Sylus
- 3.Jebamani
- 4.Gnanaselvam
- 5.Ambi
- 6.Abraham
- 7.Christhudhas
- 8.Beula
- 9.Mary
- 10.Jose
- 11.Amala Pushpam
- 12.Baby

... Appellants

Vs.

- 1.Ramadhas (Died)
- 2.Baby (Died)
- 3.Lalitha
- 4.Mohandhas



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- 5.Krishnadhas
6.Vijayakumari
7.Sunil Kumar
8.Sugin Kumar
9.Suma
10.Sreemathy
11.Kiji Thilakavathy
12.Mahesh Ram
13.Priyadhnya

... Respondents

[Respondents 10 to 12 are brought on record as legal heirs of the deceased 1st respondent vide court order dated 04.01.2024 made in C.M.P.(MD)Nos.3189, 3190 and 3191 of 2023 in S.A.(MD)No.379 of 2017]

[13th respondent is brought on record as legal heir of the deceased 2nd respondent vide court order dated 04.01.2024 made in C.M.P. (MD)Nos.3193, 3194 and 3195 of 2023 in S.A.(MD)No.379 of 2017]

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, praying to allow the Second Appeal and set aside the judgment and decree in A.S.No.68 of 2011 dated 03.02.2017, on the file of the Sub Court, Kuzhithurai, reversing the judgment and decree in O.S.No.14 of 2008 dated 13.12.2010, on the file of the 1st Additional District Munsif Court, Kuzhithurai.



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For Appellants : Mr.C.Godwin
For Respondents 3 to 9 : Mr.S.Meenakshi Sundaram,
Senior Counsel
for Mr.N.Ka.Natraj
For Respondents 10 to 13 : No appearance

JUDGMENT

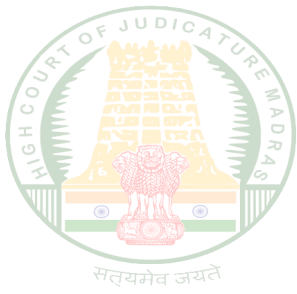
Defendants 2 to 13, aggrieved by the reversal findings rendered by the Subordinate Judge, Kuzhithurai, in A.S.No.68 of 2011 dated 03.02.2017, setting aside the judgment and decree in O.S.No.14 of 2008 dated 13.12.2010, on the file of the First Additional District Munsif Court, Kuzhithurai, are the appellants herein.

2.The above Second Appeal was admitted by this court on 30th August 2017, on the following substantial questions of law:

“1.Whether the observation made in Ex.A. 7 confer fresh cause of action to file O.S.No.14 of 2008?

2.Whether the suit is barred by limitation in view of the final decree passed in I.A.No.925 of 1978, dated 22.03.1983 and parties have taken delivery of their respective share?

3.Whether the Court has got power to grant leave to file fresh suit dehors Order 23 C.P.C?



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4. Whether the suit is barred by Order 2

Rule 2 in view of Ex.A.8 judgment?"

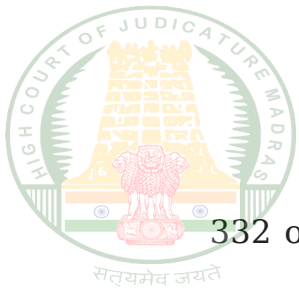
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3.I have heard Mr.C.Godwin, learned Counsel for the appellants and Mr.S.Meenakshi Sundaram, learned Senior Counsel for Mr.N.Ga.Nataraj, learned Counsel for the respondents.

4.The brief facts that are necessary for a decision in the above Second Appeal are as follows:

4.1.The plaintiffs are the legal heirs of Ponnumani Nadar and Janaki. The plaintiffs sought for partition and separate possession of 22 cents, claiming right under exhibits A.1, A.3 and A.5 between the years 1965 and 1967. The case of the plaintiffs is that the property was purchased from defendants 50 to 53 in an earlier litigation in O.S.No.161 of 1962. The defendants in the present suit, who are the appellants in this Second Appeal are none else than the legal heirs of defendants 50 to 53 in O.S.No.161 of 1962.

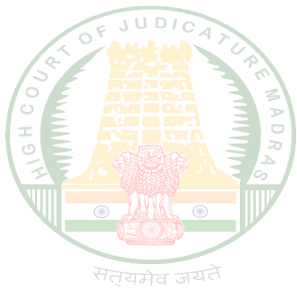
4.2.O.S.No.161 of 1962, was disposed of, with no share being allotted to Ponnumani Nadar and Janaki. Ponnumani Nadar filed an appeal in A.S.No.165 of 1983, before the Subordinate Court, Kuzhithurai. Pending the said appeal, two suits came to be filed, one for permanent injunction and the other for declaration. O.S.No.



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332 of 1989, was filed by Ponnumani Nadar, seeking an injunction to restrain the appellants from taking delivery of a property in terms of the decree in O.S.No.161 of 1962 and another suit in O.S. No.336 of 1980. O.S.No.51 of 1990, was filed by Janaki, wife of Ponnumani Nadar for declaration. Both the suits were however, dismissed by the trial court. The dismissal of the two suits was brought to the notice of the Appellate Court in A.S.No.165 of 1983, the appeal filed by Ponnumani Nadar, challenging the decree in O.S.No.161 of 1962.

4.3.The appeal in A.S.No.165 of 1983, was however, dismissed on 28.08.1991. Thereafter, the plaintiffs filed the present suit in O.S.No.14 of 2008 on 02.12.2008, claiming that the Appellate Court in A.S.No.165 of 1983, had given them liberty to *sue* for partition and thus, the suit came to be filed. The suit was resisted by the defendants, contending that there was no such liberty granted by the Appellate Court; the suit was hopelessly barred by limitation; the suit was also barred under the provisions of Order II Rule 2 of the Code of Civil Procedure. The trial court after full enquiry, found the suit to be barred by *res judicata*, in view of the findings rendered in O.S.No.161 of 1962 and confirmed in A.S.No.165 of 1983.



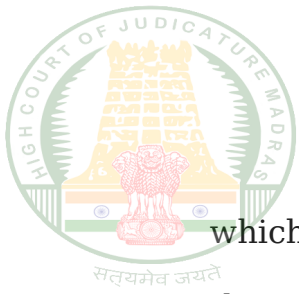
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4.4.The plaintiffs, aggrieved by the dismissal of the suit, preferred A.S.No.68 of 2011, before the Subordinate Court, Kuzhithurai. The First Appellate Court, finding that the suit for partition was maintainable and cannot be barred under Order II Rule 2 of CPC, decreed the suit by allowing the First Appeal. It is as against the said reversal findings, that the defendants have come up by way of this Second Appeal.

**5.Arguments of Mr.C.Godwin, Learned Counsel
appearing for the appellants:**

5.1.The learned Counsel, Mr.C.Godwin, at the outset, would state that even though the plaintiffs' predecessor in interest, Ponnumani Nadar and Janaki had purchased 22 cents from the defendants 50 to 53 in O.S.No.161 of 1962, they were also parties to the suit and in fact Ponnumani Nadar, himself was the 33rd defendant and no share was allotted to Ponnumani Nadar and Janaki and on the contrary, the appellants having been allotted specific shares, they had filed E.P.No.173 of 1991 and had also obtained delivery of the property as early as on 14.11.1991. It is also the contention of Mr.C.Godwin, that the defendants had filed a suit in O.S.No.336 of 1980 as well, for redemption of mortgage



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which had been created in favor of Ponnumani Nadar, and even in the said suit, a preliminary decree and final decree were passed and the defendants obtained delivery of the property as early as on 09.06.1989, from Ponnumani Nadar.

5.2.It is therefore, the submission of Mr.C.Godwin, that when no share was allotted in favor of the plaintiffs and the two suits that were filed by Ponnumani Nadar and Janaki, were also dismissed and thereafter, A.S.No.165 of 1983 was also dismissed on the ground of *res judicata*, the respondents cannot claim benefit of a stray observation in the judgment of the First Appellant Court, entitling them to seek for partition of the said 22 cents. Mr.C.Godwin, learned Counsel for the appellants, would further state that the common judgment in O.S.No.332 of 1989 and O.S.No. 51 of 1990, which are the suits filed by Ponnumani Nadar and Janaki, was exhibited as Ex.A.8 and the judgment in A.S.No.165 of 1983 was also exhibited as Ex.A.7.

5.3.He would refer to the findings of the trial court that the plaintiffs, namely Ponnumani Nadar and Janaki, were not in possession of the suit property, which is 22 cents. Referring to the observation made by the First Appellant Court in Ex.A.7 judgment, Mr.C.Godwin, would contend that the same will not confer cause of



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action or jurisdiction for filing of a fresh suit for partition. In this regard, he would emphasize the mandate of Order 23 Rule 2 of CPC. It is therefore, his submission that when no leave has been granted as required or contemplated under Order 23, the fresh suit for partition was clearly barred by the principle of *res judicata*, and hit by the provisions of Order 23 Rule 2 of CPC as well.

5.4. Pointing out to the reasons for dismissal of A.S.No.165 of 1983, Mr.C.Godwin, would further contend that the appeal was rejected only on the grounds of *res judicata*, as the very same issue of entitlement of Ponnumani Nadar had been gone into in the two suits in O.S.No.332 of 1989 and O.S.No.51 of 1990 and further holding that the case pleaded by Ponnumani Nadar as 33rd defendant was also held to be barred by *res judicata*, in view of the decree in O.S.No.161 of 1962. He would therefore, state that when the Appellate Court had dismissed the appeal, despite an observation regarding the entitlement of 22 cents to the plaintiffs Ponnumani Nadar and Janaki, the observation cannot be construed as liberty granted to them for filing a fresh suit. It is also his submission that, even assuming liberty had been granted without admitting, the appeal suit was disposed of on 28.08.1991 and the respondents / plaintiffs slept over the matter for 17 years before seeking partition in O.S.No.14 of 2008. Therefore, even on this



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ground, he would contend that the suit was clearly not maintainable.

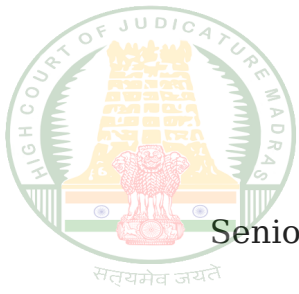
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5.5.As an alternate argument, he would also state that even assuming the plaintiffs were entitled to the 22 cents, the defendants having taken possession of the property in E.P.No.173 of 1991 in O.S.No.161 of 1962, as early as on 14.11.1991 and have been in possession and enjoyment ever since and the appellants have prescribed title by adverse possession as well. Learned Counsel, therefore, prays for the Second Appeal being allowed.

6.Arguments of Mr.S.Meenakshi Sundaram, learned Counsel appearing for the respondents:

6.1.Mr.S.Meenakshi Sundaram, learned Senior Counsel appearing for the respondents would refer to the observations made by the First Appellate Court in A.S.No.165 of 1983, that “இந்த மேல்முறையீட்டாளர் 50 முதல் 53 பிரதிவாதிகளுக்கு ஒதுக்கப்பட்ட 39.760 செண்டு நிலத்திலிருந்து தனக்கு பாத்தியப்பட்ட 12 செண்டு நிலத்தை பிரித்து வாங்கிக் கொள்ள வேண்டும்” and would state that the said observation would clearly amount to a liberty being granted by the First Appellate Court and therefore, the suit for partition cannot be bad on the ground of a *res judicata*. Mr.S.Meenakshi Sundaram, learned

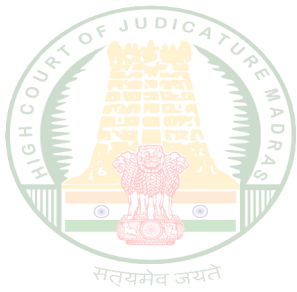
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Senior Counsel, would also contend that the suit being one for partition, the question of limitation does not arise and since the cause of action is a continuous cause of action and taking me through various litigations between the parties, the learned Senior Counsel would contend that the plaintiffs have never abandoned their entitlement or right and have been agitating the same before various Courts of law. He would therefore, state that even on the grounds of limitation, the suit cannot be held to be not maintainable.

6.2.As regards *res judicata* as well, it is the contention of the learned Senior Counsel that, no doubt Ponnumani Nadar had filed a suit for injunction in O.S.No.332 of 1989, but however, it was a relief that was wrongly sought for and therefore, *res judicata* cannot be pressed into service. In any event, it is the submission of Mr.S.Meenakshi Sundaram, learned Senior Counsel, that the relief is not the same and cause of action is also entirely different and the purchase made by the plaintiffs in Exhibits A.5 and A.6 were not even discussed in Exhibit A.7 judgment [A.S.No.165 of 1983] and therefore, the question of applying the principle of *res judicata*, cannot even arise.



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6.3.As regards Order II Rule 2 of CPC, Mr.S.Meenakshi Sundaram, learned Senior Counsel, states that the defendants have not been able to establish that both suits arise from the same cause of action and that they are between the same parties and further requirement is that the earliest suit having been decided on merits and therefore, learned Senior Counsel contends that the question of applying the provisions of Order II Rule 2 of CPC, also does not arise.

6.4.As regards adverse possession, Mr.S.Meenakshi Sundaram, learned Senior Counsel, states that even if the Courts have found that the plaintiffs Ponnumani Nadar and Janaki were not in actual possession, based on Exhibits A.1 to A.6, it has to be held that they were in constructive possession along with the appellants. In this regard, he states that the decision of the Appellate Court, granting liberty was on 28.08.1991 and in the meantime two suits have been filed by Ponnumani Nadar and Janaki. The said suits came to be disposed of only on 26.04.2006 and within two years thereafter, the present suit for partition has been filed. Learned Senior Counsel, therefore contends that the plaintiffs have not kept quiet or lost their rights and they have been continuously agitating / litigating before the Courts of law and



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hence, the question of adverse possession also will not arise, especially, when the defendants claim that their possession is adverse from 14.11.1991, when possession was taken under Exhibit B.1.

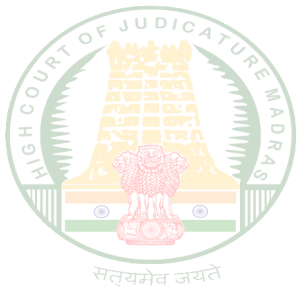
6.5.As regards Order 23 of CPC, Mr.S.Meenakshi Sundaram, learned Senior Counsel would contend that the object of Order 23 is to prevent the defeat of justice on technical grounds alone and the cause of action being recurring in nature, even if the plaintiff is not granted permission under Order 23 Rule 1 of CPC, his right to seek for partition can never be thrown out. He would also point out to the reasoning of the trial court for dismissing the suits filed by Ponnumani Nadar and Janaki in O.S.No.332 of 1989 and O.S.No.51 of 1990, on the grounds that they have not proceeded to take advantage of the liberty granted in A.S.No.165 of 1983, to claim their entitlement of 22 cents.

6.6.In support of his submissions, Mr.S.Meenakshi Sundaram, has relied on the following decisions:

1) *Thilagavathi alias Thilagam Vs. V.Samiappan*, reported in 2014 (2) MWN (Civil) 479;

2) *Chenniappan Vs. Valliammal*, reported in 2020 5 MLJ 537;

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3) Muthulakshmi Ammal Vs. Kannaian, reported in 2023 Supreme (Online) (MAD) 30801;

4) Selvaraj Vs. Mariammal, reported in 2025 Supreme (Online) (Mad) 56940;

5) R.Thirumoorthy Vs. K.Poovathal, reported in 2025 Supreme (Online) (Mad) 67490;

6) Bengal Waterproof Limited Vs. Bombay Waterproof Manufacturing Company and another, reported in (1997) 1 SCC 99;

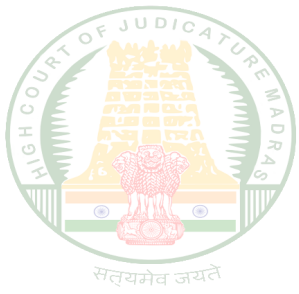
7) S.Ramasamy Vs. S.Subramanian, reported in 2013 (4) CTC 710;

8) Rajah Vs. Rajeswara Rao, reported in 1966 Supreme (Mad) 319;

9) Sengoda Gounder (Deceased) & others Vs. N.M.Murugesan & others, reported in 2013 (2) MWN (Civil) 622.

7. have carefully considered the submissions advanced by the learned Counsel on either side.

8.

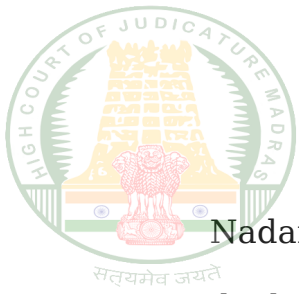


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WEB COPY **ANALYSIS:**

8.The Second Appeal throws up some interesting questions of law. At the same time, it remains to be seen if the said questions of law are substantial in nature, entitling intervention by this Court under Section 100 of CPC. It is not in dispute that the respondents / plaintiffs claim under Ponnumani Nadar and Janaki and the appellants / defendants claim under their vendors, i.e., the plaintiffs' vendors, who were the defendants 50 to 53 in O.S.No.161 of 1962.

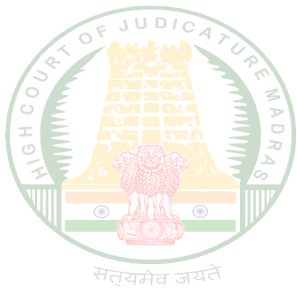
9.One Sabarimuthu Nadar was entitled to an extent of approximately 40 cents [39.760 cents] in Old S.Nos.1162, 1164 and 1175, new R.S.No.513. The said 40 cents was allotted to four heirs of Sabarimuthu Nadar, namely Enose Nadar [10 cents], Asari Nadar [10 cents], Thomas Nadar [10 cents] and Mosai Nadar [10 cents]. Under Exhibit A.6, 10 cents was purchased by Janaki from Enose Nadar. Ponmunnada Nadar purchased 6 cents out of 10 cents from Asari Nadar under the sale deed dated 15.05.1967. Ponnumani Nadar purchased another 6 cents from Mosai Nadar under Exhibit A.4, under registered sale deed dated 19.11.1966. It is therefore, the contention of the plaintiffs that 22 cents out of the total 40 cents [approximately] had been acquired by Ponnumani



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Nadar and his wife Janaki. Thomas Nadar as well as Mosai Nadar died as bachelors and hence, the entire 10 cents of Thomas Nadar and remaining 4 cents of Mosai Nadar devolved upon their two brothers, Enose Nada and Asari Nadar.

10.A suit was filed in O.S.No.161 of 1962. Ponnumani Nadar was a party to the said suit. Ponnumani Nadar was in fact, the 33rd defendant in the said suit in O.S.No.161 of 1962 and he claimed his entire entitlement of 12 cents in the final decree proceedings in O.S.No.161 of 1962. However, the claim of Ponnumani Nadar was rejected and Plot No.34, which is the suit property was allotted to defendants 50 to 53 in the said suit in O.S.No.161 of 1962. No doubt, Ponnumani Nadar challenged the decree by filing A.S.No. 165 of 1983. In the meantime, Ponnumani Nadar filed a suit for injunction in O.S.No.332 of 1989 and his wife Janaki filed a suit in O.S.No.51 of 1990, to declare her entire entitlement of 10 cents. Both the suits were dismissed by a common judgment dated 26.04.2006, which was brought to the notice of the Appellate Court. In fact, it was observed by the Trial Court in the said common judgment that the plaintiffs had failed to work out the remedy in terms of the direction in A.S.No.165 of 1983.



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11.I have already extracted the debated observation of the First Appellate Court. It remains to be seen if the said observation of the First Appellate Court would amount to any liberty granted to Ponnumani Nadar and Janaki, to file a suit for partition and claim their entitlement and whether such observation or liberty satisfies the mandate of Order 23 of the Code of Civil Procedure. It is however, to be borne in mind that despite such observations, the legality of which will be discussed later, the appeal suit was ultimately dismissed, finding that a denial of relief to Ponnumani Nadar in O.S.No.161 of 1962, did not warrant interference. The Appellate Court fell back on the principles of *res judicata*. It is also an admitted fact that Ponnumani Nadar, unsuccessfully challenged the dismissal of A.S.No.165 of 1983, in Second Appeal as well, before this court.

12.It is not in dispute that Plot No.34 which comprises of 22 cents claimed by the plaintiffs herein was handed over to Enose Nadar and Asari Nadar in final decree proceedings on 14.11.1991. The first plaintiff Janaki, was in fact, a party to the final decree proceedings as well. Therefore, the decree in O.S.No.161 of 1962 has become final and it will certainly bind the legal heirs of Ponnumani Nadar and Janaki. Order 23 Rule 1 of CPC, permits the



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plaintiff, at any time after the institution of the suit, to abandon the suit or part of the claim and if the Court is satisfied that the suit fails by reason of a formal defect or there are sufficient grounds to allow the plaintiff to institute a fresh suit for the subject matter of the suit or part of a claim, then the Court, on such terms, as it thinks fit, may grant permission to the plaintiff to withdraw from the suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or part of the claim.

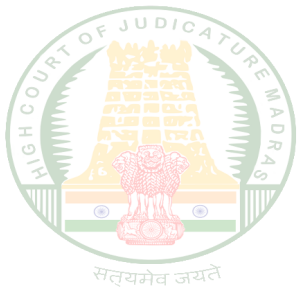
13.Admittedly, there is no application made by the plaintiffs Ponnumani Nadar and Janaki, to institute a fresh suit based on the same cause of action. No doubt, the Appellate Court in A.S.No.165 of 1983, had made a passing observation that the plaintiffs can get their share of 22 cents from defendants 50 to 53. The appeal itself was challenging the denial of the entitlement of Ponnumani Nadar in O.S.No.161 of 1962 and the suit itself was one for partition, where the subject property was allotted to defendants 50 to 53. In such circumstances, if really the Appellate Court had intended to entitle the plaintiffs to claim the share of 22 cents, the Appellate Court itself could have modified the judgment of the Trial Court, suitably and granted a decree then and there. On the contrary, despite such observation, ultimately the First Appellate Court has



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dismissed the Appeal, confirming the findings of the Trial Court, clearly holding that the claim made by Ponnumani Nadar was barred by the principles of *res judicata*.

14.In such circumstances, I am unable to countenance the arguments on behalf of the respondents that the suit being only one for partition, there can be no limitation put against the plaintiffs and that the cause of action is a continuing one and the plaintiffs are deemed to be in constructive possession. All these arguments raised can only be rejected. The entitlement of Ponnumani Nadar was negatived in O.S.No.161 of 1962. The challenge to the same in A.S.No.165 of 1983 and thereafter, Second Appeal were admittedly unsuccessful. Therefore, it is not open to the plaintiffs to take advantage of a stray observation made by the First Appellate Court in A.S.No.165 of 1983 and file a suit for partition, seeking the very same entitlement of 12 cents of Ponnumani Nadar and 10 of his wife Janaki. In fact, as rightly pointed out by Mr.C.Godwin, A.S.No. 165 of 1983, was dismissed only on the ground of *res judicata*, finding that the claim to share had been already dealt with in earlier proceedings. In such view of the matter, I am unable to accept the findings of the First Appellate Court that the judgment in A.S.No.165 of 1983, would provide a fresh cause of action to the respondents to seek for partition.

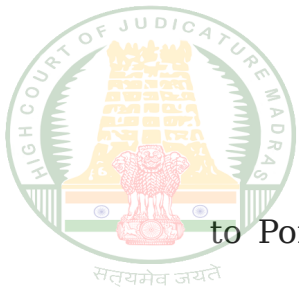


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15.As already discussed, no leave has been granted under Order 23 as well and in the event of the argument of the respondents are to be considered also, if the observation had amounted to a liberty, then the appeal should have been suitably disposed of, granting specific permission to file a fresh suit on the same cause of action or touching the subject matter of the suit or part of the claim. As already seen from the above discussions, A.S.No.165 of 1983, was in fact, dismissed on merits and therefore, the arguments that the suit is one for partition and there is no limitation and no liberty is required under Order 23 of CPC, do not merit consideration before this court.

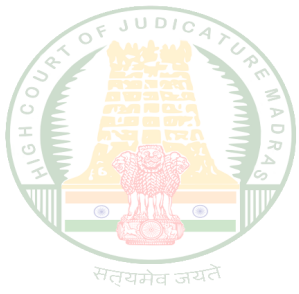
16.Coming to the issue of limitation as well, Article 65 of the Limitation Act is pressed into service by the appellants. It is however, contended by the learned Senior Counsel that since the suit is one for partition and in exhibit A.7, judgment in A.S.No.165 of 1983, the right of Ponnumani Nadar and Janaki, to 22 cents was upheld. The question of limitation does not arise, as the legal heirs of Ponnumani Nadar and Janaki are deemed to be in joint and constructive possession along with the other co-owners, namely defendants 50 to 53 and their legal heirs. The fact remains that the suit for partition in O.S.No.161 of 1962, did not carve out any share



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to Ponnumani Nadar or his wife Janaki. On the contrary, the suit property was allotted to defendants 50 to 53 in the said suit and they have also taken possession of the same, way back in their 1991 suit. This factum was not disputed by the respondents / plaintiffs as well.

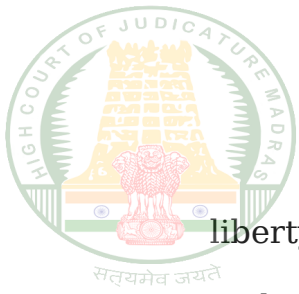
17.The subsequent litigation at the hands of Ponnumani Nadar and Janaki, also being unsuccessful and touching the very same subject matter, it does not lie in the mouth of the plaintiffs to contend that after possession was taken by defendants 50 to 53 on 14.11.1991 in E.P.No.173 of 1991, the said defendants took possession including constructive and joint possession of Ponnumani Nadar and Janaki. Such an argument cannot be sustained at all, for the simple reason that even in O.S.No.161 of 1962, the entitlement of Ponnumani Nadar was not recognized. On the contrary, the suit property was allotted to defendants 50 to 53 alone. The suit, therefore, should have been filed at least after possession was taken in E.P.No.173 of 1991. Admittedly, the present suit has been filed after a lapse of 17 years after the said date, in the year 2008 alone. In such circumstances, even applying Article 65 of the Limitation Act, the suit is hopelessly barred by limitation.



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18.Coming to adverse possession, it is contended by the appellants that the appellants have perfected their rights, having taken possession even on 14.11.1991, in view of the fact that even prior to the Execution Petition being filed in 1991, suits came to be filed by Ponnumani Nadar and Janaki in O.S.Nos.332 of 1989 and 51 of 1990, which suits were ultimately disposed of, only on 26.04.2006, and thereafter, the present suit for partition has also been filed. Therefore, it cannot be said that the appellants have perfected their right by adverse possession by being in continuous, open and hostile possession and enjoyment of the suit property for over the statutory period of 12 years. Hence, I am unable to accept the argument advanced by the learned Counsel for the appellants with regard to the applicability of adverse possession to come to the aid of the appellants.

19.Coming to the decisions that have been relied on by the learned Senior Counsel appearing for the respondents, in ***Thilagavathi's*** case, this court applied Section 14 of the Limitation Act and excluded time spent by the plaintiff in pursuing a counter-claim in an earlier suit. The facts of this case were on an entirely different contextual matter altogether. Plaintiff therein had filed a counter-claim, bonafidely, which came to be overturned in Second Appeal, that too, on technical grounds. In such circumstances,



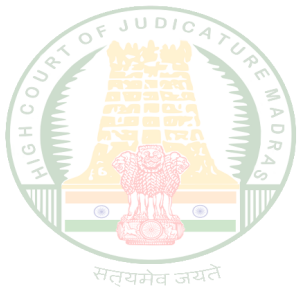
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liberty was granted. Section 14 of the Limitation Act was applied and period spent in pursuing the counter-claim was excluded while calculating period of limitation. I do not see how this decision will be of any application to the facts of the present case, which have already been elaborately discussed above.

20.In ***Chenniappan's*** case, this court held that ouster must be proved by strong evidence and when there is no evidence to establish possession of the properties at the hands of the first defendant in the said suit to the exclusion of his sisters, then mere fact that the first defendant had effected improvements would not be sufficient to prove ouster. I am unable to see how this decision again will have any application to the facts of the present case. I have not applied the principle of ouster at all and in fact, the plea of adverse possession has also been negated.

21.In ***Muthulakshmi Ammal's*** case, again, this court dealt only with ouster in the case of a co-owner. This decision again has no application.

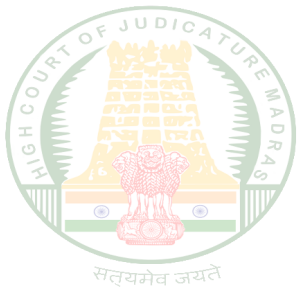
22.In ***Selvaraj's*** case and ***Thirumoorthy's*** case as well, ouster law has been dealt with. I do not see any of these decisions could therefore be applied to the facts of the present case.



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23.In ***Bengal Waterproof's*** case, the Hon'ble Supreme Court dealt with the provisions of Order II Rule 2 of CPC, where the Hon'ble Supreme Court held that the plea of bar under Order II Rule 2 of CPC can be maintained only when the defendant files before the Trial Court, pleadings in the previous suit, to prove identity of cause of action in the two cases and inference about the bar cannot be culled out merely from the plaint in the second case. Though in the present case, the pleadings in the earlier suit have admittedly not been filed, it is not in dispute that the entitlement of 22 cents was subject matter of the earlier suit as well as the present suit for partition. Therefore, though it was argued by Mr.S.Meenakshi Sundaram learned Senior Counsel that the cause of action for this suit is entirely different, the very same cause of action was in fact taken up even in O.S.No.165 of 1962 and ultimately, Ponnumani Nadar was unsuccessful. Ponnumani Nadar and his wife Janaki, in fact, chose to file only a suit for bare injunction, despite the observation, which according to him, permitted him to file a suit for partition. Similarly, his wife Janaki filed a comprehensive suit for declaration to claim her right for 10 cents. Both suits have admittedly been dismissed after elaborate trial.



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24.In *Ramasamy's* case, this Court held that the cause of action for the partition suit is a continuing one and bar of Order II Rule 2 of CPC, will not apply to a suit for partition. I have no quarrel with regard to the proposition that the cause of action for a partition suit is continuous and neither limitation nor bar of Order II Rule 2 of CPC can be made applicable to a partition suit. However, in the facts of the present case, the very same issue of entitlement of Ponnumani Nadar to 12 cents, was a specific issue framed in O.S.No.161 of 1962 and it was held against Ponnumani Nadar. The challenge to the same by way of First Appeal and Second Appeal were also admittedly unsuccessful. In such circumstances, to contend that fresh suit for partition taking advantage of an observation made by the Appellate Court in A.S. 165 of 1983, would revive the claim of the plaintiffs cannot be acceptable. This decision also, therefore, cannot be applied to the facts of the present case.

25.Coming to the next decision on which reliance has been placed by the learned Senior Counsel for the respondents, in the decision of this Court in *Raja Vs. Rajeswara Rao's* case, this Court held that even when the plaintiff is not granted permission under Order 23 Rule 1 of C.P.C., right to file a suit for partition at any time he pleases, in view of his obvious right be always

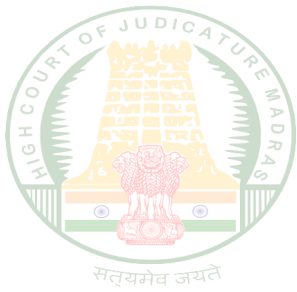


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available. However, in the facts of the present case, when in a suit for partition, the claim of Ponnumani Nadar has been negatived and subsequently, the claim of his wife Janaki for declaration of her entitlement of 10 cents was also negatived, it cannot be contended that Order 23 would not be a bar or it would not come in the way for filing a suit for partition. Therefore, in view of the peculiar facts of this case, this decision is also of no avail to the respondents.

26.Coming to the last decision relied on by the learned Senior Counsel for the respondents in ***Sengoda Gounder's*** case, this court held that when plaintiffs are purchasers from decree holders in an earlier suit for partition, they step into the shoes of their vendor and they are entitled to execute the decree obtained by their vendor and continue proceedings for partition. So, I am unable to see how this decision can come to the rescue of the respondents. In the present facts, the entitlement of the purchasers in interest of the plaintiffs was negatived and there was no decree granted, unlike in the facts of ***Sengoda Gounder's*** case. This decision is again not applicable to the facts of the present case.

27.In view of the above discussion and for all the above reasons, the substantial questions of law are answered in the following manner:



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Question of Law No.1:

The observations in Exhibit A.7, cannot and do not confer fresh cause of action for filing a suit for partition.

Question of Law No.2:

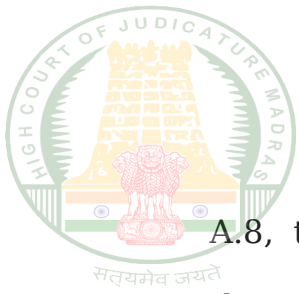
Suit filed for partition in 2008, after final decree was passed in I.A.No.925 of 1978 on 22.03.1983 and possession was also delivered on 14.11.1991, is clearly barred by limitation.

Question of Law No.3:

The Court does not have power to grant leave to file a fresh suit, dehors Order 23 of CPC and in any event, I have already held that the observation made by the Appellate Court in Ex.A.7 would not tantamount to grant of leave in the first place.

Question of Law No.4:

It is now settled law that unless the Trial Court before whom the plea of Order II Rule 2 bar is taken, the pleadings in the earlier suit are filed to establish that the earlier suit and the present suit are based on the very same cause of action, then alone the court can take cognizance of the plea of Order II Rule 2 of CPC. Admittedly, in the present case, excepting for judgment in Exhibit



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A.8, the pleadings in the earlier suit have not been filed. Even though, this Court, from Exhibit A.8 judgment can make out the case of the parties to the said case, it would not be proper and in the interest of justice, to go by the brief summary made by the Court in the said judgment, without noticing the actual pleadings of the parties, especially the cause of action, to invoke the bar of Order II Rule 2 of CPC. Therefore, Question of Law No.4 is answered against the appellants and in favour of the respondents.

28.For all the above reasons and in fine, the appellants are entitled to succeed and the Second Appeal is allowed. The judgment and decree of the First Appellate Court in A.S.No.68 of 2011 dated 03.02.2017, on the file of the Sub-Court, Kuzhithurai, is set aside and the judgment and decree of the Trial Court in O.S.No. 14 of 2008 dated 13.12.2010, on the file of the 1st Additional District Munsif Court, Kuzhithurai is restored. There shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

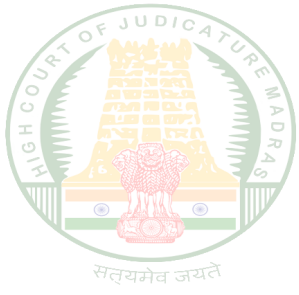
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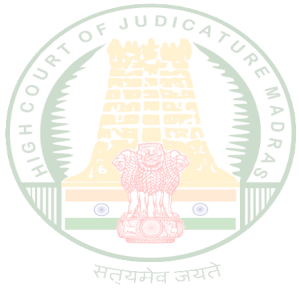
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To

1.The Subordinate Judge,
Kuzhithurai.

2.The 1st Additional District Munsif,
Kuzhithurai.

3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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P.B.BALAJI, J.

MR

PRE-DELIVERY JUDGMENT MADE IN

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