

2015-4-L.W. 153

**BEFORE THE MADURAI BENCH OF  
MADRAS HIGH COURT**

01.07.2015/Second Appeal (MD) No.357  
of 2009

**P.R.Shivakumar, J.**

V.Meenakshysundaram through his  
power agent R.Jeyaraman .. Appellant/  
Respondent/Plaintiff

Vs.

P.Shanmugam & another...  
Respondents/ Appellants/Defendants  
Second Appeal is filed under Section 100  
C.P.C against the judgment and decree in  
A.S.No.37 of 2007, dated 28.03.2008 on the file  
of the Principal District Court, Pudukottai  
reversing the judgment and decree made in  
O.S.No.360 of 2003, dated 05.02.2007 on the  
file of the Sub Court, Pudukottai.

**Limitation act (1963), Articles 64,65,**

**C.P.C., Order 23, Rule 1, Order 2, Rule 2,  
Order 1, Rule 10(5).**

**Suit for declaration of title, recovery of  
possession was dismissed, appeal  
against— Plea of limitation, bar of earlier  
suit, Scope of.**

**Earlier suit withdrawn, liberty, effect of —  
on limitation — what is, scope.**

**Earlier suit was for declaration, recovery  
of possession — present suit is also for  
same reliefs in respect of same property.**

**plaintiff filed suit admitting that he was  
out of possession — Limitation for, suit  
for recovery of possession — Article 65,  
effect of, what is.**

**suit filed beyond 12 years from date on  
which possession became adverse to  
plaintiff, even as per his own admission  
made in the prior proceedings —  
contended that permission granted in the**

**former suit caused interruption and break  
in, running of limitation, present suit  
came to be filed within 12 years from the  
date of withdrawal of earlier suit, is  
within the period of limitation, Plea  
rejected — limitation started on the  
original cause of action would have  
continued without any break — suit  
ought to have been filed within 12 years,  
not from the date of withdrawal of the  
earlier suit, but from the date of arisal of  
the original cause of action stated in the  
previous suit.**

**Paras 17,21**

**permission obtained was for filing a suit  
based on same cause of action — petition  
ought to have been filed under Order 2  
Rule 2 C.P.C.**

**Para 20**

**Amendments allowed by trial Court not  
carried out in original plaint — purpose is  
to have a clean copy — Trial court without  
making party to amend plaint, treating  
amended copy of plaint as original,  
improper.**

**Para 22**

**When a new party is added in a pending  
suit, the suit shall be deemed to have been  
instituted against such party only on the  
date on which such new party is added—  
Order 1(10(5) makes it clear — suit as  
against second defendant hit by  
limitation.**

**Para 24**

Article 65 of the Indian Limitation Act, 1963  
prescribes 12 years period of limitation for  
recovery of an immovable property based on  
title. The starting point of limitation has been  
provided as the date from which the  
possession of the defendant became adverse  
to the plaintiff. In this case, admittedly the  
Second Appeal has arisen out of the second  
suit filed by the plaintiff as O.S.No.360 of 2003  
on the file of the trial Court. The earlier suit,  
namely O.S.No.494 of 1985 came to be filed by  
the plaintiff against the first defendant and  
the same was withdrawn with liberty to file a

fresh suit. In fact, the appellant herein/plaintiff suppressed the fact that earlier suit was filed and was withdrawn with liberty to file a fresh suit in the original plaint. Only, after a plea of defence was raised by the defendants in this regard, the plaint was amended adducing averments to the effect that the former suit would not provide a bar for the present suit as the same was withdrawn with liberty to file a fresh suit. Para 13 A permission granted under Order 23 Rule 1 shall prevent the withdrawal of the suit from constituting a bar of res judicata for a subsequent suit in respect of the same subject matter. It will not have any effect on the limitation for the fresh suit to be filed. Rule 2 of Order 23 makes it clear that when a fresh suit is filed after withdrawal of the earlier suit with permission to file a fresh suit in respect of the same subject matter, for the purpose of limitation, it shall be presumed that the earlier suit was not at all filed and the limitation would be counted from the date of arisal of the cause of action. Para 15

Ex.B.39 reveals that the permission obtained was for filing a suit based on the same cause of action. Hence, the petition ought to have been filed under Order 2 Rule 2 C.P.C., if he intended to file the further suit on the same cause of action. The permission contemplated under Order 2 Rule 2(1) is also qualified by the condition that the relinquishment of any portion of the claim should be in order to bring the suit within the jurisdiction of any Court. Therefore, it is obvious that the permission was obtained either under an erroneous provision or on the basis of a wrong prayer. Para 20

Be that as it may, the fact remains that the plaintiff himself filed the suit admitting that he was out of possession from 30.04.1983. Limitation for filing a suit for recovery of possession of immovable property based on title is prescribed to be 12 years from the date on which the possession of the defendant becomes adverse to the plaintiff as per Article 65 of the Indian Limitation Act, 1963. The previous proceeding in O.S.No.494 of 1985

itself indicates that he was out of possession and the possession of the occupier was in defiance of the title of the plaintiff. Hence, the possession of the second defendant, who is none other than the wife of the first defendant, became adverse to the plaintiff at least from the admitted date 30.04.1983. The present suit came to be filed on 04.02.1999. Hence, it is clear that the same has been filed clearly beyond the period of limitation of 12 years from the date on which the possession of the second defendant became adverse to the plaintiff, even as per his own admission made in the prior proceedings. However, the appellant herein/plaintiff relies on the fact that the previous suit was allowed by the Court to be withdrawn with permission to file a fresh suit in respect of the same cause of action and contends that the permission granted in the former suit caused interruption and break in the running of limitation and that since the present suit came to be filed within 12 years from the date of withdrawal of the earlier suit, it is well within period of limitation. Para 17

The very fact that the plaintiff chose to withdraw the suit with liberty to file a fresh suit on the same cause of action will make it clear that the limitation started on the original cause of action would have continued without any break. In such event, the suit ought to have been filed within 12 years, not from the date of withdrawal of the earlier suit, but from the date of arisal of the original cause of action stated in the prevision suit, namely 30.4.1983. In the present suit filed by the plaintiff through his power agent, a clever drafting was made suppressing the fact of filing of the earlier suit and withdrawal of the same. Para 21

It seems that the second defendant-Mariammal was impleaded by virtue of an order dated 09.03.2000 made in I.A.No.729 of 2000 in O.S.No.59 of 1999. But amendments consequent to such impleadment and further amendment denying the contentions made by the first defendant in his written statement came to be made pursuant to an order dated

25.04.2001 made in I.A.No.165 of 2001. But it is quite shocking to see that the amendments allowed by the trial Court were not carried out in the original plaint and only a copy of the plaint (as amended plaint) came to be filed on 09.06.2003 which was also returned and represented on 19.06.2003. The very purpose for which the party making an amendment of pleading is asked to file an amended copy of the pleading is to have a clean copy of the pleadings which would have become some what illegible due to the amendments carried out in the original plaint. The very procedure adopted by the trial Court without making the party to amend the plaint and treating the amended copy of the plaint as the original is improper and such practice on the part of the subordinate courts is highly deprecated by this Court. Para 22

There is yet another lacuna in the case of the appellant herein/plaintiff. The earlier suit O.S.No.494 of 1985 was not filed against the second defendant and it was filed against the first respondent herein/first defendant alone. The permission granted cannot be projected as a liberty to file a suit against the second defendant also disregarding the law of limitation. When a new party is added in a pending suit, the suit shall be deemed to have been instituted against such party only on the date on which such new party is added. Sub Rule 5 of Rule 10 of Order 1 makes it clear that the proceedings against any such person added as defendant shall be deemed to have begun only on the service of summons after impleadment and amendment. If the said aspect is taken into consideration, the suit as against the second defendant shall stand hit by the law of limitation. Para 24

The learned lower Appellate Judge has not committed any error or mistake in applying Article 65 to hold that the suit filed by the plaintiff for declaration, recovery of possession and mesne profits is one barred by limitation. Para 25

Since the present suit came to be filed not merely based on previous possession followed by the dispossession by the act of

the defendants, but as a suit for declaration and recovery of possession on the basis of title, the appropriate Article shall be 65 and not 64 of the Limitation Act. Para 26

**Second appeal dismissed.**

For Appellant : Mr.N.Balakrishnan

For Respondents: Mr.S.Muthukrishnan

### JUDGMENT

The plaintiff in O.S.No.360 of 2003 on the file of the Sub Court, Pudukottai is the appellant in the present Second Appeal. He filed the above suit for declaration of his title in respect of the suit property, for recovery of possession, for mesne profits from the date of filing of the suit till delivery of possession and for costs.

2. The said reliefs were sought for on the basis of the plaint averments that are, in brief, as follows:-

A house site measuring 2600 sq.ft bearing Plot No.253 in T.S.No.273 of Pudukottai Town, bounded on the: south by Plot Nos.251 and 255, north by road, east by Plot No.252 and west by Plot No.254 described as suit property in the plaint schedule had been assigned to the appellant/plaintiff by the Revenue Divisional Officer, Pudukottai on 15.01.1976 on condition that he should pay the land value of Rs.614.80 and annual ground rent of Rs.12.50 or such other sum that might be fixed by the Government. The appellant/plaintiff remitted the land value on 02.11.1978. Pursuant to the assignment order, the plaintiff took possession of the suit property and had been enjoying the same as its absolute owner. While the plaintiff was away from Pudukottai due to his avocation, the first respondent/first defendant who had no right, title or interest in the suit property but being the owner of house site situated on the eastern side of the suit property, encroached upon the suit property. Thereafter, he created documents in the name of Meenakshi and then in the name of Mariammal in the municipal

records using his position as municipal councilor for a term of 5 years. The appellant/plaintiff after getting knowledge of the encroachment and the mischief committed by the first defendant in the last week of June 1998, appointed R.Jeyaraman as his power agent to take action against the first respondent/first defendant for the removal of encroachment. Since the first respondent/first defendant falsely set up title in the second respondent/second defendant through her mother Meenakshi, the second defendant Mariammal has also been impleaded as a party defendant to have a complete and final adjudication of the dispute. Hence, the plaintiff was forced to file the suit for the above said reliefs through his power agent.

3. The suit was resisted by the first respondent/first defendant based on the following contentions raised in his written statement:-

The plaint averment as if the suit property was assigned to the appellant/plaintiff is an utter falsehood. In addition the first respondent/first defendant did not know anything about the said assignment. In 1960, Tmt. Meenakshi, the mother-in-law of the first defendant put up a thatched house in the suit property and was residing there. Recognising her enjoyment, Pudukottai Municipality assessed house tax and she was paying the same to the municipality. On 21.03.1984, the said Meenakshi died leaving the second respondent/second defendant Mariammal (wife of the first defendant) as her only legal heir. Thus, the second respondent/second defendant got the property by way of succession. The second respondent/second defendant has also perfected title by adverse possession by her long, continuous and adverse possession of the suit property to the knowledge of the appellant/plaintiff. The suit is also barred by limitation. The appellant/plaintiff has made an attempt to get the suit property on the basis of an

assignment order, which was issued without any enquiry.

4. The second respondent/second defendant-Mariammal, on her impleadment filed a written statement making the following averments besides denying the plaint averments.

The mother of the second respondent/second defendant constructed a thatched house in the suit property in 1960. Thereafter, the second defendant constructed a lavatory and bath room. The said structures have not been included in the description of the suit property. Relief of mandatory injunction for the demolition of the super structure has not been claimed. Hence, the suit is not maintainable. Jeyaraman, power agent of the plaintiff filed the present suit suppressing the earlier litigation between the first defendant and the plaintiff. In fact, the plaintiff Meenakshisundaram himself filed the previous suit O.S.No.494 of 1985 for the relief of declaration and recovery of possession. The said suit was contested by the first defendant and the plaintiff chose to withdraw the suit with liberty to file a fresh suit. After such withdrawal, the plaintiff did not choose to file a suit in respect of the same property within time though liberty had been granted to him. The deed of power of attorney allegedly filed along with the plaint is fabricated and the suit came to be filed by Jeyaraman without the knowledge of the plaintiff-Meenakshisundaram by using the documents abandoned by the plaintiff. The Revenue Divisional Officer, without any enquiry and without considering the fact that the second defendant's mother Meenakshi was in possession of the suit property, issued the order of assignment dated 15.01.1976 as an irregular order and ineffective. The said assignment without delivery of possession was invalid. In fact, the plaintiff was not even able to identify and locate the suit property on ground. Since the plaintiff had not been in

possession of the suit property in pursuance of the said assignment, he did not derive any title or interest. Further allegations that the first defendant using his position as a municipal councilor, created documents in the name of the mother of the second defendant and then in the name of the second defendant are all false. Meenakshi, the mother of the second defendant was all along residing in the thatched house put up by her in the suit property in the year 1960 till her death on 21.03.1984. After her death, the second defendant, being her only legal heir, succeeded to the property and she is in possession and enjoyment of the same. In any event, the second defendant has perfected title to the suit property by adverse possession. The right to sue for recovery of possession should have accrued on 15.11.1976, namely the date on which the assignment order was passed. The plaintiff ought to have filed the suit for recovery of possession within 12 years thereafter. Hence, the suit is hopelessly barred by the law of limitation. The suit should be dismissed with costs.

5. The learned trial Judge, framed the following issues:-

“(i) Does the plaintiff have title to the suit property?

(ii) has the defendant prescribed title to the suit property by adverse possession?

(iii) Is the plaintiff entitled the relief of declaration of title and recovery of possession?

(iv) Is the plaintiff entitled to the relief of future prays?

(v) To what else relief is the plaintiff entitled?”.

6. The parties went for trial based on the above said issues. In the trial, 6 witnesses were examined and 14 documents were marked as Exs.A1 to A14 on the side of the plaintiff. On the side of the defendants, D.W.1 was examined as the sole witness and 40 documents were marked as Exs.B.1 to B40. A document produced by a witness came to be marked as Ex.X-1.

7. The learned trial Judge, at the conclusion of trial, heard the arguments and

considered the evidence in the light of the points urged in the arguments. Upon such consideration, the learned trial Judge came to the conclusion that the suit property belonged to the plaintiff and that the defendants had not proved any of their contention that the suit was barred by limitation or that the second defendant had perfected title by adverse possession. Based on the said findings, the learned trial Judge held that the plaintiff was entitled to the relief of declaration as well as recovery of possession. However, the learned trial Judge, dismissed the suit in respect of the prayer for mesne profits from the date of plaint till the delivery of possession. The judgment of the trial Court was pronounced on 05.02.2007 and a decree was drafted based on the said judgment.

8. Challenging the said decree of the trial Court dated 05.02.2007, the defendants preferred an appeal on the file of the Principal District Judge, Pudukottai in A.S.No.37 of 2007. The learned Appellate Judge, after hearing, accepted the case of the defendants and rejected the case of the plaintiff with the result that the the appeal was allowed, the decree of the trial Court was set aside and the suit was dismissed with costs. The said decision was taken by the learned lower Appellate Judge on the basis that the present suit was barred by Order 2 Rule 2 CPC in view of the dismissal of the earlier suit No.495 of 1985 as withdrawn and that even though the said earlier suit was withdrawn under Order 23 Rule 1(3) C.P.C to file a fresh suit on the same cause of action, the second suit, having been filed with laches and after a lapse of 13 years from the date of dismissal of the earlier suit with such liberty, was hopelessly barred by limitation. As against the said judgment and decree of the lower Appellate Court dated 28.03.2008, the present Second Appeal has been filed.

9. The Second Appeal was admitted on 10.06.2009 identifying two questions to be

the substantial questions of law involved in the Second Appeal. They are:-

“(i)Is the conclusion arrived at by the lower Appellate Court that the appellant/plaintiff’s suit is barred by law of limitation is opposed to pith and substance of the Indian Limitation Act, 1963 in general and the spirit behind Article 65 of the Limitation Act?

(ii)Whether the finding of the lower Appellate Court that the appellant’s suit is governed by Article 64 of the Indian Limitation Act, is in consequence of non consideration of evidence brought on record both oral and documentary over-looking the relief of declaration sought for vis-a-vis Ex.A.1 patta in favour of the appellant?”

10. The arguments advanced by Mr.R.Vijayakumar for Mr.N.Balakrishnan, learned counsel for the appellant and by Mr.S.Muthukrishnan, learned counsel for the respondent are heard. The materials available on records are also perused.

11. For the sake of convenience, the parties are referred to in accordance with their ranks in the trial Court and at appropriate places their ranks in the appeal shall also be indicated.

12. The plaintiff in the original suit is the appellant in the Second Appeal. The suit was filed for declaration of title, recovery of possession and mesne profits from the date of filing of the suit. The trial Court rejected the plea for mesne profits from the date of plaint, but granted the reliefs of declaration and recovery of possession. As against the dismissal of the plea for mesne profits from the date of plaint till the delivery of possession, the appellant did not file any appeal or cross objection. That part of the decree, which remains unchallenged, has become final. So far as the prayers for declaration of title and recovery of possession of the suit property are concerned, the trial Court granted the relief, whereas the lower Appellate Court reversed the same. The reasons assigned by the lower Appellate Court for declining the said reliefs are two fold as follows:-

(i)The suit is barred by limitation

(ii)The suit is barred by Order 2 Rule 2 CPC  
13. Article 65 of the Indian Limitation Act, 1963 prescribes 12 years period of limitation for recovery of an immovable property based on title. The starting point of limitation has been provided as the date from which the possession of the defendant became adverse to the plaintiff. In this case, admittedly the Second Appeal has arisen out of the second suit filed by the plaintiff as O.S.No.360 of 2003 on the file of the trial Court. The earlier suit, namely O.S.No.494 of 1985 came to be filed by the plaintiff against the first defendant and the same was withdrawn with liberty to file a fresh suit. In fact, the appellant herein/plaintiff suppressed the fact that earlier suit was filed and was withdrawn with liberty to file a fresh suit in the original plaint. Only, after a plea of defence was raised by the defendants in this regard, the plaint was amended adducing averments to the effect that the former suit would not provide a bar for the present suit as the same was withdrawn with liberty to file a fresh suit.

14. In fact, the appellant herein/plaintiff chose to produce only a copy of the plaint and the written statement filed in the earlier suit as Exs.A11 and A12. He did not produce copies of the judgment and decree or the copy of the order passed in the application filed under Order 23 Rule 1 C.P.C in the said former suit. However, the respondents herein/defendants have chosen to produce not only the certified copy of the order passed in I.A.No.275 of 1990 in O.S.No.494 of 1985, but also the certified copy of the evidence adduced by the plaintiff-Meenakshisundaram who deposed as P.W.1 in the former suit. The said documents have been marked as Exs.B39 and 40 respectively.

15. From Ex.A.11-copy of the plaint in O.S.No.494 of 1985, it is obvious that the said former suit was filed by the present plaintiff himself against the first respondent herein/first defendant for the

reliefs of declaration and recovery of possession. It is also an admitted fact that the present suit is also for the same reliefs in respect of the very same property. Of course, the earlier suit came to be dismissed as withdrawn based on an order dated 29.06.1990 made in I.A.No.275 of 1990 in O.S.No.494 of 1985. The said application was filed under Order 23 Rule 1. A permission granted under Order 23 Rule 1 shall prevent the withdrawal of the suit from constituting a bar of res judicata for a subsequent suit in respect of the same subject matter. It will not have any effect on the limitation for the fresh suit to be filed. Rule 2 of Order 23 makes it clear that when a fresh suit is filed after withdrawal of the earlier suit with permission to file a fresh suit in respect of the same subject matter, for the purpose of limitation, it shall be presumed that the earlier suit was not at all filed and the limitation would be counted from the date of arisal of the cause of action. In this case, admittedly, the following particulars are provided as giving rise to the cause of action for filing the present suit.

- “(i)15.01.1976, the date of assignment made in favour of the plaintiff
- (ii)02.11.1978, the date on which the land value was paid by the plaintiff in Sub Treasury, Pudukottai and an endorsement on the assignment order came to be made.
- (iii)In 1987-the order of alleged encroachment made by the defendants and (iv) March 1998 when the first defendant declined the request made by the plaintiff and his power agent denying the title of the plaintiff”.

16. It is pertinent to note that the previous suit O.S.No.494 of 1985 was filed for declaration and injunction and in the alternative for recovery of possession. From the certified copy of the plaint of the previous suit O.S.No.494 of 1985 marked as Ex.A.11, it is noticed that the appellants herein filed the said suit in respect of the very same suit property for declaration of his alleged title and for an injunction

against the first defendant herein not to interfere with his alleged possession and enjoyment of the property. It is also pertinent to note that he was not sure of substantiating his possession and that is the reason why, he prayed in the former suit for declaration and recovery of possession after removing thatched shed and stone pillars as alternative reliefs.

16. In the said former suit, the cause of action for the said suit was stated as follows:-

“The cause of action for the suit arose on 15.01.1976, the date of assignment on 02.11.78, the date of payment of land value, and on 30.04.1983, when the first defendant obstructed the plaintiff and on every day subsequently, all at Pudukottai”. It was also averred therein that the defendant therein (first defendant in the present case), besides putting up a thatched shed occupying 3 x 10 feet space prevented the plaintiff from entering the suit property even for measuring it with the help of the surveyor. It is quite obvious from the said pleading that the plaintiff himself admitted that his title was disputed as early as on 30.04.1983 and the thatched shed came to be put up even prior to the said date. A copy of the written statement filed in the previous suit has been marked as Ex.A.12. The first respondent herein/first defendant, who was the sole defendant in the former suit, contended that Meenakshi, mother of the second respondent herein/second defendant, was in possession of the suit property as early as in 1970 itself and that she was in effective possession and enjoyment of the same.

17. Be that as it may, the fact remains that the plaintiff himself filed the suit admitting that he was out of possession from 30.04.1983. Limitation for filing a suit for recovery of possession of immovable property based on title is prescribed to be 12 years from the date on which the possession of the defendant becomes adverse to the plaintiff as per Article 65 of the Indian Limitation Act, 1963. The previous proceeding in O.S.No.494 of 1985 itself indicates that he was out of possession and the possession of the

occupier was in defiance of the title of the plaintiff. Hence, the possession of the second defendant, who is none other than the wife of the first defendant, became adverse to the plaintiff at least from the admitted date 30.04.1983. The present suit came to be filed on 04.02.1999. Hence, it is clear that the same has been filed clearly beyond the period of limitation of 12 years from the date on which the possession of the second defendant became adverse to the plaintiff, even as per his own admission made in the prior proceedings. However, the appellant herein/plaintiff relies on the fact that the previous suit was allowed by the Court to be withdrawn with permission to file a fresh suit in respect of the same cause of action and contends that the permission granted in the former suit caused interruption and break in in the running of limitation and that since the present suit came to be filed within 12 years from the date of withdrawal of the earlier suit, it is well within the period of limitation.

18. In this regard, it is pertinent to note that though the appellant herein/plaintiff chose to produce the certified copies of the plaint and the written statement in the earlier suit and marked them as Exs.A11 and 12 respectively, he has not chosen to produce copies of either the petition or the order granting permission to withdraw the suit with liberty to file a fresh suit or at least the certified copy of the decree passed in the earlier suit. On the other hand, the defendants have chosen to produce the certified copy of the petition and order which is relied on by the appellant herein/plaintiff in support of his case that there was a break in the running of the period of limitation. The same has been marked as Ex.B39.

19. Ex.39 shows that the petition in I.A.No.275 of 1990 in O.S.No.494 of 1985 came to be filed under Order 23 Rule 1 C.P.C praying for permission to withdraw the said suit with liberty to file a fresh suit

on the same cause of action. The prayer made therein is extracted for the sake of convenience:-

“For the reasons set forth in the accompanying affidavit filed herewith, it is prayed that this Hon’ble Court may be pleased to permit the plaintiff/petitioner to withdraw the above suit, with liberty to file a fresh suit on the same cause of action and thus render justice”.

It is also an admitted fact that the said petition was filed under Order 23 Rule 1 C.P.C and not under Order 2 Rule 2(1)C.P.C. The nature of permission that can be granted under Order 23 Rule 1, is not the one to withdraw the suit with liberty to file a fresh suit on the same cause of action. In fact, the Rule does not refer to cause of action at all. On the other hand, it refers to the filing of a fresh suit in respect of the very same subject matter.

Order 23 Rule 1(3) reads as follows:-

“Where the Court is satisfied :-

- (a) that a suit must fail by reason of some formal defect, (or)
- (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim”.

What is contemplated under the said provision is not filing of a fresh suit on the same cause of action and on the other hand, it contemplates the filing of the fresh suit in respect of the same subject matter or in respect of the same claim or such part of the claim.

20. Ex.B.39 reveals that the permission obtained was for filing a suit based on the same cause of action. Hence, the petition ought to have been filed under Order 2 Rule 2 C.P.C., if he intended to file the further suit on the same cause of action. The permission contemplated under Order 2 Rule 2(1) is also qualified by the condition



that the relinquishment of any portion of the claim should be in order to bring the suit within the jurisdiction of any Court. Therefore, it is obvious that the permission was obtained either under an erroneous provision or on the basis of a wrong prayer.

**21.** The very fact that the plaintiff chose to withdraw the suit with liberty to file a fresh suit on the same cause of action will make it clear that the limitation started on the original cause of action would have continued without any break. In such event, the suit ought to have been filed within 12 years, not from the date of withdrawal of the earlier suit, but from the date of arisal of the original cause of action stated in the prevision suit, namely 30.04.1983. In the present suit filed by the plaintiff through his power agent, a clever drafting was made suppressing the fact of filing of the earlier suit and withdrawal of the same. In the cause of action paragraph also, a new plea came to be introduced as if the cause of action arose in 1987, when the first defendant encroached upon the suit property and in March 1998, when the first defendant failed to comply with the request of the plaintiff and denied the title of the plaintiff.

**22.** It seems that the second defendant-Mariammal was impleaded by virtue of an order dated 09.03.2000 made in I.A.No.729 of 2000 in O.S.No.59 of 1999. But amendments consequent to such impleadment and further amendment denying the contentions made by the first defendant in his written statement came to be made pursuant to an order dated 25.04.2001 made in I.A.No.165 of 2001. But it is quite shocking to see that the amendments allowed by the trial Court were not carried out in the original plaint and only a copy of the plaint (as amended plaint) came to be filed on 09.06.2003 which was also returned and represented on 19.06.2003. The very purpose for which the party making an amendment of pleading is

asked to file an amended copy of the pleading is to have a clean copy of the pleadings which would have become some what illegible due to the amendments carried out in the original plaint. The very procedure adopted by the trial Court without making the party to amend the plaint and treating the amended copy of the plaint as the original is improper and such practice on the part of the subordinate courts is highly deprecated by this Court.

**23.** Coming to the facts of the case, since the present suit came to be filed without making any reference to the order passed in I.A.No.275 of 1990 in the previous suit O.S.No.494 of 1985, the present suit cannot be taken as a suit filed in pursuance to the permission granted in the former suit by an order dated 29.06.1990. Hence, the appellant herein/plaintiff cannot be allowed to contend that the present suit having been filed pursuant to the permission granted in the earlier suit, limitation for the present suit should be counted only from the date of the order granting permission in the earlier suit namely on 29.06.1990. In case, it is assumed to be the suit filed in pursuance of the order passed in the earlier suit, a copy of which has been produced as Ex.B.39, the plaintiff shall not be entitled to claim that there was a break in the running of the limitation period and that the limitation should be counted only from the date of the permission granted in the earlier suit.

Order 23 Rule 2 provides the answer to such a claim made on behalf of the appellant herein/plaintiff. Rule 2 reads as follows:

“2.Limitation law not affected by first suit:-

In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted”.

Therefore, the contention of the appellant herein/plaintiff that limitation shall be counted only from the date of dismissal of the earlier suit with permission to file a fresh suit cannot be countenanced.

**24.** There is yet another lacuna in the case of the appellant herein/plaintiff. The earlier suit O.S.No.494 of 1985 was not filed against the second defendant and it was filed against the first respondent herein/first defendant alone. The permission granted cannot be projected as a liberty to file a suit against the second defendant also disregarding the law of limitation. When a new party is added in a pending suit, the suit shall be deemed to have been instituted against such party only on the date on which such new party is added. Sub Rule 5 of Rule 10 of Order 1 makes it clear that the proceedings against any such person added as defendant shall be deemed to have begun only on the service of summons after impleadment and amendment. If the said aspect is taken into consideration, the suit as against the second defendant shall stand hit by the law of limitation. The plaintiff himself, in his evidence adduced in the former suit O.S.No.494 of 1985, made a clear admission that the cause of action arose on 30.04.1983 itself and that from the said date onwards the possession of the defendants became adverse. It is the clear admission made by him that on 30.04.1983 when he made an attempt to survey the land with the help of surveyor he was not permitted to do so. He had also made a clear admission that in the said area several persons put up sheds and they were granted patta and that some persons are residing in the huts put up by them without even getting patta. The same will make it clear that at least from 30.04.1983, his title was disputed and it is also admitted by the appellant herein/plaintiff that he is out of possession. Hence, as per Article 65 of the Indian Limitation Act, the possession of the

defendants became adverse to the plaintiff at least from 30.04.1983. As the suit has been filed beyond 12 years thereafter, it is hopelessly barred by limitation.

**25.** The learned lower Appellate Judge has not committed any error or mistake in applying Article 65 to hold that the suit filed by the plaintiff for declaration, recovery of possession and mesne profits is one barred by limitation. The first substantial question of law formulated in this Second Appeal is answered accordingly against the appellant herein/plaintiff and in favour of the respondents.

**26.** The learned lower Appellate Judge chose to refer to Article 64 of the Limitation Act, 1963 to show that even if the suit is considered to be one for recovery of possession of immovable property based on previous possession of the plaintiff, the suit should have been filed within 12 years from the date of dispossession. Even as per the admission made by the plaintiff under Ex.A11, the property was trespassed into in the year 1983 and the plaintiff was dispossessed. In order to show that the suit was not filed within 12 years from the date of alleged dispossession, the learned lower Appellate Judge chose to refer to Article 64 of the Limitation Act, 1963. Since the present suit came to be filed not merely based on previous possession followed by the dispossession by the act of the defendants, but as a suit for declaration and recovery of possession on the basis of title, the appropriate Article shall be 65 and not 64 of the Limitation Act. As pointed out supra, the possession of the second defendant became adverse to that of the plaintiff even in the year 1983 and the suit came to be filed after a lapse of 12 years, the period of limitation stipulated under Article 65. Hence, the finding of the lower Appellate Court that the suit is hopelessly barred by limitation cannot be found fault with.

**27.** At the cost of repetition, it is again pointed out that the filing of the earlier suit

and its withdrawal with liberty to file fresh suit did not cause any interruption in the running of the period of limitation as it was clearly mentioned in Order 23 Rule (2) that any fresh suit to be instituted on permission, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted. The plaintiff cannot also seek the assistance of Section 14 of the Limitation Act for the simple reason that the previous suit cannot be construed to be a suit filed and prosecuted bona fide in a Court without jurisdiction. Hence, the finding of the lower Appellate Court that the appellant herein/plaintiff lost his title by adverse possession and that the suit is barred by limitation cannot be said to be an erroneous finding warranting interference by this Court in the Second Appeal. The second question formulated as the second substantial question of law is also answered accordingly.

28. For all the reasons stated above, this Court is of the firm view that the respondents herein/defendants have proved that the suit filed by the appellant herein/plaintiff is totally barred by limitation and that hence, the appellant herein/plaintiff is not entitled to any of the reliefs sought for in the plaint. This Court does not find any defect or infirmity in the decree passed by the lower Appellate Court. There is no merit in the Second Appeal and the same deserves to be dismissed. However, considering the nature of the case and facts and circumstances of the case, there shall be no order as to costs.

29. In the result, the Second Appeal is dismissed. No costs.

VCJ/VCS

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**BEFORE THE MADURAI BENCH OF  
MADRAS HIGH COURT**

26.06.2015/Second Appeal(MD)No.1002  
of 2011 and M.P(MD)No.1 of 2011

**P.R.Shivakumar, J.**

A.Venkateswaran ... Appellant/  
Appellant/Plaintiff

Vs.

Arulmighu Poolananteeswarar Temple,  
rep. by its Executive Officer,  
Chinnamanur- 625 515 Uthamapalayam  
Taluk, Theni District & another ..  
Respondents/Respondents/Defendants

Prayer:- Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 against the Judgment and decree dated 31.10.2007 passed in Appeal Suit No.9 of 2007 by the Sub Court, Uthamapalayam, confirming the Judgment and decree dated 30.08.2006 passed in Original Suit No.548 of 2004 by the District Munsif Court, Uthamapalayam.

**Injunction/Lessee, trespasser, temple property, grant of,**

**Tamil Nadu Hindu Religious and Charitable Endowments Act (1959), Sections 78,79, lesee, trespasser,**

**Lease/Lessee, temple property, injunction.**

**Suit for injunction against poolananteeswarar temple, chinnamanur by lessee not to evict him than by due process of law after expiry of lease was dismissed – on second appeal, held: lease expired, appellant continues to be in possession — His possession cannot be termed as a possession by a lessee holding over or a legal possession than the**