



2023/KER/54125

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.SOMARAJAN

TUESDAY, THE 22nd DAY OF AUGUST 2023 / 31ST SRAVANA, 1945

CRP NO. 237 OF 2022

AGAINST THE ORDER IA 2/2021 IN OS 175/2017 OF MUNSIFF COURT, HARIPAD
REVISION PETITIONER/PETITIONER/1st DEFENDANT:

KARLOSE, AGED 72 YEARS, S/o JOSEPH,
DEEPAM VEETTIL @ PUTHENPURAYIL, CHINGOLI MURI,
CHINGOLI VILLAGE, CHENGOLI P.O., PIN-690532.

BY ADV K.P.SREEKUMAR

RESPONDENTS/RESPONDENTS/PLAINTIFFS & 2nd DEFENDANT:

- 1 STELLA LASAR, D/o KATHREENA,
PUTHENPURAYIL VEETTIL, CHINGOLI MURI,
CHINGOLI VILLAGE, CHENGOLI P.O., PIN-690532.
- 2 LASAR, AGED 74 YEARS, S/o YOHANNAN,
THOTTAPPALLISSERIL, MUTHUKULAM THEKKU MURI,
ARATTPUZHA VILLAGE, P.O. CHOOLATHERUVU, PIN-690 506.
- 3 ROOMAN JOSEPH, AGED 54 YEARS, S/o JOSEPH,
PUTHENPURAYIL VEETTIL, CHINGOLI VILLAGE,
CHENGOLI P.O., PIN-690532.
- 4 MEBIL, AGED 59 YEARS, D/o KATHREENA,
PUTHENPURAYIL VEETTIL, CHINGOLI VILLAGE,
CHENGOLI P.O., PIN-690532.
- 5 STEEPHEN, AGED 52 YEARS, S/o JOSEPH,
PUTHENPURAYIL VEETTIL, CHINGOLI VILLAGE,
CHENGOLI P.O., PIN-690532.
- 6 TREESA, AGED 74 YEARS, D/o KATHREENA,
PUTHENPURAYIL VEETTIL, CHINGOLI VILLAGE,
CHENGOLI P.O., PIN-690532.



- 7 JOSSAMMA, AGED 63 YEARS, D/o KATHREENA,
PUTHENPURAYIL VEETIL, CHINGOLI VILLAGE,
CHENGOLI P.O., PIN-690532.
- 8 JOSEPH CLEETUS, AGED 63 YEARS,
PUTHENPURAYIL VEETIL, CHINGOLI MURI,
CHINGOLI VILLAGE, PIN-690532,
NOW EMPLOYED IN 1353, TOM CILOZAS, DR.ELPASO,
TX. 79936-4720-AMERICA (EXPARTE).

BY ADVS. M.V.THAMBAN
R.REJI
THARA THAMBAN
B.BIPIN
ARUN BOSE
SUNEESH KUMAR R.

THIS CIVIL REVISION PETITION HAVING COME UP FOR HEARING ON
22.08.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**CR****ORDER**

It is a case wherein the trial court while drawing a decree on merits in a suit granted permission to file another suit in the following lines :

" Suit is dismissed. No order as to costs. The decision in this case is not a bar for filing a fresh suit subject to the law of limitation, if so advised."

2. Strange enough, this decree was passed in a subsequent suit in O.S.No.205/2011. The earlier suit, O.S.No.260/2007 between the same parties on the same subject matter on the very same cause of action was allowed to be withdrawn on payment of cost of Rs.1000/- with liberty to file a fresh suit on the same cause of action. It is thereafter, a second suit - O.S.No.205/2011 was filed on the very same cause of action and it was disposed of by the trial court (Munsiff Court, Haripad) on



its merits as above by reserving liberty to file a fresh suit. Based on the said decree, a third suit - O.S.No.175/2017 was instituted by the very same plaintiff presumably based on the reservation made in the earlier decree in O.S.No.205/2011 by removing the bar in instituting a fresh suit, but subject to the law of limitation. It is quite unfortunate that the officer had taken away the provisions contained in the Code of Civil Procedure regarding finality of the suit and doctrine of res judicata. The reservation made in the said decree removing the bar in instituting a fresh suit on the same cause of action amounts to re-writing the relevant provisions in the Code of Civil Procedure and hence non est in the eye of law and cannot be sustained. No such power is vested with the civil court to reserve any liberty to file a fresh suit on the same cause of action by the same plaintiff or the person litigating under him and it would otherwise be violative of, firstly, Section 11 C.P.C., secondly, Order XXIII Rule 1 and 2 C.P.C. and thirdly, the very concept of "decree", which should be



conclusive in the determination of right of the parties with regard to all or any of the matters in controversy in the suit. It is true that any adjudication from which an appeal lies as an appeal from an order (a deemed decree) and any order of dismissal for default would also come under the purview of "decree" as defined under the Code. But, primarily, the word "decree" stands for formal expression of an adjudication which conclusively determines the rights of parties with regard to all or any of the matters in controversy in the suit. This has to be read along with Section 11 C.P.C. and the doctrine of res judicata embedded therein. The extensive nature of Section 11 C.P.C. engulfs within its sweep even the principle of "constructive res judicata" pertaining to a matter which might and ought to have been made a ground of defence or attack in a suit (former suit) and would deem to have been a matter directly and substantially in issue in such suit, by virtue of Explanation IV attached to that section and also any relief claimed in the plaint which is not expressly granted by the decree, shall stand deemed to



have been refused by virtue of Explanation V. The principle of *res judicata* as embedded under Section 11 C.P.C. would apply not only to the party to the lis, but also those who are litigating under them or any of them. It is not permissible for the court to reserve any right of fresh suit on the same cause of action while drawing a decree on its merits or to remove any statutory bar in instituting a fresh suit on the same cause of action. A liberty to file a fresh suit can be granted only under Order XXIII Rule 1 and 2 C.P.C., when an application is submitted under that provision seeking permission to withdraw the suit. The said power or jurisdiction cannot be extended while drawing a decree in a suit irrespective of whether it is a decree of dismissal of the suit or not. All these basic principles have been overlooked by the trial court while rendering the impugned judgment and decree in the second suit - O.S.No.205/2011. No such clause can be incorporated in a decree and if any such clause is incorporated, it would stand *non est* in the eye of law. The third suit instituted in O.S.No.175/2017,



based on the abovesaid liberty granted in the decree in the second suit, hence cannot be sustained and will stand hit by Section 11 C.P.C. and also by virtue of the doctrine of constructive *res judicata*. The failure to address or adjudicate any of the disputes involved in the suit by the trial court or by the first appellate court shall be agitated in accordance with the provisions contained in the Code. The court which passed the decree cannot by itself bring out a fresh cause of action based on any failure to address any of the disputes involved in the suit except on the ground of lack of inherent jurisdiction. It is quite impermissible to leave any dispute unanswered while drawing a judgment and a decree, except on account of lack of inherent jurisdiction. The mere fact that the decree covers formal expression of an adjudication pertaining to "any of the matters in controversy" as per the definition given under Section 2(2) C.P.C. does not mean that the court can adjudicate some of the issues involved in the suit and leave open other issues within its competence for adjudication in a



separate suit. The expression "any of the matters in controversy" is consistent with the "constructive res judicata" incorporated under Explanation IV and V of Section 11 C.P.C., hence there cannot be any repugnancy in its application. The decree must satisfy the mandate of formal adjudication which conclusively determines the dispute involved in the suit and shall not be a half-baked one so as to bring out another litigation on the same cause of action.

3. In the third suit instituted under the guise of the liberty granted in the decree passed in the second suit, an application - I.A.No.2/2021 was submitted by one of the defendants challenging the maintainability of third suit, which came up before yet another officer (the Munsiff Court, Haripad), who in turn dismissed the application without relying on the legal position settled by this Court in **Rosamma Stella Florence v. Lazar Nadar [2017 (4) KHC 38]** though it was referred and found a place in the impugned order. It was not followed by the court



for the reason best known to it. The observation of the court that the said decision has to be distinguished from the factual situation of the present case without attending to and without whispering any factual situation in that behalf seems so perverse and cannot be sustained and it is against the principle of binding precedent. The courts are bound to follow the legal position settled by the High Court or the Apex Court as the case may be and it is impermissible for them to re-write the legal position, that too, without adhering to any valid reason. Hence, the impugned order passed by the trial court in the abovesaid application will stand set aside. The liberty granted in the decree in O.S.No.205/2011 for filing a fresh suit is without any jurisdiction and hence, *non est* in the eye of law.

4. At the fag end of the argument, the learned counsel for the petitioner pressed for a remand so as to explore the possibility of a settlement in the matter and wanted two weeks time. Hence, only for that purpose, the



matter is remanded back to the trial court. The parties shall appear before the trial court on 25/09/2023 and if it is not settled within two weeks from that date, the application in I.A.No.2/2021 will stand allowed and the said suit will stand dismissed as not maintainable.

The Civil Revision Petition will stand allowed accordingly.

Send a copy of this judgment to the Director(Academics), Kerala Judicial Academy for future guidance.

Sd/-

P . SOMARAJAN

JUDGE

SV



APPENDIX OF CRP 237/2022

PETITIONER'S ANNEXURES

Annexure A1	THE CERTIFIED COPY OF THE JUDGMENT DATED 20.10.2010 IN O.S.NO.260 OF 2007.
Annexure A2	THE CERTIFIED COPY OF THE PLAINT DATED 04.08.2011 IN O.S.NO.205 OF 2011.
Annexure A3	THE CERTIFIED COPY OF THE DECREE DATED 23.02.2017 IN O.S.NO.205 OF 2011.
Annexure A4	THE CERTIFIED COPY OF THE PLAINT IN O.S.NO.175 OF 2017 DATED 02.06.2017.

// TRUE COPY //

P.S. TO JUDGE