

**HON'BLE SRI JUSTICE M.SATYANARAYANA
MURTHY**

A.S.NO.2477 OF 1996

JUDGMENT:

The unsuccessful plaintiff in O.S.No.359 of 1975 on the file of the Subordinate Judge, Nalgonda (hereinafter referred to as 'trial Court' for convenience), preferred this appeal challenging the decree and judgment dated 28th June, 1996, whereunder the trial Court dismissed the said suit for partition on the ground of limitation.

2. For convenience, the ranks given to the parties before the trial Court will be adopted through out this judgment.

3(a). The plaintiff (appellant herein) filed the suit for partition of the scheduled property and recovery of possession of his half share and for mesne profits for the past three years, alleging that he is the adopted son of the first defendant (first respondent herein), who died during the pendency of the suit. The plaint schedule property before the settlement operations was situated in Survey No.366/1 and the same has been changed to Survey Nos. 409 and 413/1 after settlement and the said land belongs to the joint family, which consists of the plaintiff and the 1st defendant.

As the 1st defendant made an attempt to dispose of the joint family property 10 years after the adoption, the plaintiff demanded for partition of the schedule property in the month of November, 1965,

but the 1st defendant did not co-operate. Thereupon, the plaintiff filed O.S.No.108 of 1965 on the file of the District Munsiff Court, Huzurnagar, against the 1st defendant. In the said suit, the 1st defendant raised a contention that the plaintiff is not an adopted son and that the intended sale was to discharge the debts contracted due to marriage of his 4th daughter. During the trial of the said suit, the husband of the 2nd defendant, who has been examined as DW.3, deposed that his wife had purchased Ac.11.30 guntas of land for consideration of Rs.4,000/- by registered sale deed dated 30.09.1965 and she has been in possession and enjoyment of the said property.

(b). The District Munsiff, while holding that the plaintiff is an adopted son of the 1st defendant, decreed the suit for partition of entire schedule property, except item No.7 in Survey No.366/1 of Amaravaram Village, as the said property was not in joint possession and enjoyment of the family on the date of suit.

(c). Aggrieved by the said decree and judgment, the plaintiff herein being unsuccessful, preferred A.S.No.19 of 1968 on the file of the District Court, Nalgonda, which confirmed the decree and judgment of the trial Court in respect of Ac.11.30 guntas in Survey No.366/1 of Amaravaram Village. It is also contended in the said suit by the plaintiff that the said transaction was hit by Section 47 of A.P. (Telangana Area) Tenancy and Agricultural Lands Act, 1950, but the appeal was dismissed with the following observations:

“It is open to the plaintiff to file a suit against the wife of

witness No.3 (DW.3) for his half share in item No.7, in which suit she can put forth all the pleas available to her and the validity and binding nature of Ex.X.2 on the plaintiff can be fully and effectively decided.”

(d). It is contended by the plaintiff that the document executed in favour of the 2nd defendant by the 1st defendant is nominal and it was brought into existence by the 1st defendant to defeat his rights and thereby the document has absolutely no legal basis and not for the benefit of the estate or antecedent debt of the family. Therefore, the transaction is not binding on the plaintiff and prayed to pass a decree in respect of the schedule property also.

(e). The institution of previous suit O.S.No.108 of 1965 on the file of the District Munsiff Court, Huzurnagar, caused disruption in the status of the joint family of the plaintiff and the 1st defendant and since the date of filing of the suit, the plaintiff and the 1st defendant became tenants-in-common. Hence, the plaintiff is entitled to claim half share by way of partition and for delivery of vacant possession of the property. Therefore, prayed to pass a decree for partition of the schedule property in an extent of Ac.11.30 gts and for delivery of vacant possession.

4(a). The 2nd defendant filed written statement denying adoption of the plaintiff by the 1st defendant and that the decree and judgment in O.S.No.108 of 1965 on the file of the District Munsiff Court, Huzurnagar, is not binding on the 2nd defendant, as she is not a party to the suit and even the judgment in A.S.No.19 of 1968

is also not binding. The provisions of the A.P. (Telangana Area) Tenancy and Agricultural Lands Act, 1950 does not apply to Lingagiri Pargana. The sale deed dated 30.09.1965 executed by the 1st defendant in favour of the 2nd defendant is valid and legally enforceable document and therefore, the plaintiff and the 1st defendant cannot become tenants-in-common and the 2nd defendant alone has been cultivating the suit schedule property since the date of purchase.

(b). The valuation of the suit is improper.

(c). The provisions of Section 65 of the Limitation Act, 1965 (for short 'the Act') does not apply to the facts of the case. The plaintiff has no claim over the properties of the 1st defendant. The sale deed in favour of the 2nd defendant cannot be declared as bogus or nominal, as it is supported by consideration.

(d). The 2nd defendant is entitled to claim protection under the provisions of Section 53-A of the Transfer of Property Act and that due to inflation in the rate of the land and due to efflux of time plaintiff invented the suit. Therefore, the suit is barred by limitation and prayed to dismiss the same.

5. Basing on the above pleadings, the trial Court framed the following issues:

- 1) Whether the plaintiff is the adopted son of the 1st defendant?
- 2) Whether the registered sale deed dated 30.09.1965 executed by the 1st defendant in favour of the defendant

No.2 is valid and supported by legal necessity as alleged in the written statement?

- 3) Whether the 2nd defendant made improvements in the suit land by spending Rs.10,000/- and whether she is entitled to the value of the improvements?
- 4) Whether the plaintiff is estopped from challenging the sale transact in favour of defendant No.2 under Section 53-A of the Transfer of Property Act?
- 5) Whether the suit property is properly valued and the Court Fee paid is correct?
- 6) To what relief?

6. After the judgment and decree passed by the trial Court on 22.09.1979, this Court in L.P.A.No.161 of 1987 set aside the said judgment by decree and judgment dated 03.07.1995 and permitted the parties to let in fresh evidence after framing an issue with regard to the period of limitation.

7. However, both the parties did not adduce any evidence on the additional issue framed by this Court.

8. This Court, while remitting the matter to the trial Court after framing an issue with regard to the period of limitation made it clear that the said issue has to be decided at first directed as follows:

“If this issue is held in affirmative in favour of the 2nd defendant commenting on other issue and giving a finding on those issues including the legal effect of Section 53-A of the Transfer of Property Act vis a vis Section 47 of the Act of 1950 does not arise.”

9. As directed by this Court, the trial Court framed the following additional issue:

“Whether the suit is not barred by limitation in view of filing of the same after 3 years from the date of the execution of sale deed i.e. Ex.B.1?”

10. The trial Court after hearing both the counsel discerning entire legal position on the aspect of limitation concluded that the suit is barred by limitation, as Article 59 of the Act would apply and Article 109 or Article 65 of the Act has no application and thereby, dismissed the suit.

11. Aggrieved by the finding on additional issue, the unsuccessful plaintiff preferred this appeal raising several contentions.

12. The trial Court did not consider the scope of remand in proper perspective and relied on the decisions cited by the counsel for the defendants and wrongly concluded that Article 109 of the Act has no application and Article 59 of the Act alone is applicable. But the said finding is totally contrary to law laid down by various Courts. Since the suit is filed for partition setting aside the alienation and such suits are governed by Article 109 of the Act, but not Article 59. The relief sought by the plaintiff is not cancellation or annulment of sale deed dated 30.09.1966-Ex.B.1. But the trial Court did not appreciate the contentions of the plaintiff in proper perspective and committed an error in dismissing the suit and finally prayed to set aside the decree and judgment passed by the trial Court, more particularly setting aside the finding regarding the limitation.

13. During the course of arguments, learned counsel for the appellant Sri Y. Rama Rao would contend that when the suit is filed for partition and recovery of possession, though a sale deed was executed and marked as Ex.B.1, such suit is governed by Article 109 of the Act, but not Article 59 of the Act for the reason that Article 59 is applicable only to cancellation of sale deeds. Moreover, the plaintiff is a third party to the document. Even in such a case, the plaintiff is not entitled to seek relief of cancellation under Section 31 of the Specific Relief Act, thereby Article 59 of the Act has no application. At best, the plaintiff is entitled to seek a declaratory relief under Section 34 of the Specific Relief Act, which is governed by Article 58 of the Act. In any view of the matter, either Article 58 or 59 of the Act has no application since the plaintiff claimed partition of the schedule property and recovery of possession annulling Ex.B.1-sale deed executed by his adoptive father in favour of the 2nd defendant. In such cases, Article 109 of the Act alone is applicable. Finally, the counsel contended that the finding of the trial Court is erroneous and prayed to set aside the same holding that the suit is within the time as it is governed by Article 109 of the Act and pass a decree in favour of the plaintiff.

14. None appeared for the respondents though notices have been served.

15. Considering the rival contentions and perusing the material on record the point that arises for consideration is:

“Whether the suit claim of the plaintiff is barred by

limitation?”

POINT:

16. Undisputedly, the suit was filed for partition and recovery of possession. The trial Court did not frame any issue initially with regard to the limitation. However, in L.P.A.No.161 of 1987, dated 03.07.1995, this Court while remanding the matter issued a direction to the trial Court to frame an issue regarding limitation while permitting to let in evidence by both parties observed as follows:

“If this issue is held in affirmative in favour of the 2nd defendant, commenting on other issues and giving a finding on those issues including the legal effect of Section 53-A of the Transfer of Property Act vis a vis Section 47 of the Act, 1950 does not arise.”

17. Thus, it is clear from the observations made by this Court while remitting the matter in L.P.A.No.161 of 1987 that the trial Court was required to decide the issue of Limitation and if that issue is held in favour of the 2nd respondent, the other findings need not be touched.

18. In any view of the matter, the real controversy between the parties is with regard to the limitation. The trial Court held that Article 59 of the Act is applicable. The Schedule (Part IV) of the Limitation Act deals with suits relating to decrees and instruments and Article 59 of the Act specified three years of limitation starts from the date when the facts entitling the plaintiff to have the instrument or decree cancelled are set aside, become known to him to cancel or set aside the instrument or decree or for the

recession of a contract.

19. Therefore, the limitation to cancel or set aside the instrument starts from the date when the execution of such instrument came to the notice of the plaintiff. According to Article 59 of the Act, a party to an instrument or a decree can file the suit, but annul the document within three years from the date when such document came to the knowledge of the plaintiff. But, here the plaintiff is not a party to Ex.B.1 and that the 1st defendant executed document in favour of the 2nd defendant. Therefore, the remedy available to the plaintiff is only to seek a declaration under Section 34 of the Act and limitation to obtain declaration is three years when the right to sue first accrues under Article 58 of the Act.

20. Since the plaintiff is not a party to the document, he cannot file a suit for declaration under Section 31 of the Specific Relief Act or for cancellation or setting aside the sale deed-Ex.B.1, but filed suit for partition and recovery of possession invalidating the sale transaction covered by Ex.B.1 executed by the 1st defendant in favour of the 2nd defendant. Article 109 of the Act prescribes 12 years limitation to set aside his father's alienation of ancestral property governed by Hindu Mitakshara Law and the limitation starts from the date when the alienee takes possession of the property. The word 'alienation' in this Article includes 'mortgage' as well as the 'sale and gift'. Even if the plaintiff claims possession, the suit falls under this article, the words 'to set aside a father's alienation' include also a suit in which possession is

claimed, as held by High Court of Madras in **Periya Munia Goundan and another v Ramaswamy Goundan and another**^[1].

In **Rano Dip Singh v Parameshwar Pershad**^[2] the Privy Council held that a suit to set aside the alienation as well as to recovery possession falls under Article 109 of the Act. Even a suit by an adopted son to set aside an alienation of joint family property made by his adoptive father falls under this article.

21. In view of the law laid down in **Milapchand v Mohinibibi**^[3] when a suit filed by a son to set aside the alienation of ancestral property made by a father and to apply this Article, the following conditions have to be fulfilled:

- “1) the parties must be Hindus governed by Mitakshara
- 2) the suit is for setting aside the alienation by the father at the instance of the son.
- 3) the property relates to ancestral property;
- 4) the alienee has taken over possession of the property alienated by the father.”

22. In the instant case both the parties are governed by Hindu Mitakshara law and the suit is filed for recovery of possession on the ground that Ex.B.1-sale deed, dated 30.09.1966 is not binding as it is nominal and whereas the 2nd defendant contended that he purchased the property for valuable consideration and in possession and enjoyment of the same since the date of purchase under Ex.B.1. Therefore, the facts of the present case satisfy the requirements to apply this article.

23. The limitation would commence from the date when the possession was taken by the purchaser. If the plaintiff is a minor, he has to file the suit within three years after attaining majority and if he failed to do so the suit is barred by limitation. Therefore, to calculate the time the alienee must take possession and the limitation starts from the date of taking possession by the alienee. In the instant case, it is an admitted fact that the 2nd defendant alienee is in possession and enjoyment of the property from the date of purchase of the property under Ex.B.1. Hence, Article 109 of the Act is applicable, but not Article 59.

24. The trial Court after discussing the law laid down by various High Courts concluded that the suit is governed by Article 59 of the Act, but not by Article 109 or 65. The trial Court did not appreciate the specific contention of the plaintiff about the scope of Articles 59 and 109 of the Act. Article 59 of the Act is applicable only to set aside the document or an instrument under Section 31 of the Specific Relief Act and the same has no application to a suit filed for setting aside the alienation of ancestral property by father against the interest of the son. In the instant case, the 1st defendant being adopted father of the plaintiff, alienated the joint family property before filing the suit i.e O.S.No.108 of 1965 on the file of District Munsiff Court, Huzurnagar, and the plaintiff claimed partition of the property before the District Munsiff Court, Huzurnagar.

25. The trial Court, while granting decree for partition of other items of the property, declined to pass a decree for the present

suit schedule property on the ground that the plaintiff was not in possession of the same as on the date of filing of the suit. The judgment of the District Munsiff Court was confirmed by the District Court under Ex.A.2-certified copy of judgment in A.S.No.19 of 1968. Ex.A.3 is the certified copy of the judgment in O.S.No.108 of 1965 dated 23.12.1967.

26. The trial Court swayed away by the submissions made by the counsel for the respondents while deciding the issue involved in the suit and totally influenced by the various decisions cited by the counsel for the defendants in the said suit. Thus, the trial Court committed an error in applying Article 59 of the Act.

27. In view of my foregoing discussion, Article 109 of the Act would apply to the present facts of the case, for the reason that the plaintiff being a Hindu governed by Mitakshara Law filed the suit for partition of schedule property in to two equal shares and to allot one such share with possession challenging the alienation of ancestral property made by the 1st defendant in favour of the 2nd defendant by executing Ex.B.1 and as such the limitation starts from the date of taking possession by the alienee i.e. the 2nd defendant. According to the 2nd defendant, the possession of the property was taken on the date of execution of Ex.B.1, dated 30.09.1966, but the plaintiff filed the present plaint on 18.07.1975 and the same was registered on 01.08.1975 as per the decree copy. Therefore, the suit is within 12 years from the date of taking possession under Ex.B.1 i.e. 12 years within the limitation.

Hence, the finding of the trial Court that Article 59 of the Act is applicable to the facts of the present case is erroneous and the same is hereby set aside holding that the claim of the plaintiff is within the time by applying Article 109 of the Act.

28. This Court while remanding the matter, made an observation that when the issue of limitation was found affirmative in favour of the 2nd respondent, the trial Court need not make any comment. In view of the above observation, this Court, while holding that the suit is barred by limitation, did not touch the findings of the trial Court on the other issues. But when this Court found that the suit is within the time, it must necessarily advert to the findings on other issues, but those findings are not under challenge before this Court except the finding on additional issue framed by the Court. Hence, I myself refrain to decide the appeal against the finding of the trial Court with regard to the issue of limitation without touching any other findings recorded by it. Even otherwise, no record is available before this Court to interfere with the findings on other issues in view of observations of this Court. The parties are at liberty to take necessary steps before the trial Court in view of the findings recorded by this Court.

29. In view of my foregoing discussion, I find that the trial Court committed serious error in application of Article 59 of the Act. Hence, the finding of the trial Court is hereby set aside and the appeal is liable to be allowed.

30. In the result, the appeal is allowed setting aside the finding of the trial Court on additional issue regarding the limitation framed on remand by this Court in L.P.No.161 of 1987, but without costs.

31. Consequently, miscellaneous petitions, if any, pending in the appeal shall stand closed.

M.SATYANARAYANA MURTHY,J

Date: 24.04.2015

Kvrm

**HON'BLE SRI JUSTICE M.SATYANARAYANA
MURTHY**

A.S.NO.2477 OF 1996

DATE: 24.04.2015

kvrn

[\[1\]](#) 41 Madras 650
[\[2\]](#) AIR 1925 PC 33
[\[3\]](#) AIR 1928 OUDH 348