

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.01.2018

CORAM

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

**C.R.P. (PD) No.677 of 2015
and M.P.No.1 of 2015**

G.Vijaya

...

Petitioner / Plaintiff

Vs

M.Gurusamy (died)

1.P.Arulmozhi

2.G.Subramaniam

3.P.Palanisamy

4. The President
Kavindapady Village Panchayat
Kavindapady
Bhavani Taluk

5.M.Sadasivam

6.Pasupathy

7.Valarmathy

...

Respondents

Prayer : Civil Revision Petition is filed under Article 227 of the Constitution of India to set aside the fair and final order dated 12/01/2015 made in I.A.No.2 of 2015 in O.S.No.1 of 2010 on the file of the Sub Court, Bhavani.

For Petitioner : Mr.T.Murugamanickam,
Senior Counsel for
Ms.Zeenath Begum

For Respondents : Mr.P.Valliappan for
R2, R5 & R7.

No appearance for
R1, R3, R4 & R6.

ORDER

This Civil Revision Petition is filed to set aside the fair and final order dated 12/01/2015 made in I.A.No.2 of 2015 in O.S.No.1 of 2010 on the file of the Sub Court, Bhavani.

2. The petitioner is the plaintiff and the respondents are defendants 2 to 7 in the suit in O.S.No.1 of 2010 on the file Sub Court, Bhavani. The petitioner filed the above suit for partition against the respondents 1 to 5 and one Gurusamy. The said Gurusamy died and respondents 6 & 7 were impleaded as legal heirs of the said Gurusamy. The first respondent filed written statement on 23.08.2005 and the second respondent filed written statement on 26.09.2005. The petitioner filed reply statement on 06.12.2005. The petitioner filed present I.A.No.2 of 2015 for amendment of plaint to include four declarations to declare the release deed dated 21.09.2004, gift settlement deeds dated

09.03.2005 and 11.07.2005 and to declare the agreement dated 01.07.2005 as null and void and / or not binding on the petitioner. According to the petitioner, she is a co-parcener and documents executed by the respondents are not binding on her. By abundant action, she filed the application and prayed for amendment of plaint to include the above said relief.

2 (a) The second respondent filed counter and contended that the amendments sought for by the petitioner is barred by limitation. The second respondent in his written statement filed on 26.09.2005 itself has stated about the four documents and mentioned in the list of documents in the written statement. Further, the petitioner has not valued the relief properly and prayed for dismissal of the application.

3. The learned Judge, considering the averments in the affidavit, counter affidavit and materials on record, dismissed the application holding that the relief sought for by the petitioner is barred by limitation and petitioner has to value the suit under Section 40 of the Tamil Nadu Court Fees & Suits Valuation Act and not under Section 25 (d) of the Act.

4. Against the order of dismissal dated 12/01/2015 made in I.A.No.2 of 2015 in O.S.No.1 of 2010, the present Civil Revision Petition is filed by the petitioner.

5. The learned Senior Counsel for the petitioner contended that the amendments sought for by the petitioner is a pre-trial amendment and it must be considered liberally. The period of limitation in the present case is governed by Article 109 of the Limitation Act, as member of the family is challenging alienation by father. Section 59 of the Limitation Act is not applicable to the facts of the present case. The learned Judge erred in holding that the amendments sought for by the petitioner is barred by limitation.

5 (a) In support of his contention, the learned Senior Counsel for the petitioner relied on the following judgments -

(i) 2006 (2) CTC 377 [R.Sridharan v. Ammaniammal]

25. The finding of the Trial Court that the suit is barred by limitation since it was not filed within three years from the date of the knowledge of the sale as per Section 59 of the Limitation Act, is erroneous and cannot be sustained. The correct provision of law applicable under the Limitation Act is only Article 109 and the suit having been filed in the

year 1981, within 12 years from the date of sale viz., 11.5.1972, is within time. Point No.5 is answered accordingly.

(ii) 2006 (5) CTC 255 [Siddha Construction (P) Ltd. v. M.Shanmugam]

11. For deciding the value of the Court Fee payable by the plaintiff the averments in the plaint alone are to be considered. In O.S.No.13/2002, the prayer sought for is to declare the sale deed executed by the 1st defendant (the 5th respondent herein) in favour of the 3rd defendant (Revision Petitioner) as null and void and not binding on them. It is averred at para 10 of the plaint that since they are not party to the sale deed dated 31.10.2001, which is to be declared as null and void, the plaintiff valued the suit for the purpose of the Court Fee under Sec.25(d) of the Tamil Nadu Court Fees Act. It is also further averred in para 7 of the plaint that the plaintiffs did not execute the sale deed and they did not receive any sale consideration. It is the further case of the revision petitioner that they did not make any alienation to and in favour of any one till today in respect of the suit schedule property.

12. In the light of the averments made in the plaint, the trial court is right in coming to the conclusion that the suit has been rightly valued and the trial court has pecuniary jurisdiction to try the suit.

(iii) 2011 (6) MLJ MAD 399 [G.Seethadevi v. R.Govindaraj]

7. In the case on hand, it is to be seen that the case of the petitioner is that she has not executed Power of Attorney in favour of one Bhaskaran so as to execute the sale deed in favour of third parties. That apart, it is contended that the said Bhaskaran is unknown to the petitioner and he is an employee of

the first respondent in his petrol bunk. When such statement has been made in the plaint, the court fee that has to be payable on the relief that has been sought for by the petitioner viz., for declaration that the sale deed dated 25.04.2008 is null and void and not binding on the petitioner, under [section 25\(d\)](#) of the Act and not under [Section 40](#) of the Act. The petitioner has not admitted the execution of Power of Attorney. The court below is not justified in directing the petitioner to pay the court fee under [section 40](#) of the Act. In the case relied on by the respondents, the Power of Attorney was admitted by the respondents/plaintiffs therein and hence, this Court in the said decision has directed the party to pay the Court Fee under [section 40](#) of the Act.

5 (b) The learned Senior Counsel for the petitioner relying on the judgment reported in **2011 (6) MLJ MAD 399** cited *supra* contended that the petitioner is not a party to the document sought to be declared as null and void. In such case, the petitioner has rightly valued the suit under Section 25 (d) of the Tamil Nadu Court Fees & Suits Valuation Act and Section 40 of the Act is not applicable as the petitioner is not a party to the document.

6. Per contra, the learned counsel appearing for the respondents 2, 5 & 7 contended that Article 109 of the Limitation Act will apply only to the suit filed by the son and not by the daughter. When a daughter seeks for declaration of alienation by father, only Article 59 will apply and period of limitation is three years. The learned counsel for the respondents contended that the

first document alone was executed by father of the petitioner and other documents were executed by brother and sister of the petitioner and therefore the contention of the learned Senior Counsel for the petitioner that only Article 109 of the Limitation Act is applicable to the present case is not correct. The petitioner had earlier filed four applications for amendment and other relief and petitioner had mentioned all the four documents in the earlier application itself and contended that the said documents are not binding on her. She did not seek declaration now sought for in the earlier applications. The respondents had mentioned four documents in the written statement filed by them on 26.09.2005. The petitioner has not given any reason for not filing application for declaration at the earliest. The petitioner is seeking declaration that the documents are null and void which in fact amounts to seeking cancellation of said document. In such circumstances, the petitioner has to value the relief under Section 40 of the Tamil Nadu Court Fees and Suits Valuation Act and pay the court fee on the market value and prayed for dismissal of the Civil Revision Petition.

6(a) The learned counsel for the respondents 2, 5 & 7, in support of his contention, relied on the judgment reported in **AIR**

1996 (SC) 2358 [Radhika Devi v. Bajrangi Singh and others]

wherein it has been held as follows -

3. The appellant has instituted Partition Suit No.24/88 in the Court of Subordinate Judge, Aurangabad for partition of certain properties. Respondents 16 to 20 herein filed written statement on June 15, 1988 wherein they pleaded that Ramdeo Singh had executed and registered a gift deed in their favour on July 28, 1978 bequeathing the properties covered thereunder. They became owners of those lands and the appellant is bound by the same. Pending the suit, the appellant filed an application under Order 6 Rule 17, CPC on November 11, 1992 seeking declaration that the gift deed was obtained by the respondents illegally and fraudulently and, therefore, it was ineffective and does not bind the appellant. Though the trial Court by order dated November 24, 1992 allowed the petition, the High Court in Revision no.1657/92 by order dated August 13, 1993 allowed the petition and set aside the order directing amendment of the plaint. Thus, this appeal by special leave.

6. In that case this Court considered the cross-objections to be treated as a cross suit since no alteration was being made in the written statement to treat it as a plaint originally instituted. The amendment which was sought to be made was treated to be clarificatory and, therefore, this Court had upheld the amendment of the written statement and treated it to be a cross suit. The ratio therein squarely applies to a fact situation where the party acquires right by bar of limitation and if the same is sought to be taken away by amendment of the pleading, amendment in such circumstances would be refused. In the present case, the gift deed was executed and registered as early as July 28, 1978 which is a notice to everyone. Even after filing of the written statement, for 3 years no steps were taken to file the application for amendment of the plaint. Thereby the occurred right in favour of the respondents would be defeated by permitting

amendment of the plaint. The High Court, therefore, was right in refusing to grant permission to amend the plaint.

7. Heard the learned Senior Counsel appearing for the petitioner as well as learned counsel appearing for the respondents 2, 5 & 7 and perused the materials available on record.

8. The points for consideration in this Civil Revision Petition is whether Article 109 or Article 59 of Limitation Act is applicable in respect of the relief of declaration sought for by the petitioner by way of amendment.

9. From the materials on record, it is seen that in the above four documents, first document viz. release deed is executed by the father of the petitioner on 21.09.2004 and fourth document viz. Agreement deed dated 01.07.2005 is also executed by the father of the petitioner alongwith others. The petitioner who is the daughter of the first defendant viz. M.Gurusamy is seeking to challenge those two documents. She is a member of the family and therefore Article 109 is applicable in respect of those two documents. Article 59 and 109 of the Limitation Act read as follows -

SUITS RELATING TO DECREES AND INSTRUMENTS

<i>Description of suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
59. To cancel or set aside an instrument or decree or for the rescission of a contract	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him

SUITS RELATING TO MISCELLANEOUS MATTERS

<i>Description of suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
109. By a Hindu governed by Mitakshara law to set aside his father's alienation of ancestral property	Twelve years	When the alienee takes possession of the property

10. A reading of Article 109 of the Limitation Act reveals that a member of the family can challenge the alienation by father within twelve years. It does not restrict that only a son can challenge the alienation. The interpretation put forth by the learned counsel for the respondents that only the son can challenge the alienation by father within twelve years as per Article 109 and daughter has to challenge the said alienation within three years as per Article 59 is not acceptable. The judgments relied on by the learned Senior

Counsel for the petitioners are squarely applicable to the facts of the present case.

11. As far as other two documents viz. Document Nos.2 & 4 are concerned, they are executed by the brother and sister of the petitioner. The relief of declaration ought to have been filed within three years of execution of the said documents or within three years of date of knowledge, as per Article 59 of the Limitation Act. The respondents have mentioned those documents in the written statement filed on 26.09.2005 and petitioner filed reply statement on 06.12.2005 and already four applications filed for amendment of plaint and other relief mention about these documents. In spite of the same, the petitioner has not sought for amendment within three years. The relief sought for in respect of these two documents is barred by limitation as per Article 59 of the Limitation Act.

12. As far as court fee is concerned, the petitioner is not a party to the documents. In view of the same, Section 40 of the Tamil Nadu Court Fees and Suits Valuation act is not applicable and Section 25 (d) of the Act alone is applicable. For the above reason, this Civil Revision Petition is partly allowed setting aside the order dated 12/01/2015 made in I.A.No.2 of 2015 in O.S.No.1 of 2010

only in respect of document Nos.1 & 4. The order dated 12/01/2015 made in I.A.No.2 of 2015 in O.S.No.1 of 2010 in respect of document Nos.2 & 3 shall stand confirmed.

13. In the result, this Civil Revision Petition is partly allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

22.01.2018

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Index : Yes
Speaking / Non-speaking order

To

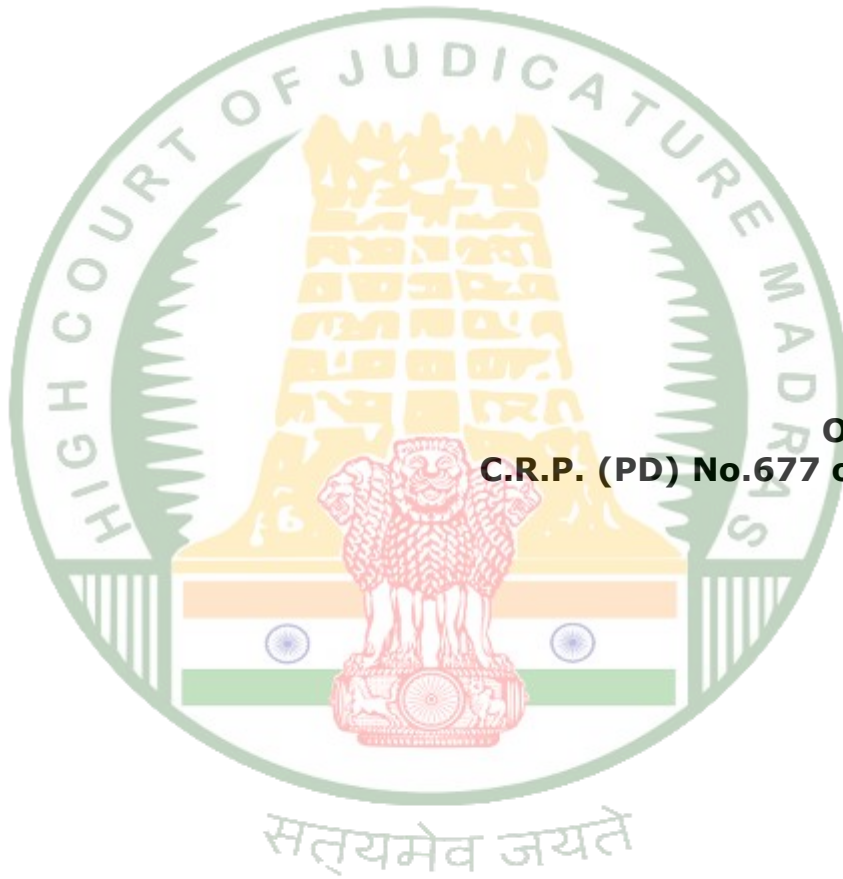
The Subordinate Judge,
Bhavani.



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V.M.VELUMANI, J.

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**Order in
C.R.P. (PD) No.677 of 2015**

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22.01.2018