IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 23-10-2019

Judgment pronounced on : 19-06-2020

CORAM :

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MRS. JUSTICE T. KRISHNAVALLI

Appeal Suit No. 298 of 2018
and
C.M.P. No. 7158 of 2018

1. Mrs. Renuka
2. Mr. Radhakrishnan
3. Mr. Ramakrishnan
4. Mrs. V. Rajalakshmi .. Appellants/Plaintiffs

Versus

Mrs. A. Kamalam (died)
Mr. A. Doraisamy (died)

1. Mr. A. Rajagopal
2. Mrs. Leelavathy @ Pappai
3. Mr. Jayachandran
4. Mrs. Indirani
5. Mr. Ravichandran
6. Mrs. Radha
7. Mr. Arun Karthick
   Mr. Ponnusamy (died)
8. K. Kanagaraj
9. K. Venugopal
10. Mrs. Dhanalakshmi
11. Mrs. Gokila
12. Mr. Nandakumar
13. Mrs. Radhamani
14. Mr. Chandra Mohan
15. Mr. Balachandar .. Respondents/Defendants

Appeal filed under Section 96 read with Order 41 Rule 1 of CPC to set aside the Judgment and Decree dated 21.11.2017 passed in O.S. No. 534 of 2010 on the file of the V Additional District Judge, Coimbatore.

For Appellants : Mr. N. Sridhar
for Mr. R. Bharath Kumar

For Respondents : Mr. C.R. Prasanan for R1
No appearance forRR2 to 7 and R15
R8 and R9 refused service of notice
Mr. P.M. Duraisamy for RR10 to 12
R13 died
Mr. B.R. Shankaralingam for R14

JUDGMENT

R.SUBBIAH,J

The Plaintiffs in O.S. No. 534 of 2010 on the file of the V Additional District Judge, Coimbatore are the appellants in this appeal. They have come forward with this appeal, aggrieved by the Judgment and Decree dated 21.11.2017 passed by the said court dismissing the suit filed by them for partition and separate possession of the plaint schedule mentioned property and for other reliefs.

2. For the sake of convenience, the parties are referred to as 'Plaintiffs' and 'defendants' as they are arrayed before the trial court.

3. One Guruvappa Naidu had two sons and they are Govindasamy Naidu and Chinnama Naidu. Govindasamy Naidu had a son by name Annasamy. Chinnama Naidu had two sons and they are Ponnusamy, tenth defendant and Ramachandran. Ponnusamy, tenth defendant died during the pendency of the suit and therefore, his legal heirs were impleaded as D13 to D15 in the suit. The Plaintiffs are the legal heirs of Ramachandran.

4. Annasamy, Son of Govindasamy Naidu died leaving behind his legal heirs by name Dhanalakshmi, Kamalam (D-1), Duraisamy (D-2), A. Rajagopal (D-3), A. Dhamodaraswamy. Among the legal heirs of Annasamy, Dhanalakshmi and Dhamodaraswamy died even before the institution of the suit and therefore they are not arrayed as parties to the suit. The first defendant Kamalam died during the pendency of the suit and therefore her legal heirs were brought in as D-11 and D-12 respectively. Similarly, the second defendant Duraisamy died and his legal heirs were brought in as D-16 to D-18 in the suit. The defendants 4, 5 and 6 are the legal heirs of Dhamodarasamy, son of Annasamy. Dhanalakshmi, Daughter of Annasamy died even before institution of the suit and therefore her son by name Ravichandran was arrayed as seventh defendant in the suit.

5. For more clarity and better appreciation of the relationship of the parties to the suit, it must be stated that the plaintiffs and defendants are descendants of Guruvappa Naidu. As mentioned above, Guruvappa Naidu had two sons namely Govindasamy Naidu and Chinnama Naidu. In other words,

Govindasamy Naidu and Chinnama Naidu are brothers. Govindasamy Naidu died in the year 1948 and Chinnama Naidu died in the year 1954. The Plaintiffs are sons and daughters of Ramachandran, who is one of the sons of Chinnama Naidu. The other son of Chinnama Naidu is Ponnusamy, who is arrayed as 10th defendant in the suit. Since Ponnusamy died during the pendency of the suit, his sons and daughters were arrayed as D13 to D15 in the suit. The other defendants in the suit are descendants of Annasamy, who is the only son of Govindasamy Naidu.

6. The entire case of the plaintiffs rests on the fact that Govindasamy Naidu and Chinnama Naidu, brothers, along with one Appa Naidu have purchased a larger extent of land measuring 21.64 acres in Pattanam Village, jointly under a Sale deed dated 05.04.1911 registered as document No. 558 of 1911 on the file of Sub-Registrar, Sulur. As per the sale deed dated 05.04.1911, Appasamy Naidu purchased undivided half share in the land measuring 21.64 acres and the remaining undivided half share was jointly purchased by the brothers namely Govindasamy Naidu and Chinnama Naidu. According to the plaintiffs, both the brothers namely Govindasamy Naidu and Chinnama Naidu have equally contributed money for purchase of the half share covered under the sale deed dated 05.04.1911. However, the sale deed was executed in the name of Govindasamy Naidu, being elder among the brothers as per the practice which was prevailing on those days. Even though the sale deed stood in the name of the elder brother Govindasamy Naidu, the younger brother Chinnama Naidu also enjoyed the lands by exercising rights of ownership equally along with his elder brother. The said Govindasamy Naidu was holding a fiduciary position in relation to his younger brother Chinnasamy Naidu. It is the case of the plaintiffs that such a fiduciary capacity continued till the death of Govindasamy Naidu in the year 1948. In fact, few years after the sale deed dated 05.04.1911, the said two brothers along with the co-sharer namely Appa Naidu have orally divided the property covered under the sale deed dated 05.04.1911 by and under which the half share on the eastern side on the North to South direction in S.F. Nos. 61, 64 and 67 was allotted to Appa Naidu while remaining extent on those three survey fields measuring 10.44 ½ acres was jointly allotted to Govindasamy Naidu and Chinnama Naidu.

7. The Plaint proceeds to refer to the registered mortgage of the property purchased by Govindasamy Naidu and Chinnama Naidu on 05.04.1911 jointly by both the brothers in the name of one Thavasi Konar on 05.12.1911 in which the other co-purchaser Appasamy was an attestor. It has been specifically mentioned in the said document that the properties covered in the said said mortgage deed are self-acquired properties of the said two brothers and the same was purchased in the name of one of the brothers by name Govindasamy Naidu. After redeeming the

mortgage and asserting an ownership over the lands, the brothers have once again mortgaged their respective 1/4 share in the property in favour of one Ayyavu Konar, son of the earlier Mortgagee Thavasi Konar under a registered mortgage deed dated 03.03.1926. This mortgage was executed by the elder brother Govindasamy Naidu as well as the younger brother namely Chinnama Naidu. Thereafter, the younger brother Chinnama Naidu executed a registered mortgage on 13.09.1943 in favour of one Velliangiri Thevar in respect of his undivided 1/4 share in the said property. Subsequently, on 20.07.1951, Chinnama Naidu once again mortgaged the undivided 1/4 share in the suit property in favour of Pattnam Multi Purpose Cooperative Society and availed a loan.

8. According to the plaintiffs, Appa Naidu, who jointly purchased half share in the suit property along with Govindasamy Naidu sold his undivided half share situated on the western side portion of the suit property to one Venkatasamy under a sale deed dated 28.01.1917 itself and the said Venkatasamy in turn sold the same to one Periyan Konar under a sale deed dated 10.06.1918. Therefore, Periyan Konar was shown as Co-pattadhar in respect of the suit property along with Govindasamy Naidu and Chinnamma Naidu as joint owners.

9. It is contended by the plaintiffs that Govindasamy Naidu died in the year 1948 leaving behind his only son Annasamy and Chinnama Naidu died in the year 1954 leaving behind his two sons Ponnusamy and Ramachandran as his legal heirs to succeed to the suit property. The Plaintiffs further contend that after the death of Chinnama Naidu, his two sons Ponnusamy and Ramachandran have succeeded to his estate and enjoyed the property jointly along with the legal heirs of Govindasamy Naidu. Further, Ponnusamy and Ramachandran have mortgaged the property under a registered mortgage deeds dated 16.05.1957 and 11.04.1961 respectively with Pattanam Multi Purpose Cooperative Society. And further, the revenue authorities issued Patta in the joint name of Ramachandran, Ponnusamy and Annasamy, who is the only son of Govindasamy Naidu.

10. The Plaintiffs further submit that Annasamy, Son of Govindasamy Naidu died on 30.05.1987 leaving behind his three sons and two daughters viz., Duraisamy, Rajagopal, Damadorasamy, Kamalam and Dhanalakshmi as his legal heirs. At this stage, Ramachandran, son of Chinnamma Naidu filed a suit for partition in O.S. No. 280 of 1994 before the Sub Court, Tirupur. On notice, the defendants in the suit have filed an application under Order 7 Rule 11 of CPC to reject the plaint on the ground that there is no cause of action for filing the suit. The trial court accepted the plea of the defendants and dismissed the suit on 17.08.1998. Aggrieved by the same, Ramachandran filed an

Appeal before the I Additional District Court, Coimbatore in A.S. No. 188 of 1999. During the pendency of the said appeal, an application in I.A. No. 195 of 2000 has been filed seeking to withdraw the suit with leave to file a separate partition suit on the same cause of action. The said application in I.A. No. 195 of 2000 was allowed on 28.03.2001 and the suit in O.S. No. 280 of 1994 was dismissed as withdrawn with liberty to file a fresh suit on the same cause of action.

11. It is the plea of the plaintiffs that Ramachandran, one of the sons of Chinnama Naidu continued to be in joint possession of the suit property along with his co-sharers which is evident from the Patta issued by Tahsildar on 27.06.2008. It is further pleaded that Ramachandran, father of the plaintiffs, made several attempts to partition the suit property with his brother Ponnusamy, however, he could not succeed in such attempt until his death in the year 2007. The Plaintiffs also made concerted efforts to divide the suit property into metes and bounds among the legal heirs. It is also stated that the suit property continued to be in possession jointly by the legal heirs of Govindasamy Naidu and Chinnama Naidu. At this stage, the plaintiffs received a notice dated 18.05.2010 from the Tahsildar, Sulur. The said notice was issued on the basis of a petition dated 19.10.2009 given by Rajagopal, Son of Annasamy Naidu, seeking to remove the name of Ponnusamy and Ramachandran, who are the sons of Chinnama Naidu, in the Patta issued in respect of the suit property. On receipt of the notice, the plaintiffs thought that it is no longer possible to effect an amicable partition among the legal heirs and therefore filed the instant suit in O.S. No. 534 of 2010 for partition and separate possession of the suit property.

12. The defendants 2 and 3, who are sons of Annasamy Naidu, have filed separate written statement repudiating the plaint averments. According to the second defendant, the suit property was purchased by his grand father Govindasamy Naidu out of his own funds, for which, his brother Chinnama Naidu has not contributed any amount. Therefore, it is his contention that the suit property was the personal property of his grand father Govindasamy Naidu over which Chinnama Naidu or his legal heirs have no right for partition. It is further stated that the Mortgage deeds relied on by the plaintiffs were purposely and intentionally created by Chinnama Naidu for name sake and therefore those mortgage deeds are sham and nominal documents. Those documents namely the mortgage deeds can never be treated as document of title and they cannot be relied upon. Further the third defendant along with the second defendant, settled portion of the property owned by Annasamy Naidu with their brother and sister and after such allotment, they are in absolute and separate enjoyment of the suit property. The tenth defendant

Ponnusamy was permitted to look after a small portion of the suit property for his livelihood by the third defendant. When Chinnama Naidu has not contributed any amount in purchasing the suit property and the sale deed in respect of the suit property was executed only in the name of his grand father Govindasamy Naidu, the claim of the plaintiffs, who are grand sons of Chinnama Naidu and sons of Ramachandran, for partition and separate possession of the suit property, cannot be sustained.

13. Similarly, the third defendant filed a written statement reiterating that Chinnama Naidu has not contributed any amount for purchasing the suit property. He was also not in joint possession of the suit property, as alleged. The revenue records have been manipulated and the name of Chinnama Naidu was erroneously included in the revenue records. Earlier, Ramachandran, father of the plaintiffs filed a suit in O.S. No. 280 of 1994 for partition and separate possession of the suit property and it was dismissed. When the appeal as against the decree and judgment in O.S. No. 280 of 1994 was pending, the suit was withdrawn on 28.03.2001 with a liberty to file a fresh suit. But, Ramachandran, who withdrew the suit, did not file any fresh suit till his death in the year 2007. However, three years after the death of Ramachandran and nine years after withdrawal of the appeal against the Judgment and Decree passed in O.S. No. 280 of 1994, the instant suit has been filed for partition and separate possession by the legal heirs of Ramachandran. Therefore, the third defendant prayed for dismissal of the suit on the ground of limitation.

14. The defendants 7, 11 and 12 have also filed written statement contending inter alia that Chinnama Naidu did not contribute any amount for purchasing the suit property and the entire contribution was made only by Govindasamy Naidu. Therefore, the plaintiffs, who are descendants of Chinnama Naidu, have no right, interest or share in the suit property. The suit has been filed only to harass the defendants and to get a share in the suit property even though the plaintiffs have no semblance of right over the suit property. The execution of various mortgage deeds by Chinnama Naidu which the plaintiffs relied on, are not true. In any event, mortgaging the property with a financial institution for the purpose of obtaining loan will not confer any title to the suit property in favour of Chinnama Naidu. The defendants 7, 11 and 12 therefore prayed for dismissal of the suit.

15. The tenth defendant Ponnusamy, who is the brother of Ramachandran, has filed a written statement and admitted the title of Chinnama Naidu in the suit property. However, he prayed for dismissal of the suit on the ground of ouster.

16. Before the trial court, on behalf of the plaintiffs, the fourth plaintiff examined herself as PW1 and Exs. A1 to A-25 were marked. On behalf of the Defendants, Nandakumar, 15th defendant examined himself as DW1; Rajagopal, third defendant was examined as DW2 and Chandramohan, 17th defendant as DW3 and Exs. B1 to B25 were marked. The trial court originally framed 7 issues for consideration. Subsequently, four additional issues were also framed for determination in the suit.

17. Upon considering the oral and documentary evidence, the trial court held that the suit properties are the joint family properties of Govindasamy Naidu and Chinnamma Naidu by specifically rejecting the contention of the defendants that the suit properties are the absolute properties of Govindasamy Naidu. The trial court also accepted the plea of the plaintiffs as regards joint possession of the suit properties. However, the trial court concluded that the suit is barred on account of the previous litigation at the instance of Ramachandran, father of the plaintiffs, who filed O.S. No. 280 of 1994 for the very same relief of partition and separate possession. The trial court recorded a specific finding that even though father of the plaintiffs namely Ramachandran withdrew the appeal filed by him as against the Judgment and Decree passed in O.S. No. 280 of 1994 with liberty to institute a fresh suit for partition on the same cause of action, he failed to institute a fresh suit until his death in the year 2007. As per Article 113 of the Limitation Act, Ramachandran ought to have laid the suit within a period of three years that too on the basis of same cause of action. Therefore, the present suit filed by the legal heirs of Ramachandran is barred by limitation.

18. Though all the issues framed by the trial court were answered in favour of the plaintiffs, the suit was dismissed by the trial court on the ground of limitation in filing the suit. Assailing the validity of such judgment and decree passed by the trial court on 21.11.2017 in O.S. No. 534 of 2010, the plaintiffs are before us with this appeal.

19. At the outset, the learned counsel for the respondents/defendants submits that even though the trial court decided most of the issues in favour of the plaintiffs, ultimately, the suit was dismissed only on the ground of limitation, hence, the respondents/defendants are entitled to make their submission before this Court in respect of all the issues decided by the trial court, in the present appeal filed by the appellants/plaintiffs as provided under Order 41 Rule 33 of Code of Civil Procedure. Accepting such submission of the counsel for the respondents, we proceeded to hear the counsel for the parties.

20. The learned counsel appearing for the appellants would vehemently contend that under Ex.A1, sale deed dated 05.04.1911 the suit property was jointly purchased in the name of Govindasamy Naidu and Appa Naidu. According to the plaintiffs, the half share in the suit property was purchased by Govindasamy Naidu for and on behalf of his brother Chinnama Naidu also. He also contended that Chinnama Naidu has also jointly contributed money for purchasing the suit property along with his elder brother Govindasamy Naidu. As Govindasamy Naidu was elder among them, the sale deed was executed in the name of Govindasamy Naidu. The fact that Chinnamma Naidu contributed for purchasing the suit property under Ex.A1 is explicit from the recitals contained under Ex.A2. A few months after purchasing the suit property under Ex.A1, a mortgage deed dated 05.12.1911, Ex.A2 was executed by Govindasamy Naidu and his brother Chinnamma Naidu, jointly. Under this mortgage deed, Ex.A2, both the brothers borrowed a sum of Rs.2,000/- from Thavasi Konar and discharged the earlier mortgage debt to their vendor. If the property under Ex.A1 was purchased solely out of the funds of Govindasamy Naidu, there is no necessity to execute a mortgage deed jointly with his brother Chinnama Naidu under Ex.A2. Even, the purpose of this mortgage under Ex.A2 is to discharge the earlier mortgage debt shown as part of sale consideration under Ex.A1. Further, in Ex.A2, it has been specifically mentioned that the property mortgaged is the self-acquired property of both the brothers though the same was purchased in the name of Govindasamy Naidu. Thus, it is clear that the property purchased under Ex.A1 in the name of Govindasamy Naidu was in fact purchased out of the joint funds of the brothers -Govindasamy Naidu and Chinnama Naidu. Further, while executing Ex.A2, Appasamy Naidu, co-purchaser under Ex.A1, signed as one of the identifying witnesses to Ex.A2.

21. The learned counsel for the appellants also placed reliance on Ex.B15, mortgage deed dated 03.03.1926 executed by Govindasamy Naidu in favour of Ayyavoo Konar. By and under this mortgage deed, Govindasamy Naidu has mortgaged his 2/8 share in Ex.A1. As per the recitals contained under Ex.B15, the mortgagee is entitled to half share in the western side i.e., except the undivided half share of the brother Chinnama Naidu on the western side. Therefore, under Ex.B15, Govindasamy Naidu clearly accepted the title of the suit property in favour of his younger brother Chinnama Naidu in respect of 1/8 share in the suit property.Further, Ex.B15 is a registered document and it is sufficient to prove the title of Chinnamma Naidu. While so, in the written statement filed by the defendants 2 to 9 and 11, 12, 16 and 18, they have contended that Chinnama Naidu has not contributed anything for purchasing the suit property. Such a plea in the written statement need not be considered inasmuch as Ex.A2 was executed atleast eight decades before the birth of the

defendants and a century prior to institution of the suit in the year 2010. Therefore, the defendants cannot have any personal knowledge about the contribution made by their grand father - Chinnama Naidu and it has to be inferred only from the recitals contained in the documents and other attendant facts and circumstances of the case.

22. The learned counsel for the appellants proceeded to contend that on 03.03.1926, Govindasamy Naicker executed a mortgage deed in favour of Ayyavoo Konar, under Ex.B15. On the same day, under Ex.A5, Chinnama Naidu has executed a registered mortgage deed in favour of the very same Ayyavoo Konar for the purpose of discharging the balance debt payable by him under Ex.A2 and directed Ayyavoo Konar to adjust the same towards discharge of his share of earlier mortgage debt due under Ex.A2. Both Exs. B15 and A5 are registered in the office of the Sub-Registrar, Sulur under Document Nos. 400 and 401 of 1926, in respect of their respective portion of the property which would only indicate that the suit property was purchased out of the joint contribution of Govindasamy Naidu and Chinnama Naidu. If really Chinnama Naidu has no right, title or interest in the suit property, on the same day, he could not have executed a separate mortgage deed along with his elder brother Govindasamy Naidu. Further, under Ex.A6 dated 13.09.1943 and under Ex.A7 dated 20.07.1951, Chinnama Naidu had mortgaged the properties independently in favour of one Velliangiri and Pattinam Multi Purpose Cooperative Society respectively, which would only show that he had asserted his ownership, right, interest and title over the suit property along with his elder brother Govindasamy Naidu. Even otherwise, under Ex.A10, Patta, the name of Govindasamy Naidu and Chinnama Naidu were shown as joint Pattadars. The name of the subsequent purchaser Periyan Konar, who purchased the Eastern half portion from Appa Naidu, was also included as one of the joint owners in Ex.A10. From Ex.A11, which is series of Kist receipts paid by Chinnama Naidu for the period from 12.02.1931 till 1952, it could be evident that Chinnama Naidu has jointly contributed for purchasing the property covered under Ex.A1 along with his elder brother Govindasamy Naidu. Therefore, the entries shown in the revenue records clearly reveal that Chinnama Naidu is having equal right, title and interest as that of his elder brother Govindasamy Naidu in the suit property, which was also accepted by the trial court.

23. The learned counsel for the appellants had also drawn our attention to the sale price indicated under Ex.A1 at Rs.5,900/-. According to him, out of the sum of Rs.5,900/- the vendor directed the purchaser to discharge the previous debt of Rs.3,401/- to one Thirumalaiswamy Iyengar. Therefore, both the joint owners namely Govindasamy Naidu and Chinnama Naidu

executed Ex.A2, mortgage deed dated 05.12.1911 in favour of Thavasi Konar to discharge the debt. In fact, the recitals under Ex.A2 indicate that the property was the self-acquired property of Govindasamy Naidu and Chinama Naidu and the mortgage deed under Ex.A2 was executed to discharge the past debt. Therefore a conjoint reading of Exs. A1, A2, A5 and B15 would only go to show that Chinnama Naidu had equally contributed for purchasing the suit property along with his brother Govindasamy Naidu. The defendants also did not let in any contra evidence to disprove the recitals contained under Ex.A1, A2, A5 and B15 and therefore, the trial court has also, by and large, accepted these recitals to conclude that the suit property was jointly purchased by Govindasamy Naidu and Chinnama Naidu, which was also not assailed by the defendants by filing any cross-appeal.

24. Yet another submission of the counsel for the appellants is that before the trial court, one of the defences raised by the defendants/respondents herein is that the suit claim is barred under the Prohibition of Benami Property Transactions Act, 1988 and on that ground the suit is liable to be dismissed. According to the learned counsel for the appellants, such a contention raised by the respondents/defendants is contrary to Section 2 (9), (ii) (iv) of the amended Act (Amended Act, 2016). In this case, Govindasamy Naidu and Chinnama Naidu have jointly contributed for purchasing the suit property, but the sale deed stood in the name of Govindasamy Naidu as he is elder among them. Both the brothers lived together until their life time and such a relationship between them continued till their death. By pooling together their income, they have purchased the suit property along with one Appa Naidu of Pattinam Village under a registered sale deed dated 05.04.1911, Ex.A1. Since the elder brother was holding fiduciary relationship, the sale deed stood in his name. Such a holding is recognized under Section 4 of the Prohibition of Benami Property Transaction Act 1988 (under Section 2 (9) (ii) (iv) of The Amended Act). Therefore, the purchase/holding of the suit property in the name of the elder brother Govindasamy Naidu is not hit by the provisions of the Act. On the contrary, the same is covered/saved by the exception of "fiduciary relationship". The trial court has also accepted such a plea urged on behalf of the appellants and held that the suit is not barred under the Prohibition of Benami Property Transactions Act, 1988. As against such a finding, the respondents have also did not file any cross-appeal. Therefore, it is no longer open to the respondents to contend that the suit transaction is hit by the provisions of The Benami Transactions Act, 1988. In this regard, the learned counsel for the appellants placed reliance on the decision of the Honourable Supreme Court in the case of Marcel Martins vs. M. Printer and others reported in AIR 2012 Supreme Court page 1987.

25. As a next fold of submission, the learned counsel for the appellants would further contend that the present suit is not barred by the provisions of Limitation Act merely because the present suit is not filed within three years from the date of obtaining leave by Ramachandran, father of the plaintiffs in the earlier suit filed by him in O.S. No. 280 of 1994 for partition. The said suit was not dismissed on merits, but at the instance of the defendants in that suit, who have filed an application under Order VII Rule 11 of CPC to reject the plaint on the ground that there is no cause of action for instituting that suit. The trial court accepted the application filed under Order VII Rule 11 of CPC and dismissed the suit. As against the same, an appeal in A.S. No. 188 of 1999 was filed. Pending appeal, an application was filed to withdraw the suit with liberty to file a fresh suit on the same cause of action. Accordingly, granting liberty to file a fresh suit on the same cause of action, the appeal in A.S. No. 188 of 1999 was dismissed as withdrawn on 28.07.2001. However, after withdrawing the appeal, Ramachandran did not file any fresh suit until his death. Rather, he persuaded all the legal heirs and attempted to find out an amicable resolution of the dispute. The fact remains that till his death, Ramachandran was in joint possession of the suit property and after his death, the plaintiffs continued to remain in joint possession of the suit property along with the defendants, which is evident from Exs. A24 and A25, Patta and Adangal Extract filed by the plaintiffs/appellants. It is also submitted that at no point of time, the defendants/respondents herein disputed the joint possession of the suit property by the appellants and that is the reason why a petition dated 19.10.2009 was given by the defendants 2 and 3, who are sons of Annasamy to the Tahsildar to remove the name of Ramachandran in the joint patta. The said Petition was given by suppressing the fact that Ramachandran died on 10.06.2007. Based on such petition, a notice dated 18.05.2010 was addressed to the deceased Ramachandran and on receipt of the same, the plaintiffs were compelled to file the present suit. The said notice was marked as Ex.A19. Therefore, the present suit was independently filed on the basis of a separate cause of action. In such circumstance, the earlier suit filed by Ramachandran in O.S. No. 280 of 1994 is not a bar for institution of the present suit and the present suit is not barred by the provisions of Limitation Act. However, the trial court, on an erroneous approach, has held that the present suit is hit by Article 113 of The Limitation Act inasmuch as it was not filed within three years from the date on which the appeal was withdrawn by the deceased Ramachandran, but it was filed by the plaintiffs, who are the legal heirs of Ramachandran, three years after the death of Ramachandran on 10.06.2007. Such a finding rendered by the trial court is contrary to the settled legal position inasmuch as even after the dismissal of the suit filed by Ramachandran, the

plaintiffs continued to remain in joint possession of the suit property and it constitutes a separate cause of action for filing the present suit. It is settled law that the cause of action for filing a suit for partition is always a recurring one and therefore the suit for partition can be filed at any time within three years from the date of recurring of each cause of action. In this context, the learned counsel for the appellants placed reliance on the decision of the Honourable Supreme Court in the case of Rukhmabai vs. Lala Laxminarayan reported in AIR 1960 Supreme Court page 335. Apart from this decision, the learned counsel for the appellant relied on several decisions. He also relied on the decision rendered by the Madhya Pradesh High Court in the case of Narsingh Rao and others vs. Shantabai and others) reported in 1974 MPLJ page No.211 wherein it was held that a fresh suit for partition is not barred even if an earlier suit was dismissed as compromised because the right to bring a suit for partition, like any other suit, is a continuing right incidental to the ownership of the property. This decision was relied on by the counsel for the appellant to drive home the point that the right to institute a suit for partition survives as long as the property remains joint. The learned counsel for the appellant therefore prayed for setting aside the judgment and decree of the trial court and to allow this appeal.

26. Per contra, the learned counsel for the first respondent would contend that earlier, Ramachandran had filed the suit in O.S. No. 280 of 1994 for partition and it was dismissed on 17.08.1998. The said suit was filed by him after issuing a notice dated 07.03.1994 calling upon all the legal heirs to come for partition of the suit property, amicably. A reply notice dated 17.03.1994 was issued thereto by specifically denying the title of Ramachandran over the suit property. While so, Ramachandran has filed the suit only for partition without getting his title declared by seeking a declaratory relief. An appeal thereagainst was filed in A.S. No. 188 of 1999. During the pendency of the appeal, Ramachandran filed an application to withdraw the suit with liberty to file a fresh suit on the same cause of action. However, no such suit was filed by Ramachandran till his death on 10.06.2007. Even the present suit was filed by the plaintiffs without a prayer for declaration of their title. Further, the present suit was filed on 07.07.2010 beyond three years from the date of death of Ramachandran and 12 years from the date on which the suit was dismissed by the trial court on 17.08.1998 and 9 years from the date on which the appeal was withdrawn by Ramachandran on 28.03.2001. Therefore, viewed from any angle, the suit filed by the plaintiffs/appellants is hopelessly barred by limitation which was rightly appreciated by the trial court.

27. The learned counsel for the first respondent would

further contend that much reliance has been placed by the appellants on Ex.A2 to contend that Govindasamy Naidu himself has admitted the title of Chinnamma Naidu thereunder. The fact remains that Ex.A2 is only a mortgage deed and it will not confer any title to Chinnama Naidu. Under Ex.A2, there was no transfer of any title in favour of Chinnama Naidu. At best, Ex.A2 can be relied on to show that Govindasamy Naidu admitted the right of Chinnama Naidu over the suit property. However, such admission will not confer an absolute title in favour of Chinnama Naidu. There must be a registered document conveying the title expressly in favour of Chinnama Naidu, conveying half share in the suit property and in the absence of the same, neither Chinnama Naidu nor the plaintiffs can assert a right, interest or title in the suit property. In this context, the learned counsel for the respondents relied on the decision of the Honourable Supreme Court in the case of Canbank Financial Services Limited vs. Custodian and others) reported in 2004 (8) Supreme Court Cases 355 to contend that an admission by a party to the litigation does not confer title to the another. In para No.85 of this judgment, it was held as under:-

> "85. The constitutional validity of the Act came up for consideration before this Court in Harshad Shantilal Mehta vs. Custodian (1998) 5 SCC 1. The vires of the said Statute was upheld, inter alia, on the ground that by reason thereof the right, title and interest in a property belonging to Respondent 3 is not affected. The interest of the appellant, thus, was not affected by the said act or by the Benami Transactions Act. Extinction in right, title and interest in a property must be caused as a result of operation of law and not otherwise. Creation of title by an act of parties is subject to law. Once a title vests in a person he cannot be divested therefrom except by reason of or in accordance with a statute and not otherwise. An admission does not create a title; the logical corollary whereof would be that an admission of a party would not lead to relinquishment of his right therein, if he has otherwise acquired a title in the property.

28. The learned counsel for the first respondent would further contend that the suit for partition without a prayer for declaration of title is not maintainable. In fact, the only pleading in the plaint was joint possession of the suit property by Govindasamy Naidu and Chinnama Naidu, which will not confer any right, title or interest in the suit property in favour of Ramachandran. To avoid filing a suit for declaration of title, which is barred by limitation, the appellants have deliberately filed the suit with a prayer for partition and separate possession. A suit for partition was already filed by the father

of the plaintiffs Ramachandran and it was dismissed. As against which an appeal was filed and during the pendency of the appeal, an application was filed to withdraw the suit to file a fresh suit on the same cause of action. However, no such suit was filed till the death of Ramachandran. Therefore, the present suit filed by the plaintiffs is not maintainable since it is hit by the provisions of Limitation Act. In order to buttress this submission, the learned counsel for the first respondent relied on the decision of the Honourable Supreme Court in Ramti Devi (Smt) vs. Union of India reported in (1995) 1 Supreme Court Cases 198 wherein it was held as follows:-

> "2. The question is whether the suit is within limitation. In the evidence, it was admitted that she had knowledge of the execution and registration of the sale deed on 29.01.1947. Initially, a suit was filed in 1959 but was dismissed as withdrawn with liberty to file fresh suit. Admittedly, the present suit was filed on 30.07.1966. The question, therefore, is whether the suit is within limitation. Article 59 of the Schedule to the Limitation Act, 1963, relied on by the appellant herself, postulates that to cancel or set aside an instrument or decree or for the rescission of a contract, the limitation is three years and it began to run when the plaintiff entitles to have the instrument or the decree cancelled or set aside or when the contract rescinded first became known to him. As seen, when the appellant had knowledge of it on 29.01.1949 itself the limitation began to run from that date and the three years' limitation has hopelessly been barred on the date when the suit was filed. It is contended by Shri. V.M. Tarkunde, learned Senior counsel for the appellant, that the counsel in the trial court was not right in relying upon Article 59. Article 113 is the relevant article. The limitation does not begin to run as the sale deed document is void as it was executed to stifle the prosecution. Since the appellant having been remained in possession, the only declaration that could be sought and obtained is that she is the owner and that the document does not bind the appellant. We are afraid that we cannot agree with the learned counsel. As seen, the recitals of the documents would show that the sale deed was executed for valuable consideration to discharge pre-existing debts and it is a registered document. Apart from the prohibition under Section 92 of the Evidence Act to adduce oral evidence to contradict the terms of the recital therein, no issue in this behalf on the voidity of the sale deed or its binding nature was raised nor a finding recorded that

the sale deed is void under Section 23 of the Contract Act. Pleading itself is not sufficient. Since the appellant is seeking to have the document avoided or cancelled, necessarily, a declaration has to be given by the court in that behalf. Until the document is avoided or cancelled by proper declaration, the duly registered document remains valid and binds the parties. So, the suit necessarily has to be laid within three years from the date when the cause of action had occurred. Since the cause of action had arisen on 29.01.1947, the date on which the sale deed was executed and registered and the suit was filed on 30.07.1966, the suit is hopelessly barred by limitation. The courts below, therefore, were right in dismissing the suit. The appeal is accordingly dismissed with costs."

29. By placing reliance on the above decision, the learned counsel for the first respondent would contend that once cause of action is set in motion, as in the present case on hand, in the year 1994 when Ramachandran filed a suit for partition, it ought to have been filed within three years from the date of denial of title by the defendants. However, the present suit is filed after a decade on 07.07.2010 and therefore, the suit is hopelessly barred by limitation. In this context, the learned counsel for the first respondent also relied on the decision of the Honourable Supreme Court in Krishna Pillai Rajasekaran Nair vs. Padmanabha Pillai (dead) by LRs and others) reported in 2004 12 SCC 754 to contend that for filing a suit for partition the starting point of limitation is when the right accrues to a party viz., when the plaintiff has notice of his entitlement to partition being denied and before the expiry of three years from the date of such denial. When such a right of the plaintiff is denied the plaintiff is bound to file a suit for partition within three years from the date of denial of his share. In para No.22 of the said judgment, it was held as follows:-

"22. In our opinion, the suit filed in the present case, being a suit for partition primarily and predominantly and the relief of redemption having been sought for only pursuant to the direction made by the High Court in its order of remand, the limitation for the suit would be governed by Article 120 of the Limitation Act, 1908. For a suit for partition the starting point of limitation is - when the right to sue accrues, that is, when the plaintiff has notice of his entitlement to partition being denied. In such a suit, the right of the redeeming co-mortgagor would be to resist the claim of non-redeeming co-mortgagor by pleading his right of contribution and not to part with the property unless the non-redeeming co-mortgagor had discharged his duty to make contribution. This equitable defence taken by the redeeming co-mortgagor in the written statement would not convert the suit into a suit for redemption filed by the non-redeeming co-mortgagor."

30. The learned counsel for the first respondent proceeded to contend that the suit filed by Ramachandran in O.S. No. 245 of 1994 (re-numbered as O.S. No. 280 of 1994) does not contain any pleading with respect to holding of the property in a fiduciary capacity. There is no plea that the mortgage deed confers title in favour of Chinnama Naidu. The suit was filed for partition only on the basis of alleged joint possession of the suit properties. On the other hand, the present suit has been filed with the averment that their grand father Chinnamma Naidu had contributed for purchasing the suit property along with his elder brother Govindasamy Naidu. They have also averred in the present suit that the subsequent mortgage deeds in respect of the suit property have been executed jointly by Govindasamy Naidu and Chinnamma Naidu to indicate that the suit property was purchased by them jointly with equal contribution and they were in joint possession of the suit property. However, there was no specific plea of the joint title or fiduciary capacity in the plaint. This is more so that the third defendant, in his written statement, raised a specific plea denying the title in favour of the plaintiffs and their predecessors. In fact, after a written statement was filed denying the title of the plaintiffs, the plaintiffs have taken out an application in I.A. No. 3 of 2012 in O.S. No. 534 of 2010 for amendment of the plaint to introduce the plea that the suit property was a joint family property, but such an application was dismissed by the trial court. Aggrieved by the same, the plaintiffs have filed CRP (PD) No. 986 of 2013 before this Court and it was also dismissed on 27.01.2015 with an observation that it is open to the plaintiffs to file a reply statement with respect to the plea of applicability of Section 4 of the Benami Transactions (Prohibition) Act, 1988. Thus, the plea with respect to fiduciary capacity has not been raised in the plaint but was introduced by way of reply statement. Thus, the plaintiffs introduced too many inconsistent plea, one being contrary to the other. Further, that Govindasamy Naidu was holding the suit property in a fiduciary capacity for Chinnama Naidu was never pleaded by Ramachandran in the earlier suit filed by him in O.S. No. 280 of 1994. According to the learned counsel for the first respondent, unless and until the alleged title, if any, is conferred on Chinnamma Naidu, the plea of the plaintiffs for partition and separate possession cannot be countenanced. A suit for partition would not lie at the instance of the plaintiffs whose predecessor in interest do not have an

assertable title in the suit property. In any event, in the absence of a prayer for declaration that Govindasamy Naidu and Chinnama Naidu are joint owners of the suit property by virtue of the sale deed dated 05.04.1911, Ex.A1, the present suit is not maintainable.

31. According to the learned counsel for the first respondent, when it is the plea of the plaintiffs that Govindasamy Naidu and Chinnama Naidu were in joint possession of the suit property, then the Benami Transaction (Prohibition) Amendment Act, 2016 would apply. Section 2 (9) (ii) and (iv) of the said Act defines a fiduciary capacity for the benefit of another person to whom he acts in a fiduciary capacity or as a trustee. In the present case, the plaintiffs have miserably failed to prove that Govindasamy Naidu acted as a trustee for and on behalf of Chinnamma Naidu and therefore, the plaintiffs, who are descendants of Chinnamma Naidu, cannot seek for partition. Even otherwise, the plea of holding the suit property in a fiduciary capacity is a personal one and it cannot be raised by the plaintiffs after a decade of execution of Ex.A1, sale deed. Even Ramachandran, father of the plaintiffs, did not raise the plea of fiduciary capacity in O.S. No. 280 of 1994 filed by him and therefore, the plaintiffs, who are the legal heirs of Ramachandran, are estopped from raising such a plea. The plaintiffs introduced a case that revenue records stand in the name of legal representatives of Chinnama Naidu to prove the fiduciary capacity. But it is well settled that entries in the revenue records will not confer any authority conferring title on anybody when there is no title in the person in whose name entries stand.

32. The learned counsel for the first respondent would also contend that Sections 81, 82 and 94 of the Indian Trust Act, 1882, which have been repealed by the Benami Act, specifically provides for the person in whose name the property is transferred for consideration provided by another to be holding the said property for the benefit of the other. In this case, the very plea of contribution of amount by Chinnamma Naidu for purchasing the suit property under Ex.A1 demolishes the plea of fiduciary capacity. Further, in view of Sections 81, 82 and 94 of the Indian Trust Act, 1882, the concept of trusteeship or fiduciary capacity as was the position prior to 1988, after repeal of Sections 81, 82 and 94 of the Indian Trust Act, it is only those instances of fiduciary capacity such as property of partnership firm or any other person notified by the Central Government, such a plea can be raised. In this case, Govindasamy Naidu purchased the suit property in his own name and therefore, it can be inferred that the suit property stands exclusively in his name and there is nothing to infer that he acted as a trustee or in a fiduciary capacity to hold the suit property for

and on behalf of his younger brother Chinnamma Naidu. Such a plea is untenable in view of the Benami Act and consequently, the exceptions contained in Section 4 (3) (b) of the Old Act cannot be applicable to this case. In the present case, when Govindasamy Naidu purchased the properties in his own name under Ex.A1, the contention of the plaintiffs that it can only be inferred to be standing in a fiduciary capacity or trustee cannot be sustained in view of the provisions contained under the Prohibition of Benami Transaction Act and the amendments made thereof. In this context, the learned counsel for the first respondent placed reliance on the decision in Pramila Gulati vs. Anil Gulati reported in 2015 SCC Online Delhi 7406.

33. The learned counsel for the first respondent has also drawn our attention to the deposition of PW1 and contends that she has clearly admitted that her father did not raise any plea with respect to joint family property or fiduciary capacity in the suit in O.S. No. 280 of 1994. She also admitted that she did not take any steps for about 11 years from the date of dismissal of the suit in O.S. No. 280 of 1994 filed by Ramachandran before instituting the present suit. In any event, when admittedly the recitals in Ex.A1, sale deed do not contain any contribution having been made by Chinnamma Naidu, the claim of the plaintiffs for partition and separate possession cannot be countenanced. Though, the appellants/plaintiffs have contended that they are in joint possession of the suit property, PW1 in her evidence clearly admitted that the plaintiffs are not in joint possession and therefore, there is no cause of action for instituting the suit with the plea of joint possession. The learned counsel appearing for the first respondent therefore, prayed for dismissal of the appeal.

34. The learned counsel appearing for the respondents 10, 11 and 12 would contend that the respondents 10, 11 and 12 are legal heirs of Ponnusamy, who was arrayed as 10th defendant in the suit. The said Ponnusamy is the brother of Ramachandran and both of them are sons of Chinnama Naidu. According to the learned counsel, the tenth defendant has filed his written statement in the suit in which he has admitted that Govindasamy Naidu and his younger brother Chinnamma Naidu have jointly purchased the suit property. It is the contention of the tenth defendant in the written statement that as per the then prevailing custom, culture and tradition, in the absence of the father, the eldest male member of the family takes a predominant and leading role in the family and all the functions in the family used to be performed at the behest of such elderly male member. True to such custom, the sale deed dated 05.04.1911, Ex.A1 was registered in the name of Govindasamy Naidu, even though Chinnamma Naidu has equally contributed for purchasing the suit property. The tenth defendant also in his written

statement admitted that the contribution made by Chinnamma Naidu could be evident from Ex.A2, Mortgage deed dated 05.12.1911 as also Ex.A5 dated 03.03.1926 in favour of Ayyavoo Konar, Son of Thavasi Konar. By inviting our attention to the written statement filed by the tenth defendant, it was contended that Ex.A6 dated 13.09.1943 executed by Chinnamma Naidu in favour of one Velliangiri Thevar further strengthens the title of the suit property in favour of Chinnamma Naidu. It is also stated that Govindasamy Naidu, ever since the purchase of the suit property was in joint ownership and possession along with his younger brother Chinnamma Naidu. For about 37 years from the date of purchase of the suit property, certain mortgage deeds executed by Chinnamma Naidu independently was not opposed or protested by Govindasamy Naidu which would further show that Chinnamma Naidu has equal right, title and interest over the suit property. So, Chinnama Naidu's ownership and title of half share in the property covered under Ex.A1 was recognised by Govindasamy Naidu and therefore his descendants have no right or locus standi to deny the title of Chinnamma Naidu in the suit property. Further, even after the death of Govindasamy Naidu and Chinnamma Naidu and till the filing of the suit in O.S. No. 280 of 1994, none of the descendants of Govindasamy Naidu have ever disputed the title of Chinnamma Naidu in the suit property. Therefore, the learned counsel for the respondents 10, 11 and 12 would contend that Chinnamma Naidu has absolute right, title and interest in the suit property. The suit properties were purchased in the name of Govindasamy Naidu in his fiduciary capacity and Govindasamy Naidu recognised his younger brother Chinnamma Naidu's absolute possession and enjoyment of half share in the property purchased under Ex.A1. No one ever questioned his right and title even after the demise of Govindasamy Naidu.

35. As regards the plea of joint possession, it is contended by the learned counsel for the respondents 10 to 12 that the suit properties are agricultural lands and if at all both the brothers namely Govindasamy Naidu and Chinnamma Naidu were in joint possession of the suit property, there must be some semblance of evidence to show the same, however, except the revenue records, there is nothing to prove the joint possession of the suit property by the brothers. Therefore, after their death, their respective legal heirs continue to enjoy the suit properties separately. In fact, under Ex.A11, Chinnamma Naidu paid taxes separately and after his demise, his son Ponnusamy, D-10 continued to pay the taxes separately which could be evident from Exs. B1 and B6. There were also documentary evidence filed before the trial court such as Ex.B13 and B14 to show that the legal representatives of Govindasamy Naidu were in separate possession and enjoyment of half share in the property purchased under Ex.A1. While so, the suit filed by the

plaintiffs on the ground that the suit property was in joint possession of the plaintiffs and defendants is legally not sustainable. In fact, PW1 also admitted in her evidence that the suit properties are not in joint possession of the plaintiffs and defendants. Therefore, when it is admitted by PW1 that the plaintiffs are not in joint possession, the Court fee payable is under Section 37 (1) of the Tamil Nadu Court Fee and Suit Valuation Act. However, the suit has been valued under Section 37 (2) and 27 (c) of the Tamil Nadu Court Fee and Suit Valuation Act by raising a plea that the plaintiffs are in joint possession of the suit property. Therefore, the suit has not been properly valued and on that ground, the suit is liable to be dismissed. The plea of co-sharer deemed to be in joint possession of the suit properties would arise only if the plaintiffs prove that they are in joint possession of the suit property. In this case, as mentioned above, PW1 in her deposition had categorically admitted that the plaintiffs are not in joint possession of the suit property, therefore, the suit, as filed by the plaintiffs, is not maintainable.

36. According to the learned counsel for the respondents 10 to 12, the descendants of Govindasamy Naidu namely Anna Samy Naidu and his sons who are arrayed as D1 to D3 in the suit have sold their common share in the suit property in S.F. No. 64 measuring an extent of 79 cents to one Ranganayaki Ammal under Ex.B13 dated 20.04.1969 and the said Ranganayaki took possession of the property purchased by her. However, Ranganayaki Ammal has not been impleaded as a party to the suit and therefore, the suit filed by the plaintiffs is liable to be dismissed for non-joinder of necessary parties. Further, the plaintiffs were also fully aware of the partition entered into between the descendants of Govindasamy Naidu under Ex.B14 dated 15.05.1970 in respect of the land in S.F. Nos. 61 and 67, but the said partition deed has not been challenged by the plaintiffs in a manner known to law. Similarly, during the life time of tenth defendant, he had executed a settlement deed dated 14.10.2005 under Ex.B8, settling his half share in the suit property in favour of his son and daughter, who were arrayed as D-14 and D-15 in the suit. However, the plaintiffs did not challenge Ex.B8 and therefore also, the suit as filed is not maintainable. Above all, the plaintiffs father filed O.S. No. 280 of 1994 and on it’s dismissal, he has filed A.S. No. 188 of 1999 which he withdrew on 28.03.2001. The appeal was withdrawn with liberty to institute a fresh suit, however, till the life time of Ramachandran no such suit was filed and therefore, the present suit filed by the plaintiffs is clearly barred by limitation. In any event, the plaintiffs ought to have filed a suit for partition and declaration of title and in the absence of a prayer for declaration, the suit is not maintainable.

37. Lastly, the learned counsel for the respondents 10 to 12 would contend that the tenth defendant, even in his written statement, has specifically raised the plea of ouster. Such a plea has been substantiated by the deposition of PW1 herself who has stated that the plaintiffs are not in possession of the suit property. In fact, from the year 1961, the tenth defendant was in possession of half of the suit property which had come to Chinnama Naidu and subsequently, his legal heirs, the defendants 13 to 15 are in exclusive possession and enjoyment of the suit property. This was also substantiated by marking Exs. B1 to B8. Such possession by the D-10 and subsequently by D-13 to D-15 is also known to plaintiff's father Ramachandran and to the plaintiffs. Therefore, the claim of the plaintiffs for partition and separate possession has to be rejected since the plaintiffs were ousted from co-ownership for more than 33 years. The trial court has failed to consider this aspect and erroneously concluded that the plaintiffs were in joint possession of the suit properties and the plea of ouster will not arise in this case. Such a finding of the trial court is unsustainable and it is liable to be set aside even though it has not been assailed by filing a cross-appeal. The learned counsel for the respondents 10 to 12 therefore prayed for dismissal of the appeal on the ground of ouster.

38. The learned counsel for the 14th respondent would contend that the plaintiffs have filed the suit on the ground that they are in joint possession of the suit property. The plaintiffs have also raised the plea that the suit property was held in a fiduciary capacity by Govindasamy Naidu for and on behalf of Chinnamma Naidu. However, the plaintiffs have miserably failed to prove the averments raised in the plaint. In fact, PW1 has categorically admitted that the plaintiffs were never in joint possession of the suit property. The trial court, taking note of the above admission of PW1, dismissed their suit. Furthermore, Ramachandran, father of the plaintiffs, has earlier filed O.S. No. 280 of 1994 and it was dismissed on the ground that there was no cause of action for filing the suit. An appeal was filed by Ramachandran in A.S. No. 188 of 1999 as against dismissal of O.S. No. 280 of 1994 which he withdrew on 28.03.2001 with liberty to file a fresh suit on the same cause of action. However, till the life time of Ramachandran, he did not file any fresh suit. While so, the present suit filed by the plaintiffs, after a lapse of 9 years from the date of withdrawal of A.S. No. 188 of 1999 on 28.03.2001, is hopelessly barred by limitation. This was also admitted by PW1 in her deposition that for about 9 years from the date of withdrawal of appeal in A.S. No. 188 of 1999, no fresh suit was instituted. In any event, when it was admitted by plaintiffs that they were not in joint possession of the suit property, the suit ought to have been

valued under Section 37 (1) of the Tamil Nadu Court Fee and Suit Valuation Act. However, the suit has been valued only under Section 37 (2) and 27 (c) of the Tamil Nadu Court Fee and Suit Valuation Act and therefore, the suit is not maintainable. In such circumstances, the dismissal of the suit by the trial court is proper and this Court need not interfere with such an order of dismissal. The learned counsel therefore prayed for dismissal of this appeal.

39. The learned counsel for the appellants, by way of reply would contend that the suit for partition filed by the plaintiffs, even in the absence of a prayer for declaration, is maintainable. In this context, the learned counsel for the appellants placed reliance on Exs. A2 and B15, Mortgage deeds and contended that Govindasamy Naidu himself has accepted the title of his brother Chinnama Naidu in the suit properties. Even in the written statement, the defendants did not dispute about the various mortgage deeds relied on by the appellants, but only contended that they have been created for the purpose of filing the suit. The tenth defendant also in his written statement has admitted the title of Chinnamma Naidu in the suit property. Further, no issue has been framed by the trial court as regards the maintainability of the suit for want of a prayer for declaration. Therefore, in the appellate stage, the respondents are estopped from canvassing such a plea and he prayed for allowing the appeal.

40. We have heard the counsel for the parties at some length and have carefully gone through the materials placed. As we have dealt with the factual matrix of the case at some required length, we refrain ourselves from dealing with the facts of the case any further. However, certain facts which are absolutely necessary alone are dealt with hereunder for the purpose of adjudicating this appeal.

41. Having considered the contentions urged on behalf of the counsel on either side, for the purpose of disposal of this appeal, the following points are required to be dealt with and they are:-

(i) Whether Govindasamy Naidu alone was having half share in the land covered under the sale deed dated 05.04.1911, Ex.A1 or Govindasamy Naidu and Chinnasamy Naidu are having equal right, interest and title in the half share of the property covered under Ex.A1 dated 05.04.1911?

(ii) Whether Govindasamy Naidu was holding the share of his brother Chinnama Naidu in his fiduciary capacity?

(iii) Whether the suit transaction is hit by the provisions of Benami Transaction Act?

(iv) Whether the claim of the appellants for partition and separate possession is hit by the provisions of Limitation Act?

(v) Whether the present suit for partition is not maintainable without a prayer for declaration of title?

(vi) Whether the plaintiffs are ousted from the suit property as has been claimed by the defendants 10 to 13?

Point No. 1:-

42. It is not in dispute that Govindasamy Naidu and Chinnamma Naidu, grand fathers of plaintiffs and defendants, are brothers. It is also not in dispute that the suit property was purchased by means of a sale deed dated 05.04.1911, Ex.A1. As per Ex.A1, the suit property was purchased jointly by Govindasamy Naidu and one Appa Naidu and both of them are entitled for half share in the suit property. According to the plaintiffs, Chinnamma Naidu, the younger brother of Govindasamy Naidu, has also jointly contributed for purchasing half share in the suit property along with his brother Govindasamy Naidu, however, as per the then prevailing custom and tradition, the sale deed was executed only in the name of elder brother Govindasamy Naidu. The sale deed was executed by Ramasamy Iyer for a sale consideration of Rs.5,900/-. In the said sale deed, it has been specifically mentioned that the Vendor directed the Purchaser to discharge the mortgage debt of Rs.3,401.10 payable by him to one Thirumalaisamy Iyengar and this mortgage liability is shown as part of sale consideration.

43. To prove that Chinnamma Naidu has also contributed for purchasing the suit property along with Govindasamy Naidu, the plaintiffs relied on the subsequent mortgage under Ex.A2, dated 05.12.1911 by which Govindasamy Naidu and Chinnamma Naidu have jointly mortgaged the suit property in favour of one Thavasi Konar for Rs.2,000/- in which the other co-purchaser Appa Naidu was an attestor. The purpose of this mortgage deed is to discharge the earlier mortgage debt shown as part of sale consideration under Ex.A1, which is specifically indicated in this mortgage deed viz., Ex.A2. Similarly, reliance was also placed on the mortgage deed under Ex.B15 dated 03.03.1926 executed by the elder brother Govindasamy Naidu in favour of one Ayyavoo Konar mortgaging his 2/8 share under Ex.A1. Much reliance was placed on Ex.B15 for the reason that on the same

day namely 03.03.1926, under Ex.A5, Chinnama Naidu has separately executed a registered mortgage deed in favour of the very same Ayyavoo Konar mortgaging his 1/8 share in the property covered under Ex.A1 for the purpose of discharging the balance debt payable under Ex.A2 and directed Ayyavoo Konar to adjust the same towards discharge of his share of earlier mortgage debt under Ex.A2. Ex.B15 and Ex.A5 are registered as document Nos. 400 and 401 of 1926. Similarly, the plaintiffs also relied on Ex.A6 dated 13.09.1943 executed by Chinnamma Naidu in favour of one Velliangiri mortgaging his share in the suit property. Yet another mortgage deed under Ex.A7 dated 20.07.1951 executed by Chinnamma Naidu in favour of Pattanam Palanokku Co-operative Society was also relied on by the plaintiffs to prove his title in respect of his share in the property covered under Ex.A1. Further, the plaintiffs relied on Exs. A3, by which the co-purchaser of half of the property under Ex.A1 namely Appa Naicker sold his half share in favour of one Venkatasamy, who, in turn, sold the same under Ex.A4, sale deed dated 28.01.1977 to one Periyan Konar. Therefore, under Ex.A10, Patta, the name of Periyan Konar was shown as joint-pattadhar along with Govindasamy Naidu and Chinnamma Naidu. By placing reliance on Exs. A2, A3, A4, A5, A6, A7 and Ex.B15, it was contended on behalf of the plaintiffs that if really half share in the property covered under Ex.A1 was purchased only out of the contribution of Govindasamy Naidu, without any contribution by Chinnamma Naidu, Govindasamy Naidu ought not to have permitted the execution of Exs.A2, A5, A6 and A7 individually by Chinnamma Naidu and he would have protested. However, the fact remains that with the knowledge, consent and express agreement of Govindasamy Naidu, Exs. A2, A5, A6 and A7 came to be executed by Chinnamma Naidu. Further, Ex.A2, A5, A6 and A7 are registered mortgage and therefore, it partakes the character of a legally admissible document.

44. The execution of Exs. A2, A5, A6 and A7 by Chinnamma Naidu in his individual capacity asserting that he is having a share in the property purchased by Govindasamy Naidu under Ex.A1 has not been disputed by the defendants, rather, they would contend that these documents were created for the purpose of institution of the present suit besides it will not confer any right, title or interest in the suit property in favour of Chinnamma Naidu. It was also contended by the defendants that admittedly Chinnamma Naidu has got no separate sale deed to assert a right, interest or title in his favour and the recitals contained under Exs. A2, A5, A6 and A7 will not confer him title to the suit property.

45. Such a contention urged on behalf of the defendants cannot be countenanced. The present suit was filed by the plaintiffs for partition in the year 2010 and the documents

under Ex.A1, A2, A5, A6 and A7 have emanated long before the birth of the plaintiffs, defendants or their respective father. Further, Exs. A1, A2, A5, A6 and A7 are registered documents and they partake the character of a genuine and admissible document to be relied on and marked in a judicial proceeding. On a careful reading of the recitals contained under Exs. A1, A2, A3, A5, A6 and A7, it is evident that Govindasamy Naidu, in whose name the sale deed under Ex.A1 stands, has permitted his brother Chinnamma Naidu to execute Exs. A2, A5, A6 and A7, meaning thereby, he had expressly conferred title in favour of his brother in respect of 50% in the half share he had purchased under Ex.A1. Such a conferment could further strengthen the fact that Chinnamma Naidu had adequately contributed for the purchase of the suit property along with his elder brother Govindasamy Naidu. If really the suit property was purchased wholly out of the contributions of Govindasamy Naidu, he would not have permitted his brother to assume ownership by executing the subsequent mortgage deeds. In fact, as per the recitals under Ex.A1, out of the total sale price of Rs.5,900/- the vendor directed the purchaser Govindasamy Naidu to discharge the balance amount of Rs.3,401.10 payable to Thirumalaiswamy Iyengar towards mortgage debt. Therefore, under Ex.A2, both the brothers jointly mortgaged the suit property in favour of Thavasi Konar by indicating that the property is their self-acquired property. The words contained under Ex.A2 to the effect that ",,,,,நாங்கள் எழுதிக் கொடுத்த அடமானக் கடன் பத்திரம். எங்களுக்கு சுயார்ஜித வகையில் பாத்தியப்பட்டதும் எங்களில் கோவிந்தசாமினாயக்கன் பெயருக்கு கிரய பாத்தியப்பட்டிருக்கிறதுமான இதனடியில் கண்ட......" would only indicate that the property covered under Ex.A1 was jointly purchased by both the brothers Govindasamy Naidu and Chinnamma Naidu by equal contribution. Otherwise, there is no necessity to indicate the words "நாங்கள்" (we) and "எங்களுக்கு" (for us) in Ex.A2. These recitals do expressly indicate that the property under Ex.A1 was jointly purchased by Govindasamy Naidu along with his brother Chinnamma Naidu with equal contribution. Even though there is no evidence to show the quantum of contribution made by Chinnama Naidu for purchasing the suit property under Ex.A1, the fact remains that the elder brother Govindasamy Naidu had, without any qualm or quarrel, by his expressed act and deeds, admitted the half share in the property covered under Ex.A1 in favour of his younger brother Chinnama Naidu. Therefore, merely because there was no separate deed of conveyance in favour of Chinnamma Naidu, it cannot be gainsaid that Chinnama Naidu could not assert a rightful ownership over half of the share in the suit property. A title to a property cannot always be looked into through a deed of conveyance such as Sale deed, Will, Settlement Deed, Partition deed, succession etc., and it can be inferred from other legally admissible documentary evidence and the attendant circumstances in which those documents came to be executed. A title to a property can also be conferred by long and continued possession of the property, which may prove adverse to the rightful owner. Therefore, whenever title in favour of a property is denied by a person, the other person, who is called upon to prove his title, can always rely on the documentary evidence that had emanated out of the title already conferred on him either expressly or indirectly. Keeping in view this settled principle of law, we have no hesitation to hold that Chinnamma Naidu had adequately contributed for purchasing the half share in the suit property by his elder brother Govindasamy Naidu under Ex.A1 and that is the reason why Chinnama Naidu could independently execute Exs. A5, A6 and A7, registered mortgage deeds in favour of third parties, for availing a loan. It is also to be stated that even a mortgage cannot be permitted to be executed by a person who has no title to the property covered under the mortgage. This is more so that the mortgage deeds under Exs. A5, A6 and A7 were registered mortgage deeds. In the absence of title in favour of Chinnamma Naidu, the registering authorities would not have permitted execution of Exs. A5, A6 and A7 by Chinnamma Naidu, independently. Therefore, we answer point No.1 framed in this appeal to the effect that it was established by the appellants/plaintiffs that their grand father Chinnamma Naidu had adequately contributed for purchasing the property covered under Ex.A1, sale deed dated 05.04.1911 along with his elder brother Govindasamy Naidu.

Point Nos. 2 and 3:-

46. As regards the claim of the defendants with respect to the bar under the Prohibition of Benami Property Transactions Act, 1988, it is to be observed that the appellants/plaintiffs did not raise any pleading with respect to fiduciary relationship between the brothers Govindasamy Naidu and Chinnamma Naidu in the plaint. However, when the defendants filed written statement and pleaded the inadequacy of pleadings in the plaint with respect to the fiduciary relationship between the brothers Govindasamy Naidu and Chinnamma Naidu, the plaintiffs have unsuccessfully attempted to amend the plaint. The application filed by the plaintiffs under Order VII Rule 17 of CPC in I.A. No. 3 of 2012 in O.S. No. 534 of 2010 for amendment was dismissed by the trial court. Aggrieved by the same, the plaintiffs have filed CRP (PD) No. 986 of 2013 before this Court and it was also dismissed on 27.01.2015 with an observation that it is open to the plaintiffs to file a reply statement with respect to the plea of applicability of Section 4 of the Benami Transactions (Prohibition) Act, 1988. Accordingly, a reply statement was filed by the plaintiffs specifically contending that both the brothers have jointly contributed for purchasing the suit property, but the sale deed under Ex.A1 stood in the name of the elder brother Govindasamy Naidu and

such a transaction is nothing but Govindasamy Naidu holding the suit property in a fiduciary capacity for and on behalf of his brother Chinnamma Naidu.

47. In this regard, the learned counsel for the appellants/plaintiffs would contend that such a holding by Govindasamy Naidu is recognized under the exceptions to Section 4 of the Prohibition of Benami Property Transaction Act, 1988 (now Section 2 (9) (ii) (iv) of The Benami Transactions (Prohibition) Amendment Act, 2016. The learned counsel for the appellant also, to fortify this submission, relied on the decision of the Honourable Supreme Court in Marcel Martins vs. M. Printer and others) reported in AIR 2012 Supreme Court page No.1987 wherein it was held that a fiduciary relationship is normally accepted between the legal relationships between the parties, such as guardian and ward, administrator and heirs and other similar relationship. The said judgment was rendered by the Honourable Supreme Court in a suit filed by father and his daughters claiming a right over the property of the son. The Honourable Supreme Court in para Nos.23, 24 and 26, held thus:-

> "23. In determining whether a relationship is based on trust or confidence, relevant to determining whether they stand in a fiduciary capacity, the Court shall have to take into consideration the factual context in which the question arises for it is only in the factual backdrop that the existence or otherwise of a fiduciary relationship can be deduced in a given case. Having said that, let us turn to the facts of the present case once more to determine whether the appellant stood in a fiduciary capacity vis-à-vis the plaintiffs-respondents.
>
> 24. The first and foremost of the circumstance relevant to the question at hand is the fact that the property in question was tenanted by Smt. Stella Martins-mother of the parties before us. It is common ground that at the time of her demise she had not left behind any Will nor is there any other material to suggest that she intended that the tenancy right held by her in the suit property should be transferred to the appellant to the exclusion of her husband, C.F. Martins or her daughters, respondents in this appeal, or both. In the ordinary course, upon the demise of the tenant, the tenancy rights should have as a matter of course devolved upon her legal heirs that would include the husband of the deceased and her children (parties to this appeal). Even so, the reason why the property was transferred in the name of the appellant was the fact that the Corporation desired such transfer to be made in the name of one individual

rather than several individuals who may have succeeded to the tenancy rights. A specific averment to that effect was made by plaintiffs-respondents in para 7 of the plaint which was not disputed by the appellant in the written statement filed by him. It is therefore, reasonable to assume that transfer of rights in favour of the appellant was not because the others had abandoned their rights but because the Corporation required the transfer to be in favour of individual presumably to avoid procedural complications in enforcing rights and duties qua in property at a later stage. It is on that touchstone equally reasonable to assume that the other legal representatives of the deceased-tenant neither gave up their tenancy rights in the property nor did they give up the benefits that would flow to them as legal heirs of the deceased tenant consequent upon the decision of the Corporation to sell the property to the occupants. That conclusion gets strengthened by the fact that the parties had made contribution towards the sale consideration paid for the acquisition of the suit property which they would not have done if the intention was to concede the property in favour of the appellant. Superadded to the above is the fact that the parties were closely related to each other which too lends considerable support to the case of the plaintiffs that the defendant-appellant held the tenancy rights and the ostensible title to the suit property in a fiduciary capacity vis-à-vis his siblings who had by reason of their contribution and the contribution made by their father continued to evince interest in the property and its ownership. Reposing confidence and faith in the appellant was in the facts and circumstances of the case not unusual or unnatural especially when possession over the suit property continued to be enjoyed by the plaintiffs, who would in law and on a parity of reasoning be deemed to be holding the same for the benefit of the appellant as much as the appellant was holding the title to the property for the benefit of the plaintiffs.

25.….

26. We may while parting say that we have not been impressed by the contentions urged on behalf of the appellant that the plea of a fiduciary relationship existing between the parties and saving the suit from the mischief of Section 4 of the Act, was not available to the respondents, as the same had not been raised before the Courts below. The question whether the suit was hit by Section 4 of the Act was argued before the High Court and found against the

appellant. The plea was not, therefore, new nor did it spring a surprise upon the appellant, especially when it was the appellant who was relying upon Section 4 of the Act and the respondents were simply defending the maintainability of their suit. That apart, no question of fact beyond what has been found by the High Court was or is essential for answering the plea raised by the appellant nor is there any failure of justice to call for our interference at this stage."

48. In the present case, according to the plaintiffs, Chinnamma Naidu had adequately contributed for purchasing the suit property however, the sale deed under Ex.A1 stands in the name of his elder brother Govindasamy Naidu, who holds the suit property in a fiduciary capacity. The Plaintiffs have also contended that as per the then prevailing custom and tradition, a property will be purchased in the name of the elder even if the younger had also contributed for purchasing the property. This would indicate that Chinnamma Naidu had reposed faith, trust and confidence upon his elder brother Govindasamy Naidu in whose name the sale deed under Ex.A1 stood. Until the death of Govindasamy Naidu and Chinnamma Naidu, there was no partition among them in respect of the suit property. However, for all practical purpose, the suit property was enjoyed jointly by Govindasamy Naidu and Chinnamma Naidu and that is the reason why the revenue records stood mutated in the joint name of Govindasamy Naidu and Chinnamma Naidu under Ex.A10. Having regard to the fact that Ex.A1 in this case emanated during the year 1911 and the custom, tradition and belief practiced in those days, we are of the view that Chinnamma Naidu reposed absolute faith and trust towards his elder brother Govindasamy Naidu and Govindasamy Naidu, true to such faith and confidence reposed on him, had held the suit property in a fiduciary capacity on behalf of his brother Chinnama Naidu. Such a relationship falls within the exception to Section 4 of the Prohibition of Benami Property Transaction Act, 1988 (now Section 2 (9) (ii) (iv) of The Benami Transactions (Prohibition) Amendment Act, 2016. For more clarity, Section 4 of the Act reads as under:-

"4. Prohibition of the right to recover property held benami:--

(1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami, whether against the person in

whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property

(3) Nothing in this Section shall apply,--

(a) Where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) Where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.

49. It is evident from Section 4 of the Act that the provisions of the Act are not applicable, if a person, in whose name the property is held, is a coparcener in a Hindu undivided family and the property is held for the benefit of such coparcener in the family. As we have held in respect of point No.1, Chinnamma Naidu has got a share in the property covered under Ex.A1 along with his elder brother Govindasamy Naidu. Therefore, Chinnama Naidu is a coparcener in respect of the suit property and therefore, the applicability of the Act is specifically excluded. The appellants/plaintiffs also raised the plea with respect to fiduciary capacity in their reply statement before the trial court and evidence was also let in to that effect. Therefore, we hold that Govindasamy Naidu was holding the suit property in a fiduciary capacity for and on behalf of his younger brother Chinnamma Naidu and consequently, the suit transaction is not hit by the provisions of Benami Transaction Act. Accordingly, we answer point Nos. 2 and 3 also in favour of the appellants/plaintiffs.

Point No.4:-

50. The father of the plaintiffs Ramachandran has admittedly filed a suit in O.S. No. 280 of 1994 for partition. On notice, the defendants in the suit have filed an application under Order VII Rule 11 of CPC to reject the plaint on the ground that the plaint did not disclose a cause of action. The trial court, accepting the averments made in the application under Order VII Rule 11 of CPC rejected the plaint. As against the order of rejection of the plaint, the said Ramachandran filed A.S. No. 188 of 1999 before the Additional District Court, Coimbatore. During the pendency of the appeal, Ramachandran/ appellant therein himself filed an application seeking withdrawal of the suit with liberty to file a fresh suit on the same cause of action. The appellate court granted such

permission on 28.07.2001, however, till his death on 10.06.2007, Ramachandran did not file any fresh suit. It is contended on behalf of the plaintiffs that Ramachandran thought it fit not to file any fresh suit among the legal heirs, instead, he resorted to effect an amicable partition among the legal heirs, but, he could not succeed in such an attempt. This is stated to be the reason for Ramachandran not filing any fresh suit. After the death of Ramachandran, the plaintiffs herein have instituted the suit on the basis of a notice dated 18.05.2010 issued by the Tahsildar, acting upon an application dated 19.10.2009 given by defendants 2 and 3, who are sons of Annasamy, for removal of the name of Ramachandran from the revenue records. According to the plaintiffs, after the death of their father, they have taken up his cause and even tried to effect an amicable settlement of the dispute, but they could not succeed. In effect, the plaintiffs have filed the present suit on the basis of the notice dated 18.05.2010 by which the plaintiffs came to know that the defendants 2 and 3 are taking steps for removal of the name of their father Ramachandran from the revenue records. In such circumstances, whether the present suit in O.S. No. 534 of 2010 is barred by the provisions of the Limitation Act inasmuch it has not been filed within a period of three years from the date of withdrawal of A.S. No. 188 of 1999 on 28.07.2001, with liberty to file a fresh suit, is to be examined.

51. The learned counsel for the appellant placed reliance on several decisions to buttress his submission that the present suit is not hit by the provisions of the Limitation Act. He also placed reliance on Article 120 of the Limitation Act which prescribes six years for filing a suit in cases where no period is provided in the Schedule of the Act. The suits falling under Article 120 of The Limitation Act has to be filed within six years from the date on which a right to sue accrues. In the present case, according to the learned counsel, the plaintiffs attempted to effect an amicable partition as could be evident from the deposition of PW1, however, when the defendants 2 and 3 had taken steps for removal of the name of their father Ramachandran from the revenue records, they were constrained to file the suit for partition. In other words, according to the plaintiffs, the right to sue against the defendants arose on receipt of the notice from the Tahsildar and immediately, the suit was instituted. Therefore, it is the contention of the counsel for the appellants/ plaintiffs that the suit is maintainable and it is not hit by the provisions of The Limitation Act. To fortify this submission, the learned counsel relied on the decision of the Division Bench of this Court in the case of Pothukutchi Appa Rao vs. Secretary of State reported in AIR 1938 Madras 193 wherein it has been held as follows:-

> "33. The legal position may be briefly stated thus:- The right to sue under Article 120 of the

Limitation Act accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however, ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right.

52. Countering this submission, the learned counsel appearing for the respective respondents would contend that Ramachandran, having withdrawn the appeal filed by him on 28.07.2001, ought to have filed a fresh suit within three years, but he did not do so. Further, the plaintiffs have filed the present suit for the very same relief of partition without a prayer for declaration. In fact, the plaintiffs ought to have filed a suit for declaration to declare their title, when it was disputed by the defendants. When the plaintiffs have no title in their favour, the suit for partition is not maintainable. Further, the earlier suit filed by the father of the plaintiffs would operate as a bar for the present suit. In any event, the present suit ought to have been filed in the year 2004, within three years from the date on which the father of the plaintiffs Ramachandran withdrew the appeal.

53. At the first blush, it is to be stated that Ramachandran, father of the plaintiffs filed a suit in O.S. No. 280 of 1994 before the Sub Court, Tirupur for partition of the suit property. On notice, the defendants therein wanted to strike off the plaint on the ground that the plaint did not disclose a cause of action. The trial court, accepting such submission of the defendants, rejected the plaint on 17.08.1998. As against the same, Ramachandran has filed A.S. No. 188 of 1999 before the First Additional District Court, Coimbatore. When the appeal was pending, Ramachandran himself filed I.A. No. 195 of 2000 under Order VII Rule 13 read with Section 151 of CPC seeking withdrawal of the suit with liberty to institute a fresh suit on the same cause of action. On 28.03.2001, I.A. No. 195 of 2000 was allowed permitting Ramachandran to withdraw the suit with liberty to file a fresh suit on the same cause of action and accordingly, the appeal was dismissed as withdrawn. Thus, it is evident that Ramachandran filed the suit in O.S. No. 280 of 1994 by furnishing incomplete particulars and therefore, the defendants sought for striking of the plaint. In other words, the earlier suit in O.S. No. 280 of 1994, which culminated in A.S. No. 188 of 1999, was not adjudicated on merits. There was no issues framed in the earlier suit in O.S. No. 280 of 1994 filed by the father of the plaintiffs Ramachandran. According to

the plaintiffs, Ramachandran did not institute a fresh suit rather, he attempted to smoothen the roughed feathers and tried to effect an amicable partition among all the eligible legal heirs. However, Ramachandran could not succeed in finding a solution and eventually, he died on 10.06.2007. According to the plaintiffs, they also made efforts for effecting a peaceful partition among the legal heirs and at that stage, at the behest of the defendants 2 and 3, a notice dated 18.05.2010 was received from the Tahsildar to participate in an enquiry to be conducted, to enquire as to why the name of their father Ramachandran be not removed from the revenue records in respect of the suit property. As all the efforts made by the plaintiffs were demolished by reason of the application submitted by the defendants 2 and 3 for removal of the name of their father from the revenue records, the plaintiffs have decided to file a suit for partition as it is no longer possible to effect an amicable settlement of the division of the property among the legal heirs. It is the notice dated 18.05.2010 received by the plaintiffs, which prompted them to file the suit for partition, otherwise, they would have not filed the suit, rather, continued their attempts to effect an amicable division of the properties among the legal heirs. However, on receipt of the notice dated 18.05.2010 which had an imminent possibility of jeopardising their right and interest in the suit property, they have decided to file the suit. Therefore, the cause of action for the present suit is the notice dated 18.05.2010 issued by the Tahsildar, Sulur on the basis of an application dated 19.10.2009 submitted by the defendants 2 and 3. The notice dated 18.05.2010 also indicates that an enquiry will be conducted on 26.05.2010 with respect to removal of the name of Ramachandran from the revenue records. By virtue of such notice dated 18.05.2010, an imminent threat was exposed to the right of the plaintiffs in the suit property and left with no other alternative or option, they were compelled and constrained to institute the suit for partition. Thus, the cause of action for the present suit is a compulsory cause of action which prompted the plaintiffs to institute the suit to safeguard their right, title and interest, which they acquired in the suit property by virtue of being the legal heirs of Ramachandran and grand children of Chinnama Naidu. In this context, useful reference can be made to the dictum laid down by the Honourable Supreme Court in Rukhmabai case referred to above wherein in Para No.33, it was held as follows:-

> "33. The legal position may be briefly stated thus: The right to sue under Article 120 of the Limitation Act accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective and innocuous it may be, cannot be

considered to be a clear and unequivocal thrat so as to compel him to file a suit whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right."

54. Applying the above decision to this case, we are of the view that a compulsory cause of action had arisen for the plaintiffs to file the present case. When the right and interest of the plaintiffs to claim partition over the suit property is at stake and there is an imminent threat to such right, no normal prudent person would keep quiet without taking steps to assert his legitimate right and interest. The action of the defendants in attempting to remove the name of the plaintiffs' father from the revenue records is such that there is an imminent threat for the plaintiffs' to assert their right, interest and title in the property without which they will be deprived of their legitimate right. In such circumstances, we hold that the present suit in O.S. No. 534 of 2010 has nothing to do with the suit in O.S. No. 280 of 1994 filed by the father of the plaintiffs as the cause of action for both the suits are basically different. When the cause of action for the plaintiffs to file the instant suit in O.S. No. 534 of 2010 springs from and out of the notice dated 18.05.2010 issued by the Tahsildar, Sulur, we are of the view that the suit for partition, as filed by the plaintiffs, is well within the period of limitation. We could also see from the plaint averments that the plaintiffs have categorically asserted that they are in joint possession of the suit property along with the defendants. This is also evident from the fact that the name of the father of the plaintiffs Ramachandran is reflected in the revenue records in respect of the suit property, indicating that the plaintiffs, who are legal heirs of Ramachandran, continue to remain in possession of the suit property. Even otherwise, in a suit for partition, the possession of one of the co-parceners is for and on behalf of the other. The cause of action for filing a suit for partition is recurring one. As long as the relationship of co-ownership subsists, the right to seek partition continues. Even if one of the co-owners files a suit and subsequently abandon it for some reason, it will not be a ground for dismissal of the suit filed by another co-owner on the same cause of action. All that it implies is that the co-owner, who abandons a legal action initiated by him without continuing it any further, can be construed as the one who has chosen to continue his ownership in common without resorting to seek for division of the property and to allot him a separate share. We therefore hold that right to bring an action for partition is a continuing right, incidental to the right of joint ownership in the property in question. Such right subsists as long as the

property remains undivided. Therefore, we hold that the claim of the appellants for partition and separate possession is not hit by the provisions of Limitation Act and we answer Point No.4 also in favour of the appellants/plaintiffs.

Point No.5

55. In view of our conclusion with respect to point No.1 holding that Chinnamma Naidu has jointly contributed for purchase of half share of the property covered under Ex.A1 along with his elder brother Govindasamy Naidu, we have to necessarily answer this question also in favour of the plaintiffs. Even otherwise, under Ex.A10, Patta, the name of Govindasamy Naidu and Chinnamma Naidu were mentioned as joint owners of the property in question. That apart, Ex.A11, series of Kist receipt would indicate that Chinnamma Naidu has individually paid kist in respect of his share of the property covered under Ex.A1. As long as the revenue records stood mutated in the name of grand father of the plaintiffs Chinnama Naidu and the plea of the plaintiffs that they were in joint possession of the suit property along with the descendants of Govindasamy Naidu, coupled with the admission of Ponnusamy, tenth defendant, in his written statement admitting the title of Chinnama Naidu in the suit property, we are of the view that the suit filed by the plaintiffs for partition, even without the relief of declaration of title, is maintainable. We accordingly answer Point No.5 also in favour of the plaintiffs.

Point No.6

56. The plea of ouster was raised by the defendants 13 to 15 in their written statement. In view of our answer to Point No.4, this plea cannot be sustained. However, at the risk of repetition, we hasten to add that the plaintiffs, in their plaint, have asserted that they are jointly in possession of the suit property along with the other legal heirs viz., defendants. The revenue records also stand in the name of their father Ramachandran. In a suit property, it is always regarded that the possession of one of the co-parceners is for and on behalf of the other co-parcener as well and the plea of ouster cannot be considered in a suit for partition on par with the plea of ouster raised in a suit for declaration. We could also see from Ex. B16 filed before the trial court that Nandakumar, son of Ponnusamy (tenth defendant) has filed a separate suit in O.S. No. 1625 of 2016 before the District Munsif Court, Coimbatore against Rajagopal, Son of Annasamy, the third defendant in the suit, and three others. The said suit in O.S. No. 1625 of 2016 was filed for a bare injunction to restrain the defendants in the suit from in any manner alienating or encumbering the suit property. The plaintiff in O.S. No. 1625 of 2016 asserts a right

to portion of the suit property on the basis of the settlement deed executed in his favour by his father Ponnusamy (tenth defendant in the present suit). In the plaint, the plaintiff in O.S. No. 1625 of 2016 has categorically refers to the present suit in O.S. No. 534 of 2010 filed by the appellants/plaintiffs and also states that they are also in joint possession of the suit property along with other legal heirs. In such circumstances, the plea of ouster cannot be countenanced. Therefore, we answer point No.6 also in favour of the appellants/plaintiffs in this appeal.

56. In the result, we set aside the Judgment and Decree dated 21.11.2017 passed in O.S. No. 534 of 2010 on the file of the V Additional District Judge, Coimbatore. The Appeal Suit is allowed. There will be a preliminary decree for partition in O.S. No. 534 of 2010 as prayed for by the plaintiffs. However, having regard to the proximity of relationship between the parties, we award no costs. Consequently, connected miscellaneous petition stands closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

rsh

To

The V Additional District Judge
Coimbatore.

Copy to
The Section Officer,
VR Section, High Court, Madras.

Pre-delivery Judgment in
Appeal Suit No. 298 of 2018

LN(CO)
KKV/17/07/2020