



S.A.(MD)No.427 of 2014

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 03.09.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD).No.427 of 2014

and

M.P.(MD).No.1 of 2014

- 1 Sankareswari
2. Amuthalakshmi
3. Sannasi
4. Natarajan
5. Sundaram
6. Periyavellai
7. Ganesamoorthy
8. Subbaiah
9. Selvaraj
- 10.Chinnadurai
- 11.Andichi
12. Raman
- 13.Ganesan
14. Manimegalai

... Appellants

(14th appellant suo-mutu impleaded
by this Court vide order dated 03.09.2021)

Vs.

1. Periyakalai
2. M.Chithan
3. M.Vellandi
4. V.Lakshmi

... Respondents



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Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the Judgment and Decree dated 03.02.2014 passed in A.S.No.12 of 2012 on the file of Sub Court, Theni reversing the Judgement and Decree dated 30.11.2011 made in O.S.No.9 of 2007 on the file of District Munsif cum Judicial Magistrate Court, Antipatti.

For Appellants : Mr.S.Parthasarathy,
Senior Counsel,
For S.Siva Thilakar.

For Respondents : Mr.Vallinayagam,
Senior Counsel
For Mr.A.Jayaramachandran.

JUDGMENT

This Second Appeal arises out of a partition suit in O.S.No.9 of 2007 on the file of the District Munsif and Judicial Magistrate, Andipatti.

2.The defendants in the suit are the appellants herein. The respondents had filed the suit for partition and separate possession of their 4/5th share in the suit properties. The suit properties are comprised in S.Nos.146/3A & 146/4A in Palakombai Village in Antipatti Taluk and measure an extent of 2



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acres and 20 cents. The father of the plaintiffs, namely, Mookkamoopper purchased the suit properties vide Ex.A1 dated 09.09.1968. He mortgaged the same in favour of the first defendant under Ex.A5 dated 28.04.1989. During the subsistence of the mortgage, the plaintiff's father created a charge in respect of the suit properties in favour of Navaneedha Krishnasamy who is none other than the husband of the first defendant under Ex.A6 dated 10.09.1990.

3. According to the plaintiffs, in the year 2007, they came to know that the suit properties were sold by their father in favour of the first defendant under Ex.A7 dated 12.08.1992. They then verified the encumbrance register and noticed that the first defendant had sold the properties in favour of one Chellappan, husband of the second defendant under Ex.A8 dated 17.06.1998. Chellappan settled the suit properties in favour of his wife, the second defendant herein under Ex.B22 dated 31.12.2001. The other defendants had purchased the suit property from the second defendant. After the plaintiffs became aware of the same, they issued notice dated 16.11.2006 to the defendants 1 & 2. The second defendant sent a reply dated 12.12.2006. The plaintiffs sent a rejoinder vide Ex.A12 dated 18.12.2006. Thereafter, the suit came to be filed on 05.01.2007.



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4.The second defendant filed written statement controverting the plaintiff's averments. The second defendant pleaded that the suit properties were purchased by the plaintiffs' deceased father out of his own funds and that it was his self-acquired property. He mortgaged the same in favour of one Thayammal @ Alagammal on 05.11.1975 and redeemed the same on 30.10.1988. He again mortgaged the property on 28.04.1989 and 10.09.1990 in favour of the first defendant and her husband and redeemed it on 08.04.1991. Since the plaintiffs' father was heavily indebted, he sold the suit properties in favour of the first defendant on 12.08.1992. The first defendant effected mutation in the revenue records in her favour and was enjoying the suit properties. The plaintiffs were fully aware of the sale transaction. The first defendant sold the property in favour of the second defendant's husband Chellappan on 17.06.1998 and Chellappan mortgaged the property on 05.12.2000. He redeemed the same on 20.07.2001. He then settled the property in favour of the second defendant on 31.12.2001. The second defendant obtained patta in her favour and was enjoying the same independently. She laid out a portion of the suit property and sold the same to D3 to D13 for valuable consideration. She retained the remaining extent of the suit properties with herself. According to the second defendant, the suit



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is hopelessly barred by limitation. A few other legal contentions were also put forth in the written statement.

5. Based on the divergent pleadings, the trial Court framed necessary issues. On the side of the plaintiffs, the first plaintiff examined himself as PW1. Exs.A1 to A19 were marked. The daughter of the first defendant was examined as DW2. Exs.B1 to B13 were marked. After consideration of the evidence on record, the trial Court by judgment and decree dated 30.11.2011 dismissed the suit. Aggrieved by the same, the plaintiffs filed A.S.No.12 of 2012 before the Sub Court, Theni. By the impugned judgment and decree dated 03.02.2014, the first appellate court set aside the decision of the trial Court and allowed the appeal and allotted 1/5th share in favour of each of the plaintiffs. Aggrieved by the same, the Second Appeal came to be filed by the defendants. The Second Appeal was admitted by this Court on the following substantial questions of law :

- “(i) *Whether the Lower Appellate Court is correct in law in holding that the suit property is the ancestral property of the respondents/plaintiffs, when the documents marked as Ex.A1 to A27*



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coupled with the oral evidence of P.W.1 and P.W.2 will not prove their case?

- *(ii) Whether the Lower Appellate is correct in law in not holding that the claim of the respondents/plaintiffs is barred by limitation, when their father had sold the property under Ex.A7 sale deed dated 12.08.1992 in favour of the 1st appellant/1st defendant which fact is admittedly known to the respondents/plaintiffs which is evident from the oral evidence of P.W.1 and P.W.2.”*

6.During the pendency of the Second Appeal, the first appellant passed away and her daughter, Ms.Manimegalai, who was examined as DW2 was *suo motu* impleaded as her legal representative as 14th appellant.

7.Heard the learned Senior Counsel on the either side.

8.The learned Senior counsel appearing for the appellants submitted that the suit properties were acquired by Mookkamoopper. Therefore, he was very much entitled to alienate the same in favour of the first defendant. He would also contend that the suit filed only in January 2007 was hopelessly



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barred by limitation. He also submitted that the suit for partition is not maintainable, because, there is no prayer for setting aside the sale executed by their father under Ex.A7. He called upon this Court to answer the substantial questions of law in favour of the appellant by setting aside the judgment and decree passed by the first Appellate Court and to restore the decision of the trial court.

9.Per contra, the learned Senior counsel appearing for the respondents submitted that the impugned judgment and decree passed by the first appellate court do not warrant any interference. He would point out that there is ample evidence to show that the suit properties are joint family properties and therefore, the first appellate court rightly interfered with the finding of the trial Court. He would draw my attention to the fact that the first defendant who had purchased the suit properties, kept away from the witness box. Only her daughter was examined as DW2. He took me through the testimony of the other witnesses to show that the husband of the first defendant was a money lender and he had the habit of obtaining sale deeds from the persons who had borrowed from him. According to the learned Senior counsel, Ex.A7 cannot be considered as a sale deed at all. It can at



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best be considered only as creation of security towards the loan availed by the said Mookkamooppar, the father of the plaintiffs. He also submitted that even if Ex.A7 is considered as a sale deed, it would be valid only to the extent of Mookkamooppar's 1/5th share and not as regards the plaintiff's 4/5th share. He submitted that if the plaintiffs are not parties to the sale deed, there is no necessity for challenging the same. He also submitted that there is sufficient evidence on record to show that during the relevant point of time, the plaintiffs had left the native place and lived elsewhere and they were not aware of the execution of Ex.A7. After coming to know of the same, the plaintiffs issued notice and filed the present suit. He also pointed out that the partition suit is not time barred. The relevant article is not 109 but article 110. According to article 110, the limitation would be 12 years from the date when execution came to be known to the plaintiff. In a suit for partition, the burden to prove such knowledge would fall on the person pleading limitation and not on the plaintiff.

10.I have carefully considered the rival contentions and went through the evidence on record. The case of the plaintiffs is that the suit properties are ancestral properties and that therefore, the alienation made by their father



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will not affect or bind their 4/5th share in the suit properties. The specific plea of the defendants is that the suit properties were the acquired properties of Mookkamoopper. The trial Court dismissed the suit by holding that the suit properties are self-acquired properties. The first appellate court had reversed the said finding and held that the suit properties are ancestral properties. To prove the character of the suit properties, the plaintiffs marked Ex.A4 dated 10.08.1986 to which the plaintiff's father Mookkamoopper and his brother Sithamooppar are parties.

11.The learned Senior Counsel appearing for the appellants pointed out that Ex.A4 is not a record of an event that it had already taken place and that it is only a sort of an agreement. Since Ex.A4 is an operative document and not a record of an antecedent event, it requires registration. In as much as it has not been registered, it cannot be looked into. I find considerable force in the said contention and I sustain the same. Ex.A5 is the mortgage deed executed by Mookkamoopper in favour of the first defendant. Execution of Ex.A5 indicates that he was enjoying the suit properties not as ancestral properties. The first appellate court grievously erred in concluding that the suit properties are ancestral properties and not acquired by Mookkamoopper.



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It is clear that the first appellate court failed to take into account Ex.A5.

The first substantial question of law is answered in favour of the appellants.

12.The next question that arises for consideration is whether the suit is barred by limitation. The testimony of PW.1 has to be considered for answering this question. In the plaint as well as in the proof affidavit, it has been admitted that plaintiffs were very much aware of the creation of mortgage of the suit properties in favour of the first defendant. In fact, in Ex.A5 as well as Ex.A7, the family members of Mookkamoopper have figured as witnesses. In paragraph 12 of the proof affidavit, PW.1 had stated that possession of the suit properties had been given by Mookkamooppar to the first defendant under the mortgage, though the stand of the plaintiffs is that possession had been transferred to the first defendant only subsequent to the mortgage. The fact remains that the plaintiffs are very much aware that they were no longer in possession of the suit properties. However, they would claim that they were aware of the execution of sale deed only much later. One cannot lose sight of the fact that Ex.A7 is a registered document.



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13. Though the learned Senior counsel for the respondents/plaintiffs submitted that due to financial problems, the plaintiffs had left the native village, the fact remains that they had knowledge of the creation of the mortgages in respect of the suit properties. Mookkamoopper being the plaintiffs' father had passed away in the year 1995. The plaintiffs were also aware that they were no longer in possession of the suit properties. It is well settled that Mookkamoopper who is the father of the plaintiffs was in a joint family and in fact, this is not disputed. When Ex.A7 sale deed was executed, the plaintiffs had already attained majority. The plaintiffs would claim that no sale had taken place. This is intrinsically unbelievable. The plaintiffs' case is that D1's husband Navaneetha Krishnasamy was a usurious money lender who would obtain sale deeds from the borrowers and effect re-conveyances after the loan liabilities are settled. The evidence adduced by some of the witnesses examined on the side of the plaintiffs is to this effect. This clearly shows that the plaintiffs knew that Mookamoopper had sold the property in favour of the first defendant and since he did not clear the liabilities, there was no re-conveyance. After purchase under Ex.A7, the first defendant had sold the properties in favour of the second defendant's husband Chellappan in the year 1998. Chellappan had mortgaged the same in the year 2000.



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After redeeming it, he settled the properties in favour of the second defendant. Thereafter, portions of the property were sold by the second defendant in favour of the defendants 3 to 13. It is evident from the revenue records that the plaintiffs lost possession of the properties as early as on 12.08.1992 itself. The suit should have been filed within 12 years therefrom.

14. Since the suit has not been filed within 12 years after loss of possession, I have to answer the second substantial question of law in favour of the appellants. The suit is barred by limitation. The first appellate court failed to consider the character of the suit properties and erroneously held that the plaintiffs became aware of the sale of suit properties only a few months prior to the filing of the suit. It is contrary to the testimony of PW1 who categorically admitted in chief examination itself that the possession was given to the first defendant while executing Ex.A7 dated 12.08.1992. Of course, the plaintiffs would claim that it was only a mortgage and possession was given under the impression that it was a mortgage transaction. As I have already pointed out, the plaintiffs themselves have deposed that there was borrowal of money and that it was not repaid. It has been admitted that possession was also given. Ex.A7 is a registered document. It clearly reads that it is a sale deed. There have been several subsequent transactions which



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have also been registered. Therefore, the suit ought to have been filed within 12 years after the first defendant took possession of the suit properties under Ex.A7 dated 12.08.1992. The suit was filed only on 05.01.2007. Since the second substantial question of law is answered in favour of the appellants, the judgment and decree of the first appellate court are set aside and the judgment and decree of the trial court are restored. This Second Appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

03.09.2021

Index : Yes / No
Internet : Yes/ No
skm

Note :In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1. The District Munsif cum Judicial Magistrate Court, Antipatti.
2. The Sub Court, Theni.



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The Record Keeper, V.R. Section,
Madurai Bench of Madras High Court, Madurai.



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G.R.SWAMINATHAN, J.

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