



A.S.No.521 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON	JUDGMENT PRONOUNCED ON
13.09.2022	14.11.2022

CORAM:

THE HONOURABLE **MS.JUSTICE V.M.VELUMANI**
and
THE HONOURABLE **MR.JUSTICE V.SIVAGNANAM**

A.S.No.521 of 2016
and C.M.P.No.12451 of 2016

Sudha

... Appellant

Vs.

1.S.Thangavel

2.G.Arumugam

... Respondents

Prayer: This First Appeal is filed under Section 96 read with Order XLI Rule 1 of the C.P.C., 1908, against the judgment and decree dated 08.06.2016 made in O.S.No.126 of 2008 on the file of the Principal District Court, Namakkal.

For Appellant : Ms.K.Abirami
for Mr.V.Raghavachari
For R1 : Mr.N.Manokaran



A.S.No.521 of 2016

For R2 : No appearance

WEB COPY

J U D G M E N T

[Judgment of the Court was delivered by V.M.VELUMANI,J.]

The appellant is the plaintiff and respondents are defendants in O.S.No.126 of 2008 on the file of the Principal District Court, Namakkal. The appellant filed the said suit for partition of the suit properties into two equal shares and to allot one such share to the appellant and put her in separate possession and enjoyment of the same and also for the relief of permanent injunction restraining the respondents not to alienate the suit properties till the final division takes place. After contest by the judgment and decree dated 08.06.2016, the said suit was dismissed.

2.The unsuccessful plaintiff has come out with the present appeal challenging the judgment and decree dated 08.06.2016 made in O.S.No.126 of 2008 on the file of the Principal District Court, Namakkal.

Case of the appellant:

3.The appellant is the daughter of the 1st respondent. The suit properties are ancestral and joint family properties of the appellant and 1st



A.S.No.521 of 2016

respondent. The appellant is having half share in both the properties. The first item of the suit property was allotted to the 1st respondent in the partition effected between the 1st respondent, his brother and father evidenced by the deed of partition dated 15.06.1972 registered as Document No.1064/1972 on the file of Sub Registrar, Paramathi. From and out of income of the first item of the suit property, the 1st respondent purchased the second item of the suit property by the deed of sale dated 18.09.1996 bearing Document No.409/1996. The appellant is entitled to half share in the said first item of the suit property and her right over the first item of the suit property will not get extinguished by fraudulent sale in favour of the 2nd respondent.

3(i). The 1st respondent had illicit relationship with one Arukkani and in the said illicit relationship, one Gomathi and Boopathi were born. They do not have any share in the suit properties. The 1st respondent fraudulently sold first item of the suit property to the 2nd respondent as Manager of the Hindu Mittakshara Co-parcenary, by sale deed dated 20.09.2002 bearing Document No.466/2002 for himself and on behalf of the appellant, Gomathi and Boopathy. The appellant came to know about the sale only on 13.03.2008.



A.S.No.521 of 2016

The said sale is not binding on the appellant and not for the benefit of the appellant. The said sale is void abinitio, which is clear as the said Gomathi and Boopathy made as parties to the said sale deed.

3(ii). The appellant is in joint possession of the suit properties and no alienation possible for she is in joint possession with first respondent. Hence, the appellant repeatedly demanded division of the property. The 1st respondent did not partition the property. The appellant issued notice dated 27.06.2008 calling upon to divide the suit properties into two equal shares and allot one share to the appellant. The 1st respondent did not partition and did not send any reply to the said notice. The respondents are making arrangements to sell the suit properties. Hence, the appellant filed suit for partition and for injunction restraining the respondents not to alienate the suit properties till the final division takes place.

Case of the 1st respondent:

4.The 1st respondent filed written statement and denied all the allegations made in the plaint. According to the 1st respondent, one



A.S.No.521 of 2016

Saraswathi, wife of the 1st respondent and mother of the appellant deserted the 1st respondent after the birth of the appellant in the year 1986, left the appellant and 1st respondent and married one person residing in Veerapudhur Village, near Manapparai.

4(i). As per the customs, the 1st respondent married one Arukkani as in the Panchayat, wherein it was held that Saraswathi, mother of the appellant, wife of the 1st respondent informed the Panchayathars that she will not live with the 1st respondent, she cannot maintain appellant and there is no relationship between Saraswathi and 1st respondent. The two children Gomathi and Boopathy were born to the 1st respondent through Arukkani. She is legally wedded wife of the 1st respondent and she is not a concubine as alleged by the appellant. The appellant was brought up from her childhood only by Arukkani. The 1st respondent, appellant, Gomathi and Boopathy are having equal shares in the suit properties. The suit is bad for non-joinder of Gomathi and Boopathy.

4(ii). The 1st respondent wanted to conduct the marriage of the appellant in a simple manner. The appellant insisted the 1st respondent to



A.S.No.521 of 2016

celebrate her marriage in a grand manner and informed the 1st respondent that she will give up her share in the family property. On the advise of the relations, the 1st respondent celebrated marriage and reception of the appellant in a grand manner in Kongu Thirumana Mandapam at Thiruchengode on 02.06.2004. At the time of marriage, the 1st respondent gave to the appellant 100 sovereigns of gold jewels and Rs.5,00,000/- cash in lieu of her share in the property.

4(iii). The first item of the suit property was sold in the year 2002 only for the purpose of buying jewels for the appellant. The 1st respondent borrowed a sum of Rs.2,00,000/- from one Kandasamy, Elachipalayam, Rs.75,000/- from Thangarasu, Maniyanur Peechampalayam, Rs.1,00,000/- from Jayaprakash, Goundapadi, Erode, Rs.1,50,000/- from Pazhanivel, Ellapalayam, Tiruchengode, Rs.5,00,000/- totally from others and spent money for marriage expenses of the appellant. The 1st respondent is a lorry driver and is repaying the amounts from and out of income earned by him as lorry driver. A child was born to the appellant in October 2005. The 1st respondent met all the expenses in a private hospital at Erode for delivery.



A.S.No.521 of 2016

The 1st respondent presented five sovereign gold jewels to the child. Knowing fully about all the above details, the appellant has filed suit with an ulterior motive based on false allegations.

4(iv). The 1st respondent further stated that second item of the suit property was purchased from and out of income earned by him as lorry driver. The second item of the suit property is his self acquired property. The appellant is not having any share in the second item of the suit property. The 1st respondent in order to discharge the amounts borrowed for marriage expenses of the appellant, mortgaged his property to one Senthilkumar and Moorthy from Pudhupuliyampatti and Ellapalayam, Tiruchengode. In view of the appellant relinquished her right in the suit property, she was not made as party in the mortgage deeds.

4(v). After receipt of notice issued by the appellant, the 1st respondent met the appellant and informed the same. The appellant informed the 1st respondent that only on the ill advise of others, she issued notice and she will not proceed further. Therefore, the 1st respondent did not send any reply. The



A.S.No.521 of 2016

appellant has filed an application for injunction. There is no prima facie case for the appellant. Balance of convenience is in favour of the 1st respondent.

There is no cause of action for the suit. The appellant is not in joint possession of the suit properties. The Court fee paid by the appellant is not correct and prayed for dismissal of the suit.

5.The 1st respondent filed additional written statement denying his statement in paragraph 6 of the written statement that appellant is having 1/4th share in the suit properties. The 1st respondent further stated that except 1st respondent, no others have any share in the suit properties. At the time of partition in the year 1972, the 1st respondent was minor and first item of the suit property is his self acquired property and no body is having any right over the same. The second item of the suit property is self acquired property of the 1st respondent purchased from his own earnings and appellant is not entitled to any right over the same. A child can demand share in joint family property only if it is undivided property. The first item of the suit property was allotted to the 1st respondent before his marriage and it is his self acquired property. The suit was filed after 36 years of partition and the said



A.S.No.521 of 2016

suit is barred by limitation. The 1st respondent sold the first item of the suit property to the 2nd respondent for valuable sale consideration. As per the Limitation Act, the suit should be filed within 12 years from the date of document or within three years after attaining majority, which ever earlier. The appellant filed suit after three years of her attaining majority and hence, the suit is barred by limitation. The suit filed without seeking cancellation of sale deed dated 20.09.2002 is not maintainable. The 1st respondent having every right to alienate first item of the suit property, the sale deed dated 20.09.2002 is a valid one. The appellant is not having any right to claim share in the first and second items of the suit properties and prayed for dismissal of the suit.

Case of the 2nd respondent:

6.The 2nd respondent filed written statement and stated that suit is frivolous and vexatious. The 2nd respondent purchased the first item of the suit property from the 1st respondent for valuable sale consideration. The 1st respondent executed the sale deed for himself as well as for the minor children including the appellant. The suit is bad for non-joinder of necessary



A.S.No.521 of 2016

parties and barred by limitation. The 2nd respondent paid kists for the first item of the suit property by getting patta in his name and he also mortgaged first item of the suit property in a Bank. In the application filed for injunction, the appellant is not having any prima facie case and balance of convenience is in favour of the respondents. There is no cause of action for filing the suit. The Court fee paid by the appellant is not correct and prayed for dismissal of the suit.

7.The appellant filed reply statement and denied the averments in the additional written statement and submitted that the stand taken by the 1st respondent in the additional written statement is contrary to the stand taken in the original written statement. It is not correct that 1st respondent is absolute owner of the first item of the suit property. That stand taken by the 1st respondent in the additional written statement is barred by the principles of estoppel. The stand taken by the 1st respondent that appellant is not entitled to any share in the first item of the suit property as she was not born on the date of partition is not correct. Contrary to the stand taken by the 1st respondent in original written statement that property is joint family property and appellant



A.S.No.521 of 2016

is entitled to 1/4th share, the 1st respondent is precluded from taking any contrary stand. Arukkani is not legally wedded wife. Children born through Arukkani are not legitimate children. Suit is not barred by limitation. The second item of the suit property was not purchased from and out of income of the 1st respondent. It is not self acquired property of the 1st respondent. The second item of the suit property was purchased only from and out of the income derived from the first item of the suit property. The appellant denied the allegation that first item of the suit property was sold for valuable consideration and submitted that it is a fraudulent sale as evidenced by children of Arukkani as vendors.

8. Based on the pleadings, the learned Judge framed the following issues:

- “ 1.வாதி கோரும் பாகப்பிரிவினை மற்றும் சுவாதீன பரிகாரம் வாதிக்கு கிடைக்கத்தக்கதா?
2. தாவா சொத்துக்கள் வாதி மற்றும் 1ம் பிரதிவாதிக்கு பாத்தியப்பட்ட பொது குடும்ப சொத்துக்கள் என்பது சரியா?
3. தாவா அவசியமான தரப்பினர்களை சேர்க்காததால் பாதிக்கப்பட்டுள்ளது என்பது சரியா?
4. தாவா 2வது அயிட்டி சொத்து 1ம் பிரதிவாதியின் சுய சம்பாத்திய



A.S.No.521 of 2016

சொத்து என்பது சரியா?

5. தாவா காலவரையறை தோசத்தால் பாதிக்கப்பட்டுள்ளது என்பது சரியா?

6. வாதி கோரும் நிரந்தர உறுத்துக்கட்டளை பரிகாரம் வாதிக்கு கிடைக்கத்தக்கதா?

7. வாதிக்கு கிடைக்கும் இதர பரிகாரங்கள் என்ன? ”

9. Before the learned Judge, the appellant examined herself as P.W.1 and marked five documents as Exs.A1 to A5. On the side of the respondents, the 1st respondent examined himself as D.W.1 and marked six documents as Exs.B1 to B6.

10. The learned Judge considering the pleadings, oral and documentary evidence, dismissed the suit.

11. Against the said judgment and decree dated 08.06.2016 made in O.S.No.126 of 2008, the appellant has come out with the present appeal.

12. The learned counsel appearing for the appellant contended that the 1st respondent admitted that first item of the suit property is joint family



A.S.No.521 of 2016

property and he is the Kartha of joint family property. The 1st respondent and appellant are only members of joint family property. The second item of the suit property was purchased only from the income derived from the first item of the suit property and therefore, this is also joint family property. The appellant proved that second item of the suit property was purchased from the substantial income received from the first item of the suit property. Once the appellant has proved the sale, onus is on the 1st respondent to prove his independent income by which he purchased the second item of the suit property. The 1st respondent failed to mention under whom he was working, when he purchased the second item of the suit property. The sale deed dated 20.09.2002 executed in favour of the 2nd respondent is void document. The 2nd respondent is not bonafide purchaser as he purchased the property from the persons, who have no right in the said property. The said sale is fraudulent one. There is no time limit prescribed to challenge a fraudulent sale. The appellant came to know about the sale only in the year 2008. The 1st respondent failed to prove that he borrowed money to celebrate marriage of the appellant. The date of marriage of the appellant is 02.06.2004. But Exs.B3 to B6 are of the year 2005 and 2010. The learned Judge erred in holding that



A.S.No.521 of 2016

Arukkani is legally wedded wife of the 1st respondent relying on the marriage invitation.

12(i). The 1st respondent did not deny the right of the appellant. He claimed only relinquishment by the appellant in view of marriage expenses. The 1st respondent has not produced any document to prove that appellant relinquished her right. Similarly, the 1st respondent did not prove that first item of the suit property was sold only for marriage expenses. The 1st respondent also failed to prove that he borrowed money to celebrate marriage of the appellant.

12(ii). The learned counsel appearing for the appellant further contended that there is difference between void and voidable sale deed. If it is void sale deed, the appellant need not seek cancellation of sale deed. The appellant can file suit either within 12 years from the date of execution of the document/sale deed or within three years of attaining her majority. The sale deed Ex.A3 dated 20.09.2002 executed by the 1st respondent in favour of the 2nd respondent is void document and therefore, the suit is not barred by limitation. The 1st respondent in paragraph 6 of the written statement admitted



A.S.No.521 of 2016

that first item of the suit property is ancestral property and the appellant is having 1/4th share in the first item of the suit property. Subsequently, the 1st respondent filed additional written statement and withdrew the admission made in the original written statement. The 1st respondent is not entitled to withdraw the said admission by filing additional written statement and prayed for allowing the appeal.

12(iii) In support of her contentions, the learned counsel appearing for the appellant relied on the following judgments:

(1) 2010 (2) CTC 198 [Natarajan vs. Paramasivam];

"20. Learned counsel for the appellant-plaintiff would contend that if the Court comes to the conclusion that Ex.A-1 sale deed is void, it ought to have been set aside. But without setting aside Ex.A-1 sale deed, it was executed and so, no right is conferred on the respondent-defendant. To substantiate the same, learned Counsel for the appellant plaintiff relied on the decision of the Supreme Court reported in Sneh Gupta v. Devi Sarup, 2009 (6) SCC 194 and a decision of this Court reported in C.Anthonysamy v. V.Rajagopal Padayachi, 2002 (3) C.T.C. 211.



WEB COPY



A.S.No.521 of 2016

21. The second limb of argument in this aspect is that Ex.A-1 sale deed was executed on 22.9.1986 and that as per Ex.B-1, Govindaraju and Nagaraju executed the sale deed in favour of the respondent-defendant only on 9.2.1999, i.e. after 12 years of Ex.A-1 and so, the suit is barred by limitation. To substantiate the same, the decision reported in C.Anthonysamy v. V.Rajagopal Padayachi, 2002 (3) C.T.C. 211 was relied on and the learned Counsel for the appellant-plaintiff submitted that the respondent-defendant ought to have filed the suit for setting aside the sale deed within the period of limitation. Learned Counsel for the appellant-plaintiff further urged that the claim of the respondent-defendant is barred by limitation, since the vendors of the respondent-defendant ought to have filed the suit within three years from the date the minor attained majority or within 12 years from the date of execution of Ex.A-1, whichever is earlier. To substantiate the same, the decision of the Supreme Court reported in 2006 (5) SCC 353 (Prem singh v. Birbal) was relied on and the relevant portion of 2006 (5) SCC 353 (cited supra) is as follows:

"13. Article 59 of the Limitation Act applies specially when a relief is claimed on the ground of fraud or mistake. It only encompasses within its fold fraudulent transactions which are voidable



A.S.No.521 of 2016

transactions.”

“15. Section 31 of the Specific Relief Act, 1963 thus, refers to both void and voidable documents. It provides for a discretionary relief.”

“16. When a document is valid, no question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non est in the eye of law, as it would be a nullity.” (emphasis supplied)

“18. Article 59 would be attracted when coercion, undue influence, misappropriation or fraud which the plaintiff asserts is required to be proved. Article 59 would apply to the case of such instruments. It would, therefore, apply where a document is prima facie valid. It would not apply only to instruments which are presumptively invalid. (See Unni v. Kunchi Amma ILR (1891) Mad 26 and Sheo Shankar Gir v. Ram Shewak Chowdhri ILR (1897) 24 Cal 77.” ”

(2) 2006 (5) SCC 353 [Prem Singh and others vs. Birbal and others];

“28. If a deed was executed by the plaintiff when he was a minor and it was void, he had two options to file a suit to get the property purportedly conveyed thereunder. He



WEB COPY



A.S.No.521 of 2016

could either file the suit within 12 years of the deed or within 3 years of attaining majority. Here, the plaintiff did not either sue within 12 years of the deed or within 3 years of attaining majority. Therefore, the suit was rightly held to be barred by limitation by the trial court."

(3) 2022 (2) LW 754 [Vadivelu and others vs. Gandhi and another];

33. In the instant case, the 2nd defendant is none else than the brother's wife of the 1st defendant. In such circumstances, the 2nd defendant/2nd respondent herein is in a position to plead and prove the character of the property as self acquired properties of the 1st defendant. In other words, the 2nd defendant/2nd respondent being a close member of the family, cannot plead ignorance. It is important to refer to the stand taken by the 2nd respondent in the written statement. Though the 2nd defendant/2nd respondent denies every averment made in the plaint in paragraphs No. 1 to 5 of the written statement and it is stated that the suit property originally belonged to the 1st defendant and he was enjoying the same as the absolute owner with all rights, there is no plea with regard to the source of income of the 1st defendant to purchase the suit properties. From the plaint averments and the recitals in the documents Ex. A4 and Ex. A11,



WEB COPY



A.S.No.521 of 2016

the existence of joint family nucleus is established. Since the 1st defendant is the Kartha of family, the burden shifts on the 2nd defendant to prove the independent source of income or that the property under Ex. A5 to Ex. A7 are the self acquired property of 1st defendant. There is no averment in the written statement of the 2nd defendant/2nd respondent to suggest that the 1st defendant was self employed or had other income to acquire the suit properties. The Courts below have failed to consider the pleadings in a proper perspective. The judgments of the Courts below, therefore are vitiated in not applying the principles of law settled by various precedents in a proper perspective. The Courts below decided the issue regarding character of suit properties by wrongly shifting the burden of proof on the appellants ignoring the pleadings and recitals in the documents Exs. A4 and A11.

34. When the properties were acquired by the 1st defendant at the time when the 1st defendant had sufficient nucleus, the burden lies on the purchaser from the 1st defendant to show the independent income or the independent source for the 1st respondent/1st defendant to purchase the property and the 2nd defendant/2nd respondent herein in the present case who is none else than the wife of the 1st defendant's brother is bound to prove the character of the



WEB COPY



A.S.No.521 of 2016

property as the self acquisition of the 1st defendant so as to claim absolute title on the basis of the decree obtained by her against the 1st defendant in the suit for specific performance and the subsequent proceedings. The 2nd defendant/2nd respondent is not entitled to claim title to the entire property without proving that the suit properties were purchased by the 1st defendant/1st respondent out of his separate income or independent source without the aid of the joint family income or nucleus. In the suit filed by the 2nd defendant/2nd respondent for specific performance, the plaintiffs/appellants are not parties. Therefore, the judgment and decree and the subsequent orders in the execution proceedings in OS. No. 23/1997 are not binding on the appellants / plaintiffs. The appellants / plaintiffs need not challenge the judgment and decree in the other suit as they are not parties. Therefore, the appellants/plaintiffs' right to seek partition in the suit properties cannot be curtailed by the decree in the previous suit filed by the 2nd defendant/2nd respondent against the 1st defendant/1st respondent alone."

(4) AIR 1985 Kar 143 (Ganapati Santaram Bhosale vs Ramachandra Subbarao Kulkarni);

"18. Mr. Krishnappa appearing for the



WEB COPY



A.S.No.521 of 2016

plaintiff has, on the other hand, contended that the sales in favour of defendants 5 and 6 were sales of joint family property and the same being treated as minor's property would not arise and therefore question of applying the period of limitation prescribed under Art. 60 of the Limitation Act would also not arise. However, Sri Desai relied upon a decision of this Court in the case of Dodda Thimma Naika v. Lakshmaiah and others 1979(1) KLJ 289, in which it was held that a de facto guardian is as much a guardian as a natural guardian and the powers of the de facto guardian also include the power to sell a minor's property for legal necessity and therefore Art. 44 (corresponding to Art. 60 of the present Limitation Act) 1908 would apply to set aside the sale by a de facto guardian. Undoubtedly, that decision was rendered by a learned single Judge of this Court following the decision of the Andhra Pradesh High Court, in the case of Kasturi Lakshmibayamma v. Sabnivas Venkoba Rao AIR 1970 AP 440. The decision of the Andhra Pradesh High Court was approved by the learned single Judge in preference to the decision per contra, rendered by the Travancore- Cochin High Court in the case of Thomman Parakkal v. Madhavan Arakaparambil, AIR 1955 Trav Co 197. We have been taken through both the decisions rendered by this Court as well as the decision rendered by the Andhra Pradesh High Court. As a



WEB COPY



A.S.No.521 of 2016

proposition of law we do not find anything strange in 'the view taken by the learned single Judge' of this Court and the High Court of Andhra Pradesh. It is well settled law that guardian has power to make an alienation for the benefit of the minor or minor's estate but when guardian so alienates he is not alienating his property but the property which has vested in the minor. If that fact is borne in mind the alienation by karta or a guardian or a de facto guardian as claimed by the learned counsel will not be an alienation, of property belonging to minor but alienation, of joint family property in which the ward who is a minor has only an interest. There is, therefore, a difference in the alienation of joint family property by karta and alienation. If minor's property by guardian. If this distinction is borne in mind then on facts of the case the decision of the Andhra Pradesh High Court or this Court in Dodda Thimma Naika's case is not of any assistance to the case of defendants 5 and 6. The trial court has correctly held that the suit was within time having regard to the specific provision made, Art. 109 of the Limitation Act which concerns the alienations made of joint Hindu family properties. Therefore, we have necessarily to reject the first contention advanced for defendants 5 and 6.



A.S.No.521 of 2016

19. The second contention that the suit should have failed for lack of specific relief in regard to the setting aside of the sales is also devoid of merit. It is now well settled that in a suit for partition by Hindu coparcener it is not necessary for him to seek the setting aside of the sale. It is sufficient if he asks for his share in the joint family properties and he be put in possession thereof and for a declaration that he is not bound by any alienations or interest of others created in such properties which, fall to his share."

(5) 1917 SCC Online Mad 231 : AIR 1918 Mad 178 (Ganesa Aiyar

& Another vs Amirthasami Odayar & Others);

"2. As regards the question of limitation, the case so far as the 1st defendant's alienation is concerned clearly falls under Article 126 of. the Limitation Act, which provides for a period of 12 years for suits by a Hindu governed by the law of the Mitakshara to set aside his father's alienation in ancestral property. The fact that the father executes the document as guardian of his son will not take the case out of Article 126 and bring it under Article 44, which applies to cases where property belonging to a minor is transferred by his guardian."



A.S.No.521 of 2016

(6) 1996 (8) SCC 54 (Sri Narayan Bal and Others vs. Sridhar

Sutar and Others);

"5. With regard to the undivided interest of the Hindu minor in joint family property, the provisions afore-culled are qbeads of the same string and need be viewed in a single glimpse, simultaneously in conjunction with each other. Each provision, and in particular Section 8, cannot be viewed in isolation. If read together the intent of the legislature in this beneficial legislation becomes manifest. Ordinarily the law does not envisage a natural guardian of the undivided interest of a Hindu minor in joint family of the property. The natural guardian of the property of a Hindu minor, other than the undivided interest in joint family property, is alone contemplated Under Section 8 where under his powers and duties are defined. Section 12 carves out an exception to the rule that should there be no adult member of the joint family in management of the joint family property, in which the minor has an undivided interest, a guardian may be appointed; but ordinarily no guardian shall be appointed for such undivided interest of the minor. The adult member of the family in the management of the Joint Hindu Family Property may be a male or a female, not necessarily the Karta. The power of the High Court otherwise to



WEB COPY



A.S.No.521 of 2016

appoint a guardian, in situations justifying, has been preserved. This is the legislative scheme on the subject. Under Section 8 a natural guardian of the property of the Hindu minor, before the disposes of any immovable property of the minor, must seek permission of the court. But since there need be no natural guardian for the minor's undivided interest in the joint family property, as provided Under Sections 6 and 12 of the Act, the previous permission of the Court Under Section 8 for disposing of the undivided interest of the minor in the joint family property is not required. The joint Hindu family by itself is a legal entity capable of acting through its Karta and other adult members of the family in management of the joint Hindu family property. Thus Section 8 in view of the express terms of Sections 6 and 12, would not be applicable where a joint Hindu family property is sold/disposed of by the Karta involving an undivided interest of the minor in the said joint Hindu family property. The question posed at the outset therefore is so answered."

(7) 1988 (2) SCC 77 (Sunil Kumar & Anr vs Ram Prakash & Ors);

"6. In this appeal we are called upon to decide the only question whether a suit for permanent injunction restraining the Karta of



A.S.No.521 of 2016

the joint Hindu family from alienating the house property belonging to the joint Hindu family in pursuance of the agreement to sell executed already in favour of the predecessor of the appellants, Jai Bhagwan, since deceased, is maintainable. It is well settled that in a Joint Hindu Mitakshara Family, a son acquires by birth an interest equal to that of the father in ancestral property. The father by reason of his paternal relation and his position as the head of the family is its Manager and he is entitled to alienate joint family property so as to bind the interests of both adult and minor coparceners in the property, provided that the alienation is made for legal necessity or for the benefit of the estate or for meeting an antecedent debt.

7. At the outset it is to be noticed that in a suit for permanent injunction under Section 38 of the Specific Relief Act by a coparcener against the father or Manager of the Joint Hindu family property, an injunction cannot be granted as the coparcener has got equally efficacious remedy to get the sale set aside and recover possession of the property. Sub-section (h) of Section 38 of Specific Relief Act bars the grant of such an injunction in the suit. Secondly, the plaintiff-respondents brought this suit for



WEB COPY



A.S.No.521 of 2016

permanent injunction restraining their father, the defendant No. 1, from selling or alienating the property to the defendant No. 2 or any other person and also restraining the defendant No. 2 from proceeding with the suit for specific performance of the agreement to sell pending in the civil court. Thus the relief sought for is to restrain by permanent injunction the Karta of the Joint Hindu Mitakshara Family, i.e. defendant No. 1, from selling or alienating the house property in question. The defendant No. 1 as Karta of the joint Hindu family has undoubtedly, the power to alienate the joint family property for legal necessity or for the benefit of the estate as well as for meeting antecedent debts... .. "

13. The learned counsel appearing for the 1st respondent contended that Ex.A3 sale deed is valid document. The 1st respondent as Manager of the joint family property has sold first item of the suit property for himself, appellant and other two minors. The appellant was minor at the time of sale. If she was aggrieved by the said alienation, she ought to have filed suit within three years from the date of attaining majority. The appellant has filed suit after



A.S.No.521 of 2016

four years six months of attaining majority. Only when a document is void

document, a plaintiff who was minor at the time of execution of the

document, file a suit either within 12 years from the date of document or

within three years from the date of attaining majority. In case of voidable sale

deed, plaintiff has to file suit within three years from the date of attaining

majority. The sale effected by the 1st respondent by Ex.A3 is not a void

transaction and therefore, the suit is barred by limitation. The 1st respondent

had proved by pleadings as well as oral and documentary evidence that the

sale by Ex.A3 by the 1st respondent, sold first item of the suit property for the

marriage of appellant to pay the dowry and also meet out the marriage

expenses. The 1st respondent also proved that in addition to selling first item

of the suit property, he borrowed further amount of Rs.5,00,000/- from the

third parties to meet out the marriage expenses of the appellant. The 1st

respondent proved that he mortgaged the property by Exs.B3 to B5 to

discharge the amount borrowed at the time of marriage of the appellant. The

1st respondent is a lorry driver as well as partner in Mahalakshmi bore well

company. He purchased second item of the suit property from and out of

income earned by him as a lorry driver and as a partner in Mahalakshmi bore



A.S.No.521 of 2016

well company and not from the income derived from the first item of the suit property.

13(i). The learned counsel appearing for the 1st respondent further contended that in Ex.A3, appellant was made as party and 1st respondent as Manager sold the property for himself and on behalf of appellant and two other minors. In view of the appellant being party to the sale deed, sale is valid and it is not a void document. The suit filed by the appellant without challenging Ex.A3 and seeking for cancellation of sale is not maintainable. The appellant is not in joint possession of either of the two items of the suit properties and after Ex.A3, the 2nd respondent is in absolute possession and enjoyment of the first item of the suit property. The 1st respondent is in exclusive possession of the second item of the suit property as the same is his self acquired property. The learned counsel appearing for the 1st respondent submitted that the 1st respondent sold the property for family necessity and education expenses and maintenance of minor children for valuable consideration and prayed for dismissal of the appeal.



A.S.No.521 of 2016

13(ii). In support of his contentions, the learned counsel appearing for

the 1st respondent relied on the following judgments:

(1) AIR 1956 Mad 670 [Sankaranarayana Pillai and others vs.

Kandasamia Pillai];

"8. If the matter is looked at in this way there is no difficulty in reconciling the various cases and we do not propose to analyse at length the large body of case-law cited at the Bar. The distinction between a void and voidable transaction has been brought out in a number of cases and we need only refer to a few of them : Chingacham Vitil Sankaran Nair v. Chingacham Vitil Gopala Menon I.L.R.(1906) Mad. 18, Bijoy Gopal Mukerji v. Krishna Mahishi Debi MANU/PR/0017/1907, Fakirappa Limmanna v. Lumanna Bin Mahadu (1919) I.L.R. 44 Bom. 742, Bali Reddi v. Khatipulal Sab MANU/TN/0053/1935 : AIR 1935 Mad 863 , Ankamma v. Kameswaramma (1935) 70 M.L.J. 352, Raja Ramaswami v. Govindammal (1928) 56 M.L.J. 332 and Vallabhacharyulu v. Rangacharyulu MANU/TN/0318/1936 : AIR 1937 Mad 449 . There is no doubt whatever that a transaction entered into by a guardian relating to the minor's properties is not void and if the minor does not sue to set it aside within three years of



WEB COPY



A.S.No.521 of 2016

his attaining majority it becomes valid under Article 44 of the Limitation Act. In such a case the minor is deemed to be a party to the transaction. But where the document is executed by a manager of the family and it is not binding on the family, the minor or any other member can ignore the transaction and recover possession of the property. To such a case Section 7(v) of the Court-fees Act will apply. We are here not concerned with decrees to which the minor is eo nomine a party. Our answer to the first question is that if the minor is eo nomine a party to a sale-deed or other document of alienations, he must sue for the cancellation of the document under Section 7(iv-A) of the Court-fees Act and it is not enough if he applies for possession under Section 7(v) of the Act; and to the second question our answer is that there can be no distinction whether the father as guardian of the minor and not as the manager of the joint family executes the deed. Even in that case also the document has to be set aside."

(2) 2019 (20) SCC 633 [Murugan and others vs. Kesava Gounder

(dead) through legal representatives and others];

"20. The alienations, which were voidable, at the instance of minor or on his behalf were required to be set aside before relief for



WEB COPY



A.S.No.521 of 2016

possession can be claimed by the plaintiffs. The suit filed on behalf of the plaintiffs without seeking prayer for setting aside the sale deeds was, thus, not properly framed and could not have been decreed.

.. ..

24. We have noticed above that sub-section (3) of Section 8 refers to a disposal of immovable property by a natural guardian in contravention of sub-section (1) or sub-section (2) as voidable. When a registered sale deed is voidable, it is valid till it is avoided in accordance with law. The rights conferred by a registered sale deed are good enough against the whole world and the sale can be avoided in case the property sold is of a minor by a natural guardian at the instance of the minor or any person claiming under him. A document which is voidable has to be actually set aside before taking its legal effect. This Court in *Gorakh Nath Dube vs. Hari Narain Singh and others*, (1973) 2 SCC 535, while making distinction between void and voidable document held:

"5.....We think that a distinction can be made between cases where a document is wholly or partially invalid so that it can be disregarded by any court or authority and one where it has to be actually set aside before it can cease to have legal effect. An alienation made in excess of power to transfer



WEB COPY



A.S.No.521 of 2016

would be, to the extent of the excess of power, invalid. An adjudication on the effect of such a purported alienation would be necessarily implied in the decision of a dispute involving conflicting claims to rights or interests in land which are the subject-matter of consolidation proceedings....."

28. This Court time and again held that setting aside of a sale which is voidable under Section 8(3) is necessary for avoiding a registered sale deed. We may, however, not to be understood that we are holding that in all cases where minor has to avoid disposal of immovable property, it is necessary to bring a suit. There may be creation of charge or lease of immovable property which may not be by registered document. It may depend on facts of each case as to whether it is necessary to bring a suit for avoiding disposal of the immovable property or it can be done in any other manner. We in the present case are concerned with disposal of immovable property by natural guardian of minor by a registered sale deed, hence, we are confining our consideration and discussion only with respect to transfer of immovable property by a registered deed by a natural guardian of minor.

29. The Limitation Act, 1963 has been enacted by the Parliament after the enactment of Hindu Minority and Guardianship Act, 1956.



WEB COPY



A.S.No.521 of 2016

Article 60 of the Limitation Act, 1963 which provides for limitation "suits relating to decrees and instruments". The Limitation Act contemplates suit to set aside a transfer of property made by the guardian of a ward for which limitation is contemplated as three years. Article 60 of the Limitation Act although provides for a limitation of a suit but also clearly indicates that to set aside a transfer of property made by the guardian of a ward a suit is contemplated."

(3) 2005(1) LW 628 (Pandiarajan and Others vs. Korangi

Thyagarajan and Ors.);

"15. While considering the case where the Kartha of the family executed the sale deeds, taking with him the two wives for themselves as guardian of the minors as supporting executors, the Apex Court in the decision in Sri Narayan Bal v. Sridhar Sutar, AIR 1996 S.C. 2371, found that a joint Hindu family by itself is a legal entity capable of acting through its Karta and other adult members of the family in management of the joint Hindu family property and when the minors are not having any divided interest in the joint Hindu family property, the sale by Karta, though the minors are represented by his two widows is valid in law and the said sale binds the minors.



WEB COPY



A.S.No.521 of 2016

16. In view of the above, it is clear that when the Karma of the family executing the said sale deeds, merely because he takes the minors along with him as co-vendors represented by the persons other than the natural guardian, it cannot be said that the said sale deeds cannot bind the interest of the minors also, especially when the sale deeds executed by the Kartha without even impleading the minors as co-vendors bind the minors, as held in the above said decisions of the Apex Court."

(4) 1993 (2) MLJ 428 (Sridharan and Ors. vs. Arumugam and

Ors.);

"6. Before taking upon the question of the binding nature of the alienations, we would discuss the maintainability of the suit without a. prayer for setting aside the alienations as well as the valuation of the suit. The sale deeds under Exs.B-22, B-1, B-6, B-10 and B-23 in the chronological order were executed by the first defendant for himself and as guardian of the minor children. In fact, in one of the documents, he has showed the minor daughter also as a party and he executed the sale deed as a guardian for her. There are five other documents under Exs.B-20, B-25, B-30, B-31 and B-27 which are executed by the 1st defendant



A.S.No.521 of 2016

alone. In so far as the documents in which the minor children are made parties, they are bound in law to pray for setting aside the same. Without such prayer, the suit is not sustainable in relation to those documents. ..
.. . . .

It is, therefore, fairly clear that the challenges made by a minor in the matter of alienation whom or borrowing made by their elders including their father, cannot lightly be accepted by Courts unless the facts in each of those cases do satisfy the norms laid down by the various decisions cited above. .. ."

(5) 2004 (4) CTC 208 (R. Deivanai Ammal (died) & Another vs G.

Meenakshi Ammal & Ors);

"13. First let us consider the nature of the suit properties, namely, self acquired properties of late Ganapathy Moopnar or ancestral properties and whether any nucleus was available to purchase the properties. Under the Hindu Law it is only when a person alleging that the property is ancestral property proves that there was a nucleus by means of which other property may have been acquired, that the burden is shifted on the party alleging self-acquisitions to prove that the property was acquired without any aid from the family



WEB COPY



A.S.No.521 of 2016

estate. In other words the mere existence of a nucleus however small or insignificant is not enough. It should be shown to be of such a character as could reasonably be expected to lead to the acquisition of the property alleged to be part of the joint family property. Where the doctrine of blending is invoked against a person having income at his disposal and acquiring property, the reasonable presumption to make is that he had the income at his absolute disposal unless there is evidence to the contrary. If a coparcener desires to establish that a property in the name of a female member of the family or in the name of the manager himself has to be accepted and treated as property acquired from the joint family nucleus, it is absolutely essential that such a coparcener should not only barely plead the same, but also establish the existence of such a joint family fund or nucleus. Even if the joint family nucleus is so established, the prescription that the accretions made by the manager or the purchases made by him should be deemed to be from and out of such a nucleus does not arise, if there is no proof that such nucleus of the joint family is not an income-yielding apparatus. The proof required is very strict and the burden is on the person who sets up a case that the property in the name of a female member of the family or in the name of the manager or any other coparcener is to be



WEB COPY



A.S.No.521 of 2016

treated as joint family property. There should be proof of the availability of such surplus income or joint family nucleus on the date of such acquisitions or purchases. The same is the principle even in the cases where moneys were advanced on mortgages over immoveable properties. The onus is not on the acquirer to prove that the property standing in his name was purchased from joint family funds. That may be so, in the case of a manager of a joint family, but not so in the case of all coparceners. For a greater reason it is not so in the case of female members.

14.

15. It is a well-established principle of law that where a party claims that any particular item of property is joint family property, the burden of proving that it is so rests on the party asserting it. Where it is established or admitted that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the presumption arises that it was joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family. But no such presumption would arise if the



WEB COPY



A.S.No.521 of 2016

nucleus is such that with its help the property claimed to be joint could not have been acquired. In order to give rise to the presumption, the nucleus should be such that with its help the property claimed to be joint could have been acquired. A family house in the occupation of the members and yielding no income could not be nucleus out of which acquisitions could be made even though it might be of considerable value.

16. In a Hindu joint family, if one member sues for partition on the foot that the properties claimed by him are joint family properties then three circumstances ordinarily arise. The first is an admitted case when there is no dispute about the existence of the joint family properties at all. The second is a case where certain properties are admitted to the joint family properties and the other properties in which a share is claimed are alleged to be the accretions or acquisitions from the income available from joint family properties or in the alternative have been acquired by a sale or conversion of such available properties. The third head is that the properties standing in the names of female members of the family are benami and that such a state of affairs has been deliberately created by the manager or the head of the family and that really the properties or the



WEB COPY



A.S.No.521 of 2016

amounts standing in the names of female members are properties of the joint family. While considering the term 'nucleus' it should always be borne in mind that such nucleus has to be established as a matter of fact and the existence of such nucleus cannot normally be presumed or assumed on probabilities. The extent of the property, the income from the property, the normal liability with which such income would be charged and the net available surplus of such joint family property do all enter into computation for the purpose of assessing the content of the reservoir of such a nucleus from which alone it could, with reasonable certainty, be said that the other joint family properties have been purchased unless a strong link or nexus is established between the available surplus income and the alleged joint family properties. The person who comes to Court with such bare allegations without any substantial proof to back it up should fail.

17. It is also a well-established doctrine of Hindu Law that property which was originally self-acquired may become joint property if it has been voluntarily thrown by the coparcener into the joint stock with the intention of abandoning all separate claims upto it. But the question whether the coparcener has done so or not is entirely a question of fact to be



WEB COPY



A.S.No.521 of 2016

decided in the light of all the circumstances of the case. It must be established that there was a clear intention on the part of the coparcener to waive his separate rights and such an intention will not be inferred from acts which may have been done from kindness or affection. The important point to keep in mind is that the separate property of a Hindu coparcener ceases to be his separate property and acquires the characteristics of his joint family or ancestral property, not by mere act of physical mixing with his joint family or ancestral property, but by his own volition and intention by his waiving or surrendering his special right in it as separate property. Such intention can be discovered only from his words or from his acts and conduct."

14. Though notice has been served on the 2nd respondent and his name is printed in the cause list, there is no representation for him either in person or through counsel.

15. Heard the learned counsel appearing for the appellant as well as the learned counsel appearing for the 1st respondent and perused the entire materials on record.



A.S.No.521 of 2016

16. Points for consideration arising in this appeal are:

WEB COPY

1. Whether the first item of the suit property is joint family property or separate property of the 1st respondent?

2. Whether second item of the suit property was purchased by 1st respondent from and out of income derived from the first item of the suit property or from and out of earnings of the 1st respondent?

3. Whether suit is barred by limitation?

4. Whether suit filed without seeking to set aside the sale deed Ex.A3 is maintainable?

5. Whether suit is liable to be dismissed for non-joinder of parties?

Point (1):

Whether the first item of the suit property is joint family property or separate property of the 1st respondent?

17. It is the case of the appellant that first item of the suit property is ancestral and joint family property of the 1st respondent and appellant. The said property was allotted to the 1st respondent in the partition effected between 1st respondent, his father and brother of the 1st respondent as per the



A.S.No.521 of 2016

registered partition deed dated 15.06.1972 bearing document No.1064/1972.

On the other hand, it is the case of the 1st respondent that when first item of the suit property was allotted to him in the year 1972, he was minor, unmarried and appellant was not born at that time. When the said property is not a joint family property, but it is his separate property, the appellant is not having any share in the said property. This contention is not acceptable for the following reasons:

(i) The 1st respondent treated the said property as joint family property.

(ii) He sold the said property to the 2nd respondent by Ex.A3. In Ex.A3, he was not a sole vendor.

(iii) If it was a separate property of 1st respondent, he need not have included his mother, wife, appellant and two minor children as vendors.

(iv) Further in the original written statement filed, he admitted that the said property is joint family property and 1st respondent, appellant and minor Gomathi and Boopathy have 1/4th share in the said property. Having admitted so, the 1st respondent as an after thought, filed additional written statement withdrawing the admission and came out with the case that it is his separate property. The said contention in the additional written statement cannot be



A.S.No.521 of 2016

accepted as it is well settled that Kartha of joint family or member of the joint family can treat their separate property as joint family property for the benefit of all the members of the joint family.

(v) This well settled legal position is confirmed by the judgment of the Division Bench of this Court reported in **2004 (4) CTC 208 [R.Deivanai Ammal (died) and another vs. G.Meenakshi Ammal and others]** relied on by the learned counsel appearing for the 1st respondent. In the said judgment, the Division Bench of this Court has categorically reiterated the said legal principle by holding that originally, self acquired property can be made as joint family property. The relevant portion of the said judgment is extracted supra.

(vi) In view of the above well settled legal principle and admission of the 1st respondent in the original written statement, first item of the suit property is joint family property or treating the same as joint family property, sold the same by including his mother, wife Arukkani and minor Children, this Court holds that first item of the suit property is joint family property. Point (1) is answered in favour of the appellant.



A.S.No.521 of 2016

Point (2):

WEB COPY

Whether second item of the suit property was purchased by 1st respondent from and out of income derived from the first item of the suit property or from and out of earnings of the 1st respondent?

18. According to the appellant, the 1st respondent purchased second item of the suit property from and out of income derived from the first item of the suit property. On the other hand, it is the case of the 1st respondent that he is a partner in Mahalakshmi bore well company, lorry driver and from and out of income, he was earning as partner of the bore well company and driver only, he purchased the said second item of the suit property. The income from the agricultural activities in the first item of the suit property was not sufficient to purchase the second item of the suit property. The appellant has come out with the case that second item of the suit property was purchased from and out of the income derived from the first item of the suit property. When the appellant has come out with the case that the second item of the suit property is also joint family property, having been purchased from and out of the joint family property, it is for the appellant to prove the said contention. The appellant has failed to substantiate the said contention. The



A.S.No.521 of 2016

appellant has not let in any oral and documentary evidence to show the income derived from the first item of the suit property and from that income only, the second item of the suit property was purchased by the 1st respondent. On the other hand, the 1st respondent has deposed in his cross-examination that he used to cultivate groundnut in the first item of the suit property, only when there is rain during that season. The appellant has not disputed the same and failed to prove that the first item of the suit property was cultivated continuously and the 1st respondent derived income from the first item of the suit property year after year. On the other hand, the 1st respondent has proved his contention by producing and marking marriage invitation of the appellant, wherein the 1st respondent was shown as partner of Mahalakshmi bore well company. When the invitation marked through appellant in her cross-examination, the appellant admitted that in the said marriage invitation, the 1st respondent is shown as partner of Mahalakshmi bore well company.

18(i). Further it is the case of the 1st respondent that he is the lorry driver and getting income as lorry driver. He deposed to that effect as D.W.1. A suggestion was put to the appellant in her cross-examination that 1st



A.S.No.521 of 2016

respondent is working as lorry driver, the appellant did not deny the same, but has given an evasive answer that she was not aware of the same. The answer given by the appellant that she is not aware of 1st respondent is working as lorry driver is unbelievable, especially when her husband himself is a lorry driver and the appellant is residing within 20 kilometers from the residence of the 1st respondent and it cannot be believed that she is not aware of the work done by the 1st respondent. In the judgment reported in **2004 (4) CTC 208 cited supra**, the Division Bench of this Court held that the person who alleged that property was purchased from the joint family nucleus, the said person has to prove the same. The relevant portion of the said judgment is extracted supra. On the failure of the appellant to prove the income from the first item of the suit property and on 1st respondent proving that he had independent income as partner of Mahalakshmi bore well company and as lorry driver to purchase the second item of the suit property out of his own income, this Court holds that second item of the suit property is self acquired property of the 1st respondent and it is not joint family property. Point (2) is answered in favour of the 1st respondent.



A.S.No.521 of 2016

Points (3) and (4):

WEB COPY (3) Whether suit is barred by limitation?

(4) Whether suit filed without seeking to set aside the sale deed

Ex.A3 is maintainable?

19.The appellant has contended that first item of the suit property is joint family property and 1st respondent, her father is Kartha of joint family. On the other hand, it is the case of the 1st respondent, first item of the suit property is his absolute property. This Court considering the materials available on record, while answering point (1) held that first item of the suit property is joint family property.

19(i) Joint family is a legal entity and Kartha and other adult members in the family is entitled to be in management of joint family property. The father and natural guardian of minors has power to deal with joint family properties including the undivided shares of minors. The Kartha/father and natural guardian can alienate joint family property including the share of minors to discharge debts of the family, for maintenance of minors and for the welfare of minors. When the father/natural guardian/Kartha of joint family alienate the property jointly with minors, co-vendors, the sale is binding on



A.S.No.521 of 2016

the minors. Even if the minors are not parties to the alienation, when the

Kartha of joint family alienates joint family property for family necessity, the sale is binding on the minors. In the present case, the appellant minor, at the time of sale by Ex.A3 sale deed, is a party to the said sale. The 1st respondent as father and natural guardian of appellant, two other minor children Gomathi and Boopathi, along with his mother Kaliammal and wife Arukkani sold the first item of the suit property to the 2nd respondent. It is seen from the recitals in Ex.A3, the 1st respondent and others have sold the said property for family expenses, for education expenses of minors and for maintenance of minors. It is seen from the materials on record that appellant was residing along with 1st respondent and other family members till her marriage. The appellant denied the contention of 1st respondent that Arukkani, wife of 1st respondent was looking after the appellant from her childhood and appellant has not let in any evidence to show who was maintaining and looking after her. School Transfer Certificate and marriage invitation of the appellant clearly show that appellant was residing with 1st respondent along with other family members including Arukkani.

19(ii) It is not the case of the appellant that sale was not for family



A.S.No.521 of 2016

necessity or for the maintenance and welfare of the minors. It is also not the

case of the appellant that 1st respondent is a drunkard or leading an immoral life. The appellant claims that Ex.A3 sale is void only on the ground that 1st respondent has included the persons in the sale deed, who do not have any right over the property. This is not a ground to hold Ex.A3 is void. The sale has been effected by 1st respondent for himself and representing appellant and other two minors. The alienation by father and natural guardian of minors for the reasons mentioned in Ex.A3 is valid and binding on minors.

19(iii). A void document is one, which is not binding on the minor or family members. The appellant has stated that Ex.A3 is void as 1st respondent has included in the sale deed the persons, who do not have right in the property. The 1st respondent included the appellant as one of the vendors, represented by father and natural guardian along with others. The 1st respondent executed the sale deed for himself, father of the appellant and other two minors. The appellant is party to the sale deed as one of the vendors of the property represented by her father, the 1st respondent. In view of the same, the sale deed as per Ex.A3 is binding on her. The sale effected without obtaining prior permission of the



A.S.No.521 of 2016

Court is voidable sale. Voidable sale is valid till it is set aside as per law. A minor if aggrieved by the sale by guardian has to seek to set aside the sale within the time fixed by the Limitation Act.

19(iv) An alienation by the father and natural guardian of minor is valid till it is set aside. The minor or persons claiming under minor must initiate the proceedings to set aside the sale within three years from attaining majority. Article 60 of the Limitation Act is the relevant provision, which is extracted hereunder:

Article 60 of the Limitation Act	Period of limitation	Time from which period begins to run
To set aside a transfer of property made by the guardian of a ward-		
a) by the ward who has attained majority;	Three years	When the ward attains majority.
b) by the ward's legal representative-		
(i) when the ward dies within three years from the date of attaining majority;	Three years	When the ward attains majority.
(ii) when the ward dies before attaining majority.	Three years	When the ward dies.



A.S.No.521 of 2016

19(v) As per this Article, minor has to file suit within three years from the date of attaining majority. In the present case, the appellant was born on 04.06.1986, the appellant ought to have filed suit on or before 03.06.2004. But the appellant filed suit only on 22.09.2008 after four years six months. The suit not being filed within three years of attaining majority is barred by limitation. The 1st respondent produced and marked the School Transfer Certificate of the appellant as Ex.B1, which shows date of birth of the appellant is 04.06.1986. The appellant claimed that she was born in the year 1988, but she has not produced any material to substantiate the same. The contention of the learned counsel appearing for the appellant that sale by the 1st respondent under Ex.A3 is void sale and appellant can file suit within 12 years from the date of document or within three years from the date of attaining majority is not correct. As already held earlier, the sale by 1st respondent Ex.A3 is only voidable document and under Article 60 of Limitation Act, the appellant has to file suit within three years.

19(vi) The 1st respondent has stated that he is selling the property along with his mother Kaliammal, wife Arukkani, for himself and representing the



A.S.No.521 of 2016

appellant and two other minors. In Ex.A3, the 1st respondent has stated that he is selling the property for family necessity, for education and maintenance of the minors. It is not in dispute that the appellant was living with 1st respondent till her marriage. Further, it is not the case of the appellant that the 1st respondent is leading an immoral life, drunkard and property was not sold for the benefit of the appellant and for maintenance of the appellant. In view of the above materials, the suit filed by the appellant for partition without seeking to set aside the sale as per Ex.A3 is not maintainable.

19(vii) The learned counsel appearing for the 1st respondent contended that suit filed by the appellant without seeking to set aside the sale as per Ex.A3 is not maintainable. On the other hand, it is the case of the learned counsel appearing for the appellant that sale deed Ex.A3 is void, non-est in law and there is no need to set aside the said sale. This contention of the learned counsel appearing for the appellant is not acceptable. The alienation by father, natural guardian and Kartha of joint family property is valid till the sale is set aside by due process of law. The judgments reported in **AIR 1956 Mad 670** cited supra, **2019 (20) SCC 633** cited supra, **1993 (2) MLJ 428**



A.S.No.521 of 2016

cited supra and **2005 (1) LW 628** cited supra, referred to above are squarely applicable to the principles stated above.

19(viii) For the above reasons, we hold that suit is barred by limitation and suit filed without seeking to set aside the sale as per Ex.A3 is not maintainable. Points (3) and (4) are answered accordingly.

Point (5)

Whether suit is liable to be dismissed for non-joinder of parties?

20. The respondents have taken a stand that suit is not maintainable for non-joinder of necessary parties. According to the respondents, two children Gomathi and Boopathi born to the 1st respondent through Arukkani also have share in the first item of the suit property and suit is liable to be dismissed for non-joinder of necessary parties. On the other hand, it is the case of the appellant that said two children are illegitimate children and they do not have any share in the suit properties. The 1st respondent has contended that Arukkani is lawful wedded wife and two children born in the wedlock are legitimate children. It is not in dispute that 1st respondent and Arukkani are



A.S.No.521 of 2016

living together for a long period of time and is cohabitating resulting in the two children born to them. The presumption is due to long cohabitation, the 1st respondent and Arukkani lived as husband and wife.

20(i) Order I Rule 9 of C.P.C. deals with mis-joinder and non-joinder of parties. As per this Rule, the Court may in every suit deal with the matter in controversy so far as regards, the parties before it. But proviso makes it clear that said Rule is not applicable to non-joinder of necessary parties.

20(ii) In the two judgments reported in **AIR 1965 SC 271 [Kanakarathanammal vs V.S.Loganatha Mudaliar & another]** and **1983 100 LW 486 [A.Ramachandra Pillai vs Valliammal (died)]**, it has been held that when the defendants take a plea of non-joinder of necessary party, the suit is liable to be dismissed. The relevant paragraphs are extracted hereunder:

(1) **AIR 1965 SC 271 [Kanakarathanammal vs V.S.Loganatha Mudaliar & another];**

“8. It is true that the actual management of the



property was done by the appellant's father; but that would inevitably be so having regard to the fact that in ordinary Hindu families, the property belonging exclusively to a female member would also be normally managed by the Manager of the family; so that the fact that the appellant's mother did not take actual part in the management of the property would not materially affect the appellant's case that the property belonged to her mother. The rent was paid by the tenants and accepted by the appellant's father; but that, again, would be consistent with what ordinarily happens in such matters in an undivided Hindu family. If the property belongs to the wife and the husband manages the property on her behalf, it would be idle to contend that the management by the husband of the properties is inconsistent with the title of his wife to the said properties. What we have said about the management of the properties would be equally true about the actual possession of the properties, because even if the wife was the owner of the properties, possession may continue with the husband as a matter of convenience. We are satisfied that the High Court did not correctly appreciate the effect of the several admissions made by the appellant's father in respect of the title of his wife to the property in question. Therefore, we hold that the property had been purchased by the



A.S.No.521 of 2016

appellant's mother in her own name though the consideration which was paid by her for the said transaction had been received by her from her husband.

9. As soon as we reach this conclusion, it becomes necessary to consider whether the appellant's suit must fail for non-joinder of necessary parties. It is common ground that the appellant has brothers alive, and even in the trial Court respondents 1 and 2 took the alternative plea that if the property was found to belong to the appellant's mother, under the relevant Mysore law the appellant and her brother would be titled to succeed to that property and the non-joinder of the brothers was, therefore, fatal to the suit. In fact, as we have already indicated, the trial Court had dismissed the appellant's suit on this ground. The decision about the question as to the appellant's title to this property would thus depend upon the construction of the relevant provisions of the Act. Section 10 is relevant for the purpose. Section 10(1) defines 'Stridhan' as meaning property of every description belonging to a Hindu female, other than property in which she has, by law or under the terms of an instrument, only a limited estate. Section 10(2) prescribes an inclusive definition of the word 'Stridhan' by clauses (a) to (g). The appellant contends that the property



A.S.No.521 of 2016

in question falls under s. 10(2)(b), whereas according to the respondents it falls under s. 10(2)(d). There is no doubt that if s. 10(2)(b) take in the property, the appellant would be exclusively entitled to it and the plea of non-joinder of her brothers would fail. On the other hand, if s.10(2)(d) applies to the property, the appellant will not be exclusively entitled to the property and her brothers would be necessary parties to the suit. In that case the plea of non-joinder would succeed and the appellant's suit would be dismissed on that account. The position with regard to the heirs who succeed to Stridhan property belonging to a Hindu female dying intestate has been provided for by s. 12 of the Act and there is no dispute on that account.

.....

15. It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her two brothers to her suit, though on the merits we have found that the property claimed by her in her present suit belonged to her mother and she is one of the three heirs on whom the said property devolves by succession under s. 12 of the Act. That, in fact, is the conclusion which the trial Court had reached and yet no action was taken by the appellant to bring the necessary parties on the record. It is true that under O. 1 r. 9 of the Code of Civil Procedure no



A.S.No.521 of 2016

suit shall be defeated by reason of the misjoinder or non-joinder of parties; but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal.....”

(2) 1983 (100) LW 486 [A.Ramachandra Pillai vs Valliammal

(died)];

“7. Though O.1, R.9 of the Code of Civil Procedure provides that no suit shall be defeated by reason of misjoinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of parties actually before it, there is a proviso which says that nothing in that rule will apply to non-joinder of necessary parties. In a suit for general partition, there could be no doubt that all the sharers are necessary parties as mentioned above. Apart from this, the main part of R.9 is only an enabling provision and the Court shall deal with each case with reference to the particular facts in that case. It is in that context, the decision of the Supreme Court in Kanakarathnammal v. Loganatha, is relevant. In that case, also, the plaintiff filed a suit for declaration and possession



A.S.No.521 of 2016

on the ground that the properties belonged to her mother and on her death she, as the sole heir, was entitled to the entirety of the properties. The suit was filed against two defendants who claimed that the father of the plaintiff had executed a will under which the first defendant had been appointed as executor and that as such executor he obtained probate of the said will, got possession of the properties and handed over possession to the second defendant therein as directed in the will. Thus the defendants set up a title in respect of the suit properties in the appellant's father. Alternatively they also added that if the properties belonged to the plaintiff's mother, she would not be entitled to claim exclusive title to the same, because by succession, the suit properties would devolve upon the appellant and her two brothers and the appellant's failure to join her brothers made the suit incompetent for non-joinder of necessary parties. The trial Court held that the mother was the owner of the properties. However, it held that the suit is bad for non-joinder of necessary parties and on that ground the suit was dismissed. On appeal however, the High Court held that the properties belonged to the father. The appeal was dismissed on this ground and therefore there was no necessity to go into the question whether the suit was maintainable or not. On a further



WEB COPY



A.S.No.521 of 2016

appeal, the Supreme Court accepted the contention of the plaintiff that the properties belonged to the mother. However, the Supreme Court held that since she was one of the three heirs of her mother and since she had not impleaded her two brothers to her suit, the suit was liable to be dismissed. The Supreme Court further observed:

“It is true that under Order I, Rule 9 of the Code of Civil Procedure no suit shall be defeated by reason of the mis-joinder or non-joinder of the parties, but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal. Even in such cases, the Court can under Order 1. Rule 10, sub-rule (2) direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties' plea of limitation. Once it is held that the appellant's two brothers are co heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the character of a suit for partition and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents.”

This decision is thus an authority for the position that in a suit for partition, all the sharers are necessary parties and also for the position that the suit is liable to be dismissed for nonjoinder of any one of the parties. In (T. Panchapakesan and others v. Peria Thambi Naicker and



A.S.No.521 of 2016

others) also, a Division Bench of this Court has taken a similar view by judgment dated 18-7-1972. We are accordingly of the view that the finding of the learned Subordinate Judge on issue No. 10 holding that the suit is not bad for non-joinder of Nagarathinam's heirs is unsound and liable to be set aside. Accordingly, we hold that the suit is liable to be dismissed for non-joinder of the heirs of Nagarathinam.”

20(iii) The plaintiff must implead all proper and necessary parties in the suit for partition. The necessary and proper parties must be made as parties to the suit in order to decide the controversy completely and finally, in order to avoid multiplicity of proceedings. Order I Rule 9 of C.P.C. deals with mis-joinder and non-joinder of parties, which reads as follows:

“Order I, Rule 9 of C.P.C. -

9.Mis-joinder and non-joinder – No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:



A.S.No.521 of 2016

[Provided that nothing in this rule shall apply to

WEB COPY

non-joinder of a necessary party.]”

As per Rule 9 of C.P.C., no suit shall be defeated for non-joinder or mis-joinder of parties, but the Court may decide the controversy so far as the parties before it. But as per proviso, Rule 9 of C.P.C. shall not apply to non-joinder of necessary parties. A person is a necessary party to proceedings:

(a) When there is a right to some relief against such party in respect of the matter involved in the proceedings in question.

(b) It should not be possible to pass an effective decree in the absence of such party.

20(iv).In a suit for partition, all the persons having an interest must be made as parties. Without their presence, the issue whether plaintiff is entitled to partition and if so, quantum of share each party is entitled to cannot be decided.

20(v) In the present case, the appellant claims partition on the ground that the suit property is joint family property. In the two judgments reported



A.S.No.521 of 2016

in **AIR 1965 SC 271** cited supra and **1983 100 LW 486** cited supra, the relevant paragraphs extracted above, it has been held that when the defendants take a plea of non-joinder of parties and if plaintiff fails to implead necessary party, suit is liable to be dismissed. The ratios in the above two judgments are squarely applicable to the present case. The respondents 1 and 2 took a plea that suit is liable to be dismissed for non-joinder of necessary parties. In spite of such a plea, the appellant did not implead necessary parties.

20(vi) The appellant has not made the two children of 1st respondent through Arukkani as defendants in the suit. They are necessary parties. When the appellant has not made necessary parties in the suit even after respondents taking a stand that appellant has not impleaded the necessary parties, the appellant is not entitled to relief sought for by her. Considering the materials on record and judgments referred to above, this Court holds that suit is bad for non-joinder of parties and is liable to be dismissed. Point (5) is decided against the appellant.



A.S.No.521 of 2016

21.For the above reasons, we find no reason to set aside the impugned judgment and decree passed by the learned Judge.

22. In the result, this First Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

(V.M.V., J) (V.S.G., J)
14.11.2022

Index : Yes / No

kj

To

1.The Principal District Judge,
Namakkal.

2.The Section Officer,
VR Section,
High Court,
Madras.



WEB COPY



A.S.No.521 of 2016

**V.M.VELUMANI,J.
and
V.SIVAGNANAM,J.**

kj

**Pre-Delivery judgment in
A.S.No.521 of 2016
and C.M.P.No.12451 of 2016**

14.11.2022