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S.A.No.227 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.09.2022

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.227 of 2020
and
C.M.P.No.4809 of 2020

1.Rajakumari
2.Kamalatchi
3.Malar
4.Rajendiran

... Appellants/Respondents 1-4/Defendants 2 to 5

Vs.

1.Selvarasu
2.Yurakki @ Yuvaraj
3.Navaneetham
4.Sumathi
5.Loganayagi
6.Bakkiyam

... Respondents 1-6/ Appellants 1 to 6/Plaintiffs 1 to 6.

7.Kuppan

... 7th Respondents /5th Respondent / 6th Defendant.

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgement and Decree dated 02.01.2020 in A.S.No.12 of 2019 on the file of learned Principle District Judge, Villupuram, reversing the judgement and decree dated 17.09.2012 in



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O.S.No.124 of 2012 on the file of the II Additional Subordinate Judge's Court, Villupuram.

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For Appellants : Mr.N.Suresh

For Respondents : No appearance

JUDGMENT

The defendants 2 to 5 are the appellants before this Court challenging the Judgement and Decree of the Principal District Court, Villupuram in A.S.No.12 of 2019 in and by which the learned Judge has reversed the judgement passed by the II Additional Sub Judge, Villupuram in O.S.No.124 of 2012. In order appreciate the objection to the Judgement and Decree under appeal it is necessary to briefly allude to the facts of the case which has culminated in the filing of the suit in question. The parties, for ease of understanding, are referred to in the same ranking as before the Trial Court.

2. The plaintiffs had filed the suit for declaring their title to the suit A and B schedule properties and for recovery of possession of the suit B schedule of property, apart from seeking a declaration that the preliminary decree and final decree in OS.No.244 of 2001 is null and void. It is the case of the plaintiffs that the suit properties and the other properties belonged to



one Rakki Gounder who had three wives. Rakki Gounder through his 3rd wife had two sons, one Vasudeva Gounder, the father of plaintiffs 1 to 5 and Elayaperumal, the husband of the 1st defendant and father of the other defendants.

3. The said Elayaperumal lived with Rakki Gounder and Rakki Gounder had purchased the C schedule properties in his name from out of the movable properties which he retained in the partition and also from his own savings. It appears that when Elayaperumal lived with Rakki Gounder, he had clandestinely recovered the details of the various debtors to whom Rakki Gounder had advanced money, thereby cheating his own father. This resulted in Rakki Gounder disowning Elayaperumal and executing a Will in favour of his other son Vasudeva Gounder dated 24.11.1960 appointing him as a Dharmakarthha of the Selva Vinayakar Temple and empowering him to manage the temple properties. In the year 1961, Rakki Gounder died and it was Vasudeva Gounder who was managing the temple as a trustee as per the terms of the Will. The other sons of Rakki Gounder, namely, Ponmudi, Perumal, Rangasamy, Elayaperumal and legal heirs of Ramasamy objected to the same and attempted to interfere in the possession of the said right by



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the Vasudeva Gounder. Therefore, Vasudeva Gounder had filed OS.No.1058 of 1974 on the file of the District Munsif Court, Tindivanam.

The suit was decreed in his favour and in the appeal filed before the Sub Court, Cuddalore in A.S.No.148 of 1975, the same was confirmed. It was Elayaperumal, the husband of the 1st defendant and father of the other defendants who had contested the suit. Elayaperumal had never lived with Rakki Gounder and the joint family has ceased to exist from the year 1928. The said Elayaperumal had also not filed any partition over the properties which were allotted to the said Vasudeva Gounder in the partition deed dated 21.07.1928.

4. In the year 1978, Elayaperumal died leaving behind him surviving the 1st defendant and his children, defendants 2 to 6. They derive a right to the C suit schedule property and have been enjoying the same for over 22 years. They had thereafter filed a suit OS.No.244 of 2001 before the District Munsif, Villupuram claiming a half share over of the properties allotted to Vasudeva Gounder in a partition deed dated 21.07.1928. The defendants had physically prevented Vasudeva Gounder from attending the Court by beating him up with the help of henchmen. Thereafter, the defendant had



filed yet another suit O.S.No.206 of 2006 for declaration of their title and injunction pursuant to the partition decree. In the suit, the 1st and the 2nd plaintiffs had filed a written statement disputing the title to the suit property, however, the defendant allowed the said suit to be dismissed for default. At this juncture, on 02.12.2007, the defendant on the strength of the partition decree took illegal possession of the B schedule property. Vasudeva Gounder was by then bed ridden and was not able to contest the execution proceedings and ultimately he passed away on 11.05.2010. Even after the death of Vasudeva Gounder, the defendants had been causing a hindrance in the enjoyment of the suit property by the plaintiff. Therefore, the 1st plaintiff had lodged a complaint with Kedar Police Station. Subsequently, a false case was foisted on the 1st plaintiff and he was remanded to custody and thereafter released on bail. The defendants by using these methods were trying to arm twist the plaintiffs into handing over the property. Therefore, the plaintiffs have come forward with the instant suit.

5. The defendants had filed a written statement inter alia denying the contentions raised by the plaintiffs. They had admitted that the suit



properties belonged to Rakki Gounder and after partition with his sons, the suit A schedule properties were allotted to the share of his 3rd wife's family.

Rakki Gounder lived with his two sons Vasudeva Gounder and Elayaperumal jointly. Hence, the said Elayaperumal and Vasudeva Gounder were each entitled to a half share in the properties. The defendants would contend that after the death of Rakki Gounder, their father Elayaperumal and Vasudeva Gounder continued to live in the same house and enjoyed the property jointly. Since the said Vasudeva Gounder was reluctant to grant partition and hand over possession, the defendants were compelled to file O.S.No.244 of 2001 before the Principal District Munsif, Villupuram seeking a partition and separate possession of their half share of the properties. A preliminary decree came to be granted on 26.08.2003 and thereafter a final decree was passed on 31.01.2005. They denied the contention of the plaintiff that Vasudeva Gounder did not participate in the proceedings. The defendants would further submit that they have no knowledge about the inclusion of the C Schedule properties and the same was not in their possession. Though, the said decree was obtained against Vasudeva Gounder, since he is the head of the family representing the plaintiff, the decree is binding on the plaintiff as well. The defendants had



further pleaded that the suit filed by the plaintiff challenging the decree passed on 26.08.2003 and the final decree on 31.01.2005 is beyond the period of limitation. They would contend that the suit is a vexatious litigation and had to be nipped in the bud.

6. The Trial Court had framed the following issues:-

"1) Whether the plaintiffs entitled to the relief to declare that decree and judgement in O.S.No.244 of 2011 are null and void.

2) Whether the plaintiffs are entitled for the relief to declare the 'B' schedule property belongs to plaintiff?

3) Whether the plaintiffs are entitled for recover of 'B' schedule property from defendants?

4) What are other reliefs entitled for?"

7. The 1st plaintiff had examined himself as P.W.1 and marked Ex.A.1 to Ex.A.25. The 3rd defendant had entered the box as D.W.1 and no documents were marked on the side of the defendants.



8. Ultimately, the Trial Court dismissed the suit and found the same to be barred by limitation and principles of res judicata. Aggrieved by the decree of the Trial Court, the plaintiffs had filed A.S.No.12 of 2019 on the file of the Principal District Judge, Villupuram challenging the Judgement and decree in the suit. The Appellate Judge had allowed the appeal only on the ground that the judgment in O.S.No.244 of 2001 is not one passed on merits and could therefore be set aside and that the plaintiff's father had enjoyed the property till 2001 after which the legal heirs of Elayaperumal have taken forcible possession. The learned Judge had also held that it has not been proved that the suit properties are the joint family properties. Challenging this Judgement and Decree the defendants are before this Court.

9. The respondents though served had not chosen to enter appearance either in person or through counsel.

10. The Second Appeal had been admitted on the following Substantial questions of law:-

" a) Whether the Lower Appellate Court has erred

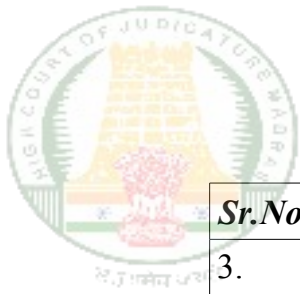


in reversing the well considered judgement of the Trial Court when admittedly the present suit filed only on 18.04.2012 by the plaintiffs challenging the decree and judgement in O.S.No.244 of 2001 rendered on 26.08.2003 is barred by limitation in view of the Article 59 of the Limitation Act?

b) Whether the Lower Appellate Court below has erred in reversing the judgement and decree of the Trial Court when admittedly the plaintiffs' father Vasudeva Gounder suffered decree and judgement in O.S.No.244 of 2001 as defendant and hence the present suit is barred by res judicata under Section 11 of the Limitation Act?"

11. The following dates and events are necessary to appreciate the issue on hand:-

<i>Sr.No.</i>	<i>Dates</i>	<i>Events</i>
1.	26.08.2003	Preliminary decree for partition passed in O.S.No.244 of 2001.
2.	31.01.2005	Final decree ordered.



Sr.No.	Dates	Events
3.	02.12.2007	Possession was taken.
4.	11.05.2010	Vasudeva Gounder died without taking any steps to set aside the Judgement and Decree in O.S.No.244 of 2001.
5.	2012	The present suit to declare the earlier decree as null and void filed.

12. A perusal of the very dates and events would clearly show that the instant suit is barred by limitation. In the Judgement reported in **1996 (7) SCC 767 - Md. Noorul Hoda Vs. Bibi Raifunnisa and others.** The Hon'ble Supreme Court had observed as follows:-

" It would thus be clear that the word 'Person' in Section 31 of the Specific Relief Act is wide enough to encompass a person seeking derivative title from his seller. It would, therefore, be clear that if he seeks avoidance of the instrument, decree or contract and seeks a declaration to have the decrees set aside or cancelled he is necessarily bound to lay the suit within three years from the date when the facts entitling the plaintiff to have the decrees set aside or cancelled he is necessarily bound to lay the suit within three years from the date when the facts



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*entitling the plaintiff to have the decree set aside, first
became known to him."*

13. A perusal of Ex.A.14 which is the Preliminary Decree in the OS.No.244 of 2001 would indicate that the father of the plaintiffs, Vasudeva Gounder had appeared as a party in person in the suit, pursuant to which the Preliminary decree was passed. Therefore, the contention of the plaintiffs that the decree had been obtained behind their back is absolutely without any basis. The decree which has been marked as Ex.A.13 in the above suit would once again read that the said Vasudeva Gounder who was the defendant therein had appeared in person before the Court. Therefore he was very much aware about the passing of the decree for partition on 26.08.2003 itself. He had passed away in the year 2010 however till his death he did not take any steps whatsoever to have a decree in OS.No.244 of 2001 set aside. It is also seen that a final decree had also been passed on 05.01.2005. Thereafter possession has been taken. The Trial Court had rightly dismissed the suit. However, the Appellate Court has proceeded on the basis that Preliminary decree in the suit OS.No.124 of 2012 is one not passed on merits which for the reasons stated supra is a totally erroneous



observation.

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14. The learned Judge has failed to appreciate that it is a Judgement that has been passed in the presence of the defendant therein namely Vasudeva Gounder the father of the plaintiffs herein who had appeared in person before the Court and therefore it cannot be stated that it is a judgment not passed on merits. That being the case, the filing of the suit OS.No.124 of 2012 nearly 9 years after the passing of the Preliminary Decree is clearly barred by limitation and further the Judgement and Decree in the earlier suit is one that has been passed in the presence of the defendant therein under whom the plaintiff's claim their title. This suit is definitely therefore barred by the principle of res judicata. In the result the Substantial questions of law are answered in favour of the defendants and the SA is allowed. The judgment and decree passed in A.S.No12 of 2009 on the file of the Principal District Judge, Villupuram is set aside and the judgment and decree passed in suit O.S.No.124 of 2012 on the file of the II Additional Sub Judge, Civil Judge, (Senior Division), Villupuram stands confirmed. No costs. Consequently, the connected Civil Miscellaneous Petition is closed, if any.



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To

- 1.The Principle District Judge, Villupuram,
- 2.The II Additional Subordinate Judge's Court, Villupuram.



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P.T. ASHA, J,

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