



A.S.No.542 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 01.12.2022

Judgment Pronounced on : **02.01.2023**

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

A.S.No.542 of 2011
and M.P.No.1 of 2011

1. J.Thiruvengadam
2. J.Venkatesan
3. J.Gnanavel

.. Appellants

Versus

1. Kalaimagal Sabha by its
President
2. Receiver No.1,
Kalaimagal Sabha,
High Court Buildings,
Chennai.
3. Receiver No.II,
Kalaimagal Sabha,
High Court Buildings,
Chennai.
4. Reka Jain
5. Rajavel
6. Srinivasan
7. Senthilnathan
8. Koteeswaran
9. Jayakumar



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10. Krishnaswamy
11. Rajaraman

.. Respondents

Prayer : Appeal Suit filed under Or XLI Rule 1 r/w Section 96 of Civil Procedure Code to set aside the decree and judgment made in O.S.No.141 of 2008 on the file of the learned Additional District Judge (Fast Track Court No.2) at Cuddalore, dated 23.03.2011 and to decree the suit as prayed for.

For Appellants : Mr.V.Ayyadurai, Senior Counsel
Mr.V.B.Perumal Raj

For Respondents : Mr.R.Singaravelan, Senior Counsel
for Mr.V.Ambika, for RR-1 to 3

: Mr.D.Ravichander, for R4

: Notice served for RR-5 to 11

JUDGMENT

A. The Appeal Suit :

This Appeal Suit is filed against the judgment and decree, dated 23.03.2011 by the learned Additional District Judge, Fast Track Court No.2, Cuddalore in O.S.No.141 of 2008, in and by which, the suit filed by the plaintiffs for partition and separate possession of 1/3rd share in the suit 'B' schedule properties and for consequential reliefs, was dismissed by the Trial Court.

B. The Complaint :



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2. The case of the plaintiffs is that the suit properties belong to one *Adimoolam*. *Ellammal* was the wife of *Adimoolam* and the couple had three sons by name *Jayaraman*, *Krishnasami* and *Rajaraman*. As on the date of filing of the suit, the aforesaid *Adimoolam*, *Ellammal* and *Jayaraman* had died. The sons of *Jayaraman* namely, *Thiruvengadam*, *Venkatesan* and *Gnanavel* are the plaintiffs. The said *Krishnasami* and *Rajaraman* are arrayed as the defendants 10 and 11. The defendants 1 to 4 are the purchasers of some of the items of the schedule properties. The suit properties are the separate properties of *Adimoolam*. He executed a Will, dated 27.01.1969 in respect of his properties. The Will covers the properties both in Puducherry and also in Tamil Nadu. This suit is filed in respect of the properties which are described in schedule-B of the suit which are in Tamil Nadu state. As per the Will, the said *Adimoolam* had bequeathed the properties conferring only the life estate to all of his three sons namely, *Jayaraman*, *Krishnasami* and *Rajaraman* and vested the properties in the children of the said three sons. Therefore, it is only the plaintiffs, defendants 5 to 9 are the owners of the property, once the Will came into force. However, without any right whatsoever, the said brothers, who had only life estate, had sold the suit items to different persons by three



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registered sale deeds, of which, two are dated 06.06.1984 and the other is dated 03.07.1985. The said purchasers are arrayed as the defendants 1 to 4. Even though the defendants 10 and 11 have life estate, considering their attitude, the suit is filed for partition and separate possession.

C. The Written Statement :

3. The other co-sharers namely, the defendants 5 to 9 had filed a written statement, supporting the case of the plaintiffs and that they also sought for partition and they paid Court fees in respect of their shares.

3.1. The suit was resisted by the third defendant by filing a written statement. According to the same, the first defendant, Kalaimagal Sabha, is the society registered under the Tamil Nadu Societies Registration Act, 1975 and it has validly purchased the suit properties. The suit properties were the separate properties of *Jayaraman*, *Krishnasami* and *Rajaraman* and they have rightly sold the same. The alleged Will is denied. The patta of the property and the other records stood in the name of *Jayaraman* and two others and after perusing the same, the third defendant purchased the



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property. The suit is filed with an ulterior motive at a belated stage and therefore, is liable to be dismissed.

3.2. The fourth defendant in the suit also contested the suit by filing a written statement. As per the same, even if the alleged Will dated 27.01.1969 is true, still *Adimoolam* had no right to execute any Will in respect of the joint family properties. After the death of *Adimoolam*, his sons have dealt with the properties by the three sale deeds, two dated 06.06.1984 and one dated 03.07.1985. The said *Jayaraman*, the father of the plaintiffs died decades ago and therefore, the suit is barred by limitation. The fourth defendant is concerned only with Ac.1.13 cents of the fifth item of the suit property.

3.3. An additional written statement was also filed by the fourth defendant, whereunder, it is contended that the said three brothers treated the suit properties as joint family properties and divided the same by a registered partition deed, dated 13.09.1943 and even in the mortgage deed, subsequently executed by the said *Adimoolam*, the suit properties are described as the joint family properties.



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D. The Issues & Trial :

4. On the said pleadings, the Trial Court framed the following issues:-

(i) Whether the suit is barred by limitation?

(ii) Whether the Will, dated 27.01.1969 executed by Adimoolam is true and genuine and will bind the parties?

(iii) Whether the defendants 1 to 3, having purchased by the same from the lawful owners, are entitled for the same?

(iv) Whether the fourth defendant has lawfully purchased the item Nos.5 to 9 of the suit properties?

(v) Whether all the schedule 'B' properties of the suit are available for partition?

(vi) If the plaintiffs are entitled for partition, to what shares they are entitled?

(vii) To what other reliefs, the plaintiffs are entitled?

4.1. On the said pleadings, the parties let in evidence. The first plaintiff examined himself as P.W.1. One *Venkatesan* and *Dhandapani @ Shanmugampillai* were examined as P.Ws.2 and 3. **Exs.A-1 to A-16** were marked on behalf of the plaintiffs. On behalf of the defendants, one



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Kanshyam was examined as D.W.1, one *Dhandapani*, *Baburaj* and *Duraisamy* were examined as D.Ws.2 to 4 and **Exs.B-1** to **B-24** were marked.

E. Findings of the Trial Court :

5. The Trial Court, thereafter, considered the case of the parties and by a judgment, dated 23.03.2011, found that the properties originally belonged to *Adimoolam* and after his death, his sons, *Jayaraman*, *Krishnasami* and *Rajaraman* were in possession and enjoyment. While so, only now, it is contended that the said *Adimoolam* had executed a Will. The Trial Court found that even during the life time of the said *Adimoolam*, he and his three sons have enjoyed the properties as if they were joint family properties. Even in **Ex.B-6** mortgage deed, the suit properties are described as joint family properties. The purchase made by the said *Adimoolam* is not by way of his separate income. It is also seen that the item Nos.7 to 9 of the suit properties were ancestral properties and were allotted to them by a partition deed dated 13.09.1943 among *Adimoolam* and his brothers. Even in the oral testimony, the plaintiffs have admitted that all the members of the family were in the avocation of climbing coconut trees and they had also



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taken lease of many coconut and palm tree groves and from the said income, the purchase was made in the name of *Adimoolam*. Therefore, the Will is invalid, because the said *Adimoolam* did not have any right to dispose off the same. Further, the sale happened in the year 1984 and the suit is belatedly filed in the year 2008. Therefore, the sale, in respect of the defendants 1 to 4, was held to be valid. In view thereof, when the suit properties were alienated validly, the question for consideration of any partition does not arise and hence, dismissed the suit. Aggrieved by the same, the present Appeal Suit is filed before this Court.

F. The Submissions :

6. Heard *Mr.V.Ayyadurai*, the learned Senior Counsel appearing on behalf of the appellants, *Mr.R.Singaravelan*, the learned Senior Counsel appearing on behalf of the respondents 1 to 3 and *Mr.D.Ravichander*, the learned Counsel appearing on behalf of the fourth respondent. Even though notices were served on the respondents 5 to 11, there was no appearance on their behalf.



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6.1. *Mr.V.Ayyadurai*, the learned Senior Counsel appearing on behalf of the appellants, would submit that admittedly, the suit properties were purchased by *Adimoolam*. He died before the Hindu Succession Act, 2005 came into force. Even the other properties allotted to him in the partition, in the year 1943, as per the Mitakshara Hindu Law prevailing at that time, devolved on the three brothers absolutely. Therefore, the said *Adimoolam* had every right to dispose off the suit properties through Will. The Hindu male's right to execute the Will is also expressly enabled under Section 30 of the Hindu Succession Act, 1956. The Will is a registered Will. All the three attesting witnesses to the Will have since passed away. Therefore, by production of a registered copy of the Will and by examining the relatives of the attesting witnesses and identifying their signatures, the Will has been duly proved. There was delay in filing the suit because the plaintiffs had no knowledge of the Will initially. Only in the year 1996, one of the plaintiffs' aunt had brought to their notice that there is a Will. Even thereafter, the original of the said Will is not traced. Therefore, the plaintiffs have duly applied for certified copy of the Will as it is a registered Will. As per the registered Will, the deceased *Jayaraman* and his brothers, who are arrayed as the defendants 10 and 11 in the suit, had only the right of enjoyment



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alone and the life estate holders could not have alienated the suit properties.

Therefore, the alienations are bad in law. The limitation has to be reckoned only with reference to the relief prayed for in the suit. The relief prayed for is partition. As long as the plaintiffs' father was alive, they could not have asked for partition. Even subsequently, the defendants 10 and 11 had limited right of enjoyment, however, because of their attitude of alienating the suit property, the plaintiffs had to file the suit. Therefore, the limitation for partition would arise only on the date, on which, the other co-sharers refused to come for partition. The sale deeds executed by them in favour of the defendants 1 to 4 are null and void and the purchase of the defendants 1 to 4 is not binding on the plaintiffs. Therefore, the findings of the Trial Court that the original Will is necessary is illegal. The Will has been duly proved and once the Will is duly proved, the plaintiffs are entitled for the relief of partition.

6.2. The learned Senior Counsel relied upon a judgment of the Hon'ble Supreme Court of India in ***Dhanpat Vs. Sheo Ram (Deceased) through L.Rs and Ors.***¹, more-fully relying upon paragraph No.28 to contend that when attesting witnesses are not available, a Will can be

¹ 2021 (1) MWN (Civil) 821



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proved by examining other witnesses by identifying their signatures. The learned Senior Counsel relied upon a judgment of the Hon'ble Supreme Court of India in ***M.Arumugam and Ammaniammal and Ors.***² to contend that life estate holder could not have alienated plaintiff's interest in the suit properties. For the proposition that properties inherited by a son from his father will not partake the character of ancestral property, the learned Senior Counsel relied upon a judgment of this Court in ***Govindan and Anr. Vs. Revathi and Ors.***³. For the same proposition that the properties will be absolute properties of *Adimoolam*, the learned Counsel would rely upon a judgment of the Hon'ble Supreme Court of India in ***Govindbhai Chhotabhai Patel and Ors. Vs. Patel Ramanbhai Mathurbhai***⁴. For the proposition that a suit will be maintainable in respect of a portion of the property being sold to third parties, the learned Senior Counsel relied upon a judgment of this Court in ***Ramasamy and Anr. Vs. A.Kandasamy and Ors.***⁵. By relying upon a judgment of the Hon'ble Supreme Court of India in ***Rakesh Mohindra Vs. Anita Beri and Ors.***⁶, more specifically on paragraph No.20, he would submit that when original Will is lost, secondary evidence

2 2020 (5) CTC 680

3 2019-5-L.W. 289

4 (2020) 16 SCC 255

5 2019 (1) MWN (Civil) 385

6 (2016) 16 SCC 483



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can be let in by producing a certified copy of the Will from the Registrar.

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6.3. Per contra, *Mr.R.Singaravelan*, the learned Senior Counsel appearing on behalf of the purchasers/the defendants 1 to 3, would submit that the other purchasers / society went into liquidation and hence, a receiver was appointed by the Court to manage the properties. The purchase was made as early as in the year 1984 and the property is in their possession and enjoyment to the knowledge of the plaintiffs. If the plaintiffs' right accrues after the death of the father, then also, they did not immediately file the suit and the suit is barred by limitation. If it is the case of the plaintiffs that as long as the defendants 10 and 11 are there, they cannot have a right and then as on the date of the filing of the suit also they did not have any right. This is a belated suit mischievously filed only to stake claim on the properties which are sold long back and as such the frivolous suit should be dismissed. The learned Senior Counsel would submit that the Trial Court has rightly found that the suit properties are the ancestral properties and therefore, the said *Adimoolam* himself did not have any right to execute the Will.



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G. Points for consideration :

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7. Upon consideration of the contentions of the learned Senior Counsel on either side and perusing the material records of the case, the following questions arise for consideration in the present case:-

(i) Whether the suit is barred by limitation?

(ii) Whether the suit properties, in the hands of *Adimoolam*, are in the nature of separate properties and alienations by his sons are valid in view of the Will executed by him?

(iii) To what reliefs, the parties are entitled?

H. Question No.1 :

7.1. At the outset, even during the arguments of the learned Senior Counsel appearing on behalf of the appellants, the learned Senior Counsel pointed out that several extents in the suit schedule properties were also sold long back to the third parties, who are not arrayed as parties in the suit and to the said limited extent, those extents of properties will not be available for partition. The rest of the suit properties were sold to the defendants 1 to 4 respectively. In this background, it can be seen that the entire alienation had taken place in the years 1984 and 1985. The plaintiffs attained majority



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from 1991. The plaintiffs' father passed away in the year 1993. The plaintiffs' version is that they came to know of the Will in the year 1997. Even accepting the said averment as such, it can be seen that the suit properties were already alienated by their father and their brothers who are legal heirs by intestate succession. Thus, in this case, there is a compulsory cause action for the plaintiffs to file the suit, even assuming that they can sue for partition *simpliciter* based on the Will. The Hon'ble Supreme Court of India, in **Mst. Rukhmabai Vs. Lala Laximanaryan and Ors.**⁷ while considering the starting point of limitation under Article 120 of the Old Act, held that though every invasion of right of the party cannot compel him to file a suit, but if the threat unequivocally infringes the right of the plaintiffs, then the same gives rise to compulsory cause of action. It is useful to extract paragraph No.34 of the judgment which reads as hereunder :

" 34.The legal position may be briefly stated thus: The right to sue under Article 120 of the Limitation Act accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question

7 AIR 1960 SC 335



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whether that threat effectively invades or jeopardizes the said right."

Thus, applying Article 113, the suit ought to have been filed within three years from 1997. However, the suit was filed in the only year 2008, thus hopelessly barred by limitation.

7.2. This apart, in this case, it may be seen that the alienees are impleaded as defendants 1 to 4 in the suit. Title was conveyed to them as per Registered Sale Deeds. It can be seen that as on date of the sale, there was no doubt or defect in title as they purchased it from the intestate legal heirs and are in possession of the property. Only on the subsequent discovery of the Will in the year 1997, the sale is now questioned. In such facts and circumstances of the case, it cannot be held that the plaintiffs can ignore the sale deeds and file suit only with relief of partition. In that view of the matter also, when the plaintiffs failed to challenge the alienations within three years from their alleged date of discovering the Will, in the year 1997, the suit which was cleverly drafted by impleading the alienees as defendants 1 to 4, but, seeking partition alone, would still be deemed to be against the alienations. The alienations are admittedly to the knowledge of the plaintiffs from the very date. The defendants 1 to 4 are admittedly in



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possession and enjoyment of the properties. As such, as per Article 59 also, the suit not being filed within three years period, atleast, from their self claimed knowledge of their right, that is, from the year 1997, the suit is hopelessly barred by limitation. The possession of the alienees of the suit property also is from 1984 and 1985 and the suit was filed after 23 to 24 years, thus, way beyond the period of 12 years. Thus, viewed from any angle, the suit is a stale claim, hopelessly barred by limitation.

7.3. The plaintiffs cannot, by willful or clever drafting, present an illusory cause of action so as to bring the suit within the period of limitation. Useful reference can be made to paragraph No.29 of the judgment of the Hon'ble Supreme Court of India in ***Dahiben Vs. Arvinbhai Kalyanji Bhanusali (Gajra) dead through LRs. and Ors.***⁸. Accordingly the question is answered that the suit is barred by limitation.

I. Question Nos.2 & 3 :

7.4. In view of my answering the first question that the suit is hopelessly barred by limitation and is a stale claim, question No.2 is answered that at this belated hour, the point as to the nature of the

⁸ (2020) 7 SCC 366



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properties, the validity and proof of Will etc., cannot be gone into. In view thereof, I answer question No.3 that the plaintiffs will not be entitled to any relief in the present suit.

J. Answers to the Issues :

8. In view thereof, the various findings of the Trial Court Court jointly in respect of the issues No. 1 to 4 is set aside and it is answered that the suit is barred by limitation and therefore consideration of the plaintiffs' case on merits does not arise and the ultimate decision of the Trial Court in dismissing the suit is affirmed.

K. The Result:

9. In the result :

- (i) The Appeal Suit in A.S. No. 542 of 2011 is dismissed;
- (ii) There shall be no order as to costs.

Consequently, the connected miscellaneous petition is closed.

02.01.2023

Index : yes



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Speaking order
grs

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To

1. The Additional District Judge (Fast Track Court No.2),
Cuddalore.
2. The Section Officer,
V.R.Section,
High Court of Madras.



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D.BHARATHA CHAKRAVARTHY, J.,

grs

Pre-Delivery Judgment in

A.S.No.542 of 2011
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