



S.A.No.251 of 2003

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 17.04.2023

Delivered on : 13.06.2023

CORAM

THE HON'BLE MR.JUSTICE P.VELMURUGAN

S.A.No.251 of 2003

and

C.M.P.No.2343 of 2003

Vaikunda Andi

... Appellant/Appellant/1st Defendant

-VS-

1.Poothangam

2.Jayanthi

3.Sivaraja

4.Selvaraja

5.Harikrishna

6.Vasanthi

... Respondents 1 to 6/Respondents 1 to 6/Plaintiffs

7.Gopalaiah

... 7th Respondent/7th Respondent/2nd Defendant

PRAYER: Second Appeal filed under Section 100 Code of Civil Procedure, against the Judgment and Decree dated 25.11.2002 made in A.S.No.46 of 2002 on the file of the Additional District Court, Kanyakumari at Nagercoil, confirming the Judgment and decree dated 30.01.2002 made in O.S.No.52 of 1993 on the file of the II Additional District Munsif Court, Nagercoil.



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For Appellants ... Mr.M.P.Senthil

For Respondents ... Mr.V.Sasikumar for R1 to R6

R7 - Died

JUDGMENT

The respondents 1 to 6, as the plaintiffs, have filed the suit in O.S.No.52 of 1993, on the file of the II Additional District Munsif, Nagercoil, for declaration and recovery of possession against the defendants. The first respondent is the mother of the respondents 2 to 6. The 7th respondent is the second defendant in the suit, who is the husband of the first respondent and the father of the respondents 2 to 6. Since at the time of filing the suit, the respondents 2 to 6 were minors, the first respondent filed the suit as guardian for the minor respondents. The said suit was decreed by the trial Court. Aggrieved by the said Judgment and Decree passed by the trial Court, the appellant/first defendant filed the appeal in A.S.No.46 of 2002, on the file of the Additional District Court, Kanyakumari at Nagercoil. The learned first appellate Judge, after hearing the appeal, dismissed the appeal. Challenging the said dismissal of the appeal and decree, the first defendant in the suit and the appellant in the first appeal has filed the present second appeal before this Court, raising the following substantial questions of law:



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“(a) Whether the suit on behalf of the minors represented by mother is maintainable when under law as long as the father is alive he is the only person who can deal with the properties of the minor from which ever source the minor gets the properties as held in 1980 (1) MLJ 486?

(b) Whether the plaintiffs have proved the alleged Will in accordance with the provisions contained under Section 69 of Evidence Act?

(c) Whether the plaintiffs are to be non suited for their failure to examine the finger print expert as required under law and as per AIR 2000 SC 1691?

(d) Are not the Judgments of the Courts below are vitiated for their failure to consider the legal position that under Hindu Law there is a presumption of ancestral property which was not rebutted especially in the absence of any document standing in the name of Karukkumlayaperumal?

(e) Whether the suit for cancellation of a document dated 27.06.1980 is in time as contemplated under Article 59 of Limitation Act?

(f) Whether the Courts below have erred in law in placing the burden on the alienee to prove that the property is ancestral one and that he is a *bona fide* purchaser for value?



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(g) Whether the 1st defendant had prescribed title by adverse possession who continues to be in possession from 27.06.1980?”

2 (i) The case of the respondents 1 to 6/plaintiffs as per the plaint is that the suit property measuring to an extent of 25 cents originally belonged to one Karukkumalaya Perumal Nadar, who is the father-in-law of the first respondent and the grandfather of the respondents 2 to 6. The said Karukkumalaya Perumal Nadar was having so many other properties including the suit properties and he executed a registered Will, dated 05.09.1980 under Doc.No.34/1980 on the file of the Edalakudi Sub Registrar's Office, with regard to the 7 items of properties in the names of the children of his son Gopaliah, who is the 7th respondent herein. The Will was executed for the benefit of the children who were already born at the time of execution of the Will to the 7th respondent and also would be born children of the 7th and 1st respondent herein. When the Will was executed, the respondents 2 to 5 were already born and after the execution of the Will, the 6th respondent was born. The said Karukkumalaya Perumal Nadar executed the Will in favour of his grandchildren for the reason that his son, the 7th respondent herein was a drunkard for a long period and he did not take care of about his family



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and he was a spendthrift and lavish. In order to safeguard the children born to him, his father Karukkumalaya Perumal Nadar executed the Will bequeathing the property in favour of his children.

2(ii) It is the further case of the respondents 1 to 6/plaintiffs that the appellant/first defendant is a close relative of the plaintiffs and he was aware of the facts and also the fact that the Gopaliah was a drunkard. Taking advantage of the above position, a sale deed was executed on 27.06.1980 under Doc.No.992/1980 regarding the suit property in the name of the appellant herein. The sale deed was not supported with consideration. The sale deed was executed without true consent of the second defendant/Gopaliah. Even otherwise, the 7th respondent/second defendant has no right or title over the property to execute any document in favour of the appellant/first defendant. The said Karukkumalaya Perumal Nadar was the absolute owner of the property and he was in possession of the same. Since the respondents 1 to 6/plaintiffs are residing in the house, which is situated at Thanavilaioor, the sale deed said to have been executed by the 7th respondent herein in favour of the appellant. In the year of 1992, on 17.08.1992, the same was informed by the neighbours. Therefore, the first respondent made arrangements to



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take a copy of the document. After obtaining a copy, she came to know that the sale deed was said to have been executed by the 7th respondent in favour of the appellant and no consideration was passed. The sale deed was not executed by the 7th respondent by consent. Taking advantage of the behavior of the 7th respondent, the appellant got sale deed in favour of him, which is not valid. At the time of execution of the sale deed, the respondents 2 to 6 were minors. Hence, it will not bind them and also the grandfather had executed Will in favour of the grandchildren, viz., the respondents 2 to 6. Hence, the sale deed, dated 27.06.1980 is liable to be cancelled.

2(iii) Further, on 19.08.1992, the first respondent approached the appellant for cancellation of the document, however, the appellant claims right over the property on the basis of the sale deed, dated 27.06.1980. Therefore, the first respondent was constrained to file the suit on behalf of her children, the respondents 2 to 6. The trial Court and the first appellant Court have rightly appreciated and re-appreciated the entire evidence and decreed the suit in favour of the respondents 1 to 6. Hence, the first defendant in the suit is before this Court. There is no substantial question of law involved in this second appeal and hence, it is liable to be dismissed.



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3(i) The case of the appellant/first defendant in the suit as per the written statement, is that the suit filed by the respondents 1 to 6 is barred by limitation and they are ousted from the suit schedule property. The appellant had derived the title and possession over the suit schedule property by adverse possession from date of sale deed. Though the suit schedule property originally belonged to one Karukkumala Perumal Nadar, there was oral partition between the said Karukkumala Perumal and his son Gopaliah, the 7th respondent herein. The suit schedule property was allotted to the 7th respondent herein and he sold the suit schedule property to the appellant under registered sale deed, dated 27.06.1980. In order to defeat the appellant/first defendant's sale deed dated 27.06.1980, the respondents 1 to 6/plaintiffs had fraudulently created the forged Will on 05.09.1989, as if, the said Karukkumalaperumal Nadar had executed the Will in respect of the suit schedule property and other properties in favour of the respondents 2 to 6. As per the oral partition, the 7th respondent is having title to the suit schedule property and he sold the same to the appellant on 27.06.1980. From the said date, the appellant is in exclusive possession of the suit property and he is in enjoyment of the suit property.



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WEB COPY 3(ii) It is the further case of the appellant/2nd defendant that the first respondent is not the competent person to file the suit as the guardian for the minors, when the 7th respondent, who is the natural guardian of the children and who is none other than the father of the respondents 2 to 6. After the partition between the father and son, the father Karukkumalaya Perumal Nadar was not having any right and interest to execute the Will dated 05.09.1989 in favour of his grandchildren. The 7th respondent is not a drunkard and there are no materials to show the same. The appellant after paying valid consideration to the 7th respondent obtained the sale deed. Subsequently, on 10.07.1980, one Dharmalingam Nadar had also executed the registered release deed in favour of the appellant mentioning the 1978 partition. The respondents 2 to 6 are not having any right or title over the suit property. The respondents 2 to 6 are having knowledge about his sale deed in favour of the appellant made by the 7th respondent even in the year 1980 itself. Therefore, the suit is barred by limitation and the respondents 1 to 6, as the plaintiffs, are not entitled to get declaration as against the appellant.



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4. Based on the said pleadings, the trial Court framed the following issues:

“1. Whether the plaintiffs are entitled to get the relief of declaration that the sale deed dated 27.06.1980 is not valid and liable to be cancelled?

2. Whether the plaintiffs 2 to 6 are entitled to get the relief of declaration on the suit property?

3. Whether the plaintiffs are entitled to recovery of possession and also mesne profits at the rate of Rs.100/- per annum.

4. Whether the Will dated 05.09.1989 is forged one?

5. Whether the first defendant is entitled to prescribed title to the adverse possession on the suit property?

6. What other relief the plaintiffs are entitled to?”

5. In order to prove the case of the respective parties on their pleadings, on the side of the plaintiffs, the first plaintiff was examined as P.W.1 and the 12 documents were marked as Exs.A1 to A12. On the side of the defendants, the first defendant was examined as D.W.1 and 5 documents were marked as Exs.B1 to B5. Besides, one Court document was marked as Ex.C1. After trial, the trial Court, considering the pleadings and oral and documentary evidence, had decreed the suit.



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Aggrieved by the Judgment and Decree, the first defendant filed the appeal and the same was dismissed. Hence, the first defendant filed the present Second Appeal.

6(i) The learned counsel for the appellant/first defendant would submit that the suit property and other properties are ancestral properties and belonged to the said Karukkumala Perumal Nadar and the 7th respondent is the son of the said Karukkumalaya Perumal Nadar. Both the father and son had entered into an oral partition. The suit property was allotted to the 7th respondent. While the said Karukkumala Perumal Nadar was alive, the 7th respondent sold the said property to the appellant under registered sale deed, dated 27.06.1980. From the date onwards, the appellant is in possession and enjoyment of the suit property and also one Dharmalingam had executed a release deed in favour of the appellant in respect of the suit property, in which also, the oral partition between the said Karukkumalaya Perumal Nadar and the 7th respondent was mentioned. Therefore, based on both the sale deed as well as the release deed, the appellant was in possession of the property and he is having title and right over the suit property and the respondents are not having any right and interest over the suit property. He would further submit



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that after the said sale, the respondents/plaintiffs had created the forged Will dated 05.09.1980, as if, the said Karukkumalaya Perumal Nadar had executed the Will in favour of the respondents 2 to 6 in respect of the suit property and other properties. The 7th respondent was not a drunkard and he was hale and healthy. With his free consent and for valuable consideration, the 7th respondent sold the suit property under registered sale deed, dated 27.06.1980. The respondents 1 to 6 were aware of all those things and they have not taken any steps. If at all, the 7th respondent has executed the sale deed against the interest of the minors and also they are knowing fully well about the sale deed, however, subsequently, they created a forged Will. Even otherwise, from the date of the said sale deed, the appellant was in possession of the suit property. The plaintiffs filed the suit in the year 1993 and hence, the suit is barred by limitation and the appellant has also prescribed title by adverse possession. Even otherwise, the sale is not valid.

6(ii) The learned counsel for the appellant/first defendant would further submit that one Dharmalingam executed a release deed stating that the said Karukkumalaya Perumal Nadar let out the property on lease to Dharmalingam and subsequently, the said Dharmalingam has executed



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the release deed in favour of the appellant. On this score, the appellant was in possession of the property. Since the appellant was in possession of the property over and above the statutory period, the suit is barred by limitation and also the appellant is having right and title prescribed by adverse possession.

6(iii) The learned counsel for the appellant/first defendant would further contend that the suit was filed by the first respondent for and on behalf of the respondents 2 to 6, as the mother and guardian. While the 7th respondent, the father of the minor children was alive, the first respondent has no *locus standi* to file the suit. In order to get over the sale deed, the 7th respondent instigated the respondents 1 to 6 to file the suit. Hence, the suit is not maintainable. Unfortunately, both the Courts below failed to appreciate the oral and documentary evidence. Hence, the learned counsel prays to set aside the Judgment and Decree passed by the both the Courts below.

7(i) The learned counsel for the respondents 1 to 6/plaintiffs would submit that the suit property originally belonged to one Karukkumalaya Perumal Nadar. During his life time, he has executed a



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registered Will dated 05.09.1980 in favour of the respondents 2 to 6, who

are none other than the grandchildren of the said Karukkumalaya Perumal Nadar. There is no oral partition between the said Karukkumalaya Perumal Nadar and the 7th respondent. Even the appellant, in his written statement, has stated that a partition has been effected without giving any date and year. The said Karukkumalaya Perumal Nadar never executed any release deed in favour of Dharmalingam. The appellant has not produced any document to show that the said Karukkumalaya Perumal Nadar executed a mortgage deed. The appellant has not produced any mortgage deed said to have been executed by the said Karukkumalaya Perumal Nadar in favour of Dharmalingam. Hence, in the absence of any such a mortgage deed, the said Dharmalingam has no right and title to execute any released deed in favour of the appellant. Even if the said Dharmalingam has executed any deed, it would not bind the respondents, since the Karukkumalaya Perumal Nadar never mortgaged the property to Dharmalingam. The said released deed is created for the purpose of this case and the appellant has not proved the same. At the time of executing the Will, only the respondents 2 to 5 were born and the 6th respondent born after the execution of the Will. In the Will, it has been clearly mentioned that



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the children born to the 1st and 7th respondents and to be born to them. At the time of the execution of the said Will, the respondents 2 to 5 were minors and in fact, the 6th respondent is not born and therefore, the sale deed will not bind them. Even otherwise, the sale is not for and interest of the minor children. The 7th respondent was a drunkard. Taking advantage of his drunken status, the appellant got the sale deed. There was no consideration passed in the said sale deed and it was not obtained by free consent and also the sale was not for and interest of the minor and hence, it was not binding on the minor children.

7(ii) The learned counsel for the respondents 1 to 6/plaintiffs would further submit that both the father and mother are the natural guardian and it is a fact that after the life time of the father, the mother would be a natural guardian. However, in this case, the father was acting against the interest of the children due to drunkard and hence, the mother, who is also a natural guardian, has filed the suit for and on behalf of the children. Therefore, the first respondent is the competent person to file the suit for and on behalf of the children against the appellant and the 7th respondent, the father of the children. The learned counsel would further submit that though especially it is not stated that



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the 7th respondent was a drunkard, even in the Will executed by the said Karukkumalaya Perumal Nadar, he himself specifically stated why his son was not giving absolute right. Hence, it is clearly proved that since the 7th respondent was a drunkard, in order to safeguard the property from him, absolute right has been given to the minor grandchildren.

7(iii) The learned counsel for the respondents 1 to 6/plaintiffs would further submit that after the death of the said Karukkumalaya Perumal Nadar, the Will came into force and patta was also transferred in the name of the minor children and kist was also paid. Therefore, from the date of the death of the Karukkumalaya Perumal Nadar, the properties were transferred to the respondents 2 to 6 and they are entitled to the suit properties. The appellant, taking advantage of the weakness of the 7th respondent due to drunkardness, created a sale deed without any consideration and therefore, the sale deed is not valid and would bind the respondents. Since the respondents 2 to 6 were minors, they were not aware of the fact. Since the mother was living with the children out of the suit property, later in the year 1992, she came to know the said fact. Both the first respondent and the 7th respondent were not living together and they were living separately. The respondents 2 to 6 were living with



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the first respondent. Hence, the sale will not bind the respondents. The trial Court has rightly appreciated the evidence and the first appellate Court has also re-appreciated the evidence.

8. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents 1 to 6 and perused the materials available on records.

9. While admitting the second appeal, this Court, considering the facts and circumstances of the case, has formulated the following substantial questions of law:

“ (a) When there is neither pleading nor proof disqualifying the second defendant/father of plaintiffs 2 to 6 as the lawful guardian (when father is alive, he is the lawful guardian in preference to the mother), can the suit for and on behalf of the minor children be filed by the mother? (See 1980(1) MLJ 486)

(b) In the absence of the evidence of the fingerprint expert as a witness before the Court, could the opinion given by him be admissible in evidence? (See AIR 2000 SC 1691)

(c) Without any relief directed against the mortgage, which the first defendant had redeemed pursuant to the



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covenant in the sale deed, can a suit for mere declaration and for recovery of possession maintainable ?”

Question (a) :

10(i) As far as the first substantial question of law is concerned, admittedly, the suit property originally belonged to Karukkumalaya Perumal Nadar. He said to have executed the Will in favour of the respondents 2 to 6 under registered Will dated 05.09.1980 and the same was marked as Ex.A1. The appellant claimed that the 7th respondent is the son of the Karukkumalaya Perumal Nadar and under oral partition, the suit property was allotted to the 7th respondent and he executed the sale deed, dated 27.06.1980 for the consideration and from the date of the sale deed, he was in possession of the property from 1980 and the sale deed was not challenged. The suit was filed only in the year 1992 and therefore, the suit is barred by limitation and the appellant prescribed title by adverse possession. The first respondent is not the competent person to file the suit for and on behalf of the respondents 2 to 6, when the 7th respondent is alive who is the father of the respondents 2 to 6 and also natural guardian. During the life time of the father, the mother is not the competent person to file the suit.



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WEB COPY 10(ii) It is not in dispute that the first respondent is the mother of the respondents 2 to 6 and the 7th respondent is the father of the respondents 2 to 6. The main contentions of the respondents/plaintiff are that the 7th respondent who is the father of the respondents 2 to 6 was a drunkard and he is a long period drunkard and he also left the respondents 1 to 6 and the respondents 2 to 6 were with the first respondent, who is their mother. Though the appellant has stated that the filing of the suit after a period of 13 years from the date of sale deed and also he was in possession for more than 12 years and therefore, it is barred by limitation and the appellant has also prescribed title by adverse possession and further, the first respondent is not the competent person to file the suit. The contention of the respondents 1 to 6/plaintiff is that 7th respondent is a drunkard and they were not aware of the sale deed and taking advantage of the drunken status, the appellant created the sale deed and no consideration was passed and it was not executed with the free consent. Even otherwise, Karukkumala Perumal Nadar executed the Will in favour of the respondents 2 to 6 and after the death of the said Karukkumala Perumal Nadar, the respondents 2 to 6 are entitled to the suit property since they were minors till the filing of the suit and even on



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the date of the alleged sale deed, they were minors and the sale deed would not bind the respondents 2 to 6. The first respondent/mother came to know the fact only in the year of 1992 through the neighbours and after verifying the encumbrance and after obtaining the sale deed, she came to know the fact that the sale deed said to have been executed by the 7th respondent.

10(iii) From the recital of Ex.A1 Will, it shows that since the 7th respondent/father is a drunkard, the grandfather Karukkumalaya Perumal Nadar executed the Will. The witness also says that the 7th respondent was living away from the family for 15 years and he is not living with his wife and children and the sale would not be valid and it is not proved and even otherwise, it would not bind on the minors. The 7th respondent has no right and title to execute the sale deed. Even assuming that the sale deed is true, that will not bind on the respondents 2 to 6 since the grandfather executed the Will in their favour and after the death of the grandfather, patta was transferred in their name and also they paid kist.

10(iv) The substantial question of law is regarding the competency of the first respondent for filing the suit for and on behalf of



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the respondents 2 to 6. The main contention is that since the father is alive who is the natural guardian, the mother is not the competent person to file the suit. In this regard, it is pertinent to note that both the father and mother are natural guardians and the welfare of the minor in the widest sense is the paramount consideration and even during the life time of the father. Therefore, both the father and mother are natural guardians. When the specific allegation is that the father was a drunkard, taking into consideration the welfare of the grandsons, the grandfather excluded the father from the absolute right and executed the Will in favour of the grandsons. The Will also proved in the manner known to law at the time of examination. Both the attestors of the Will are not alive. Therefore, they could not examine the attestors to prove the Will as per Section 68 of the Indian Evidence Act, however, the Will was proved under Section 69 of the Indian Evidence Act.

10(v) Further, since both the attesters were not alive, the admitted thumb impression of Karukkumalaya Perumal Nadar said to have been affixed in the Will executed by him in the year 1978 along with the disputed Will in favour of the grandsons in the year 1980 were sent for the Expert opinion to the Forensic Lab and a report was received from



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the Lab which was marked as Ex.C1. It is clearly proved that the thumb impression shows in the disputed Will and the admitted Will are one and the same. Therefore, the Will was proved in the manner known to law. Once it shows that the Will is genuine, the recital of the Will clearly shows that since the father was a drunkard, the Will has been executed by the grandfather in favour of the grandsons. The first respondent is the mother. The father was not acting in the interest of the children and he was also out of the family and the children are not with the father and they are residing with the mother at the time of filing of the suit. Section 19 of the Guardians and Wards Act 1890 and Section 6 of the Hindu Minority and Guardianship Act, 1956 clearly show that the father and the mother are the natural guardians. When the father is acting against the interest of the children, the mother is also natural guardian and she is the competent person to file the suit for and on behalf of the children. Therefore, as per the decision of the Hon'ble Supreme Court in the case of *Ms.Githa Hariharan and another vs. Reserve Bank of India* reported in *JT 1999(1) SC 524*, both the father and the mother are the natural guardians and it cannot be stated that during the life time of the father, the mother cannot be acted as natural guardians. Welfare of minor to be paramount consideration. Therefore, considering the facts



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and circumstances of the present case on hand, this Court is of the view that the mother is the competent to file the suit. Hence, this substantial question of law is answered accordingly.

Question (b):

11(i) As far as the second substantial question of law is concerned, admittedly, the suit property originally belonged to Karukkumalaya Perumal Nadar and he is said to have executed the Will in favour of his grandsons. According to the respondents 1 to 6/plaintiffs, the Will was proved in the manner known to law. Both the attester of the Will were not alive at the time of marking of the Will during the trial. The said fact was not disputed by the appellant. During the life time of Karukkumalaya Perumal Nadar, he executed the Will in favour of his daughter and the said Will was of the year 1972 and that Will was not disputed and that was admitted one. Since the Will said to have been executed in favour of the grandchildren in the year of 1980 was disputed by the appellant and both the attesters were not alive, the respondents could not prove the Will under Section 68 of the Evidence Act. Hence, the disputed Will and the admitted Will were sent to the Forensic Lab for Expert's opinion and a report was also received. From the said report,



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both the trial Court as well as the first appellate Court found that the Will was proved in the manner known to law. Therefore, the respondents 2 to 6 are having title over the suit property and the patta was also transferred in the name of the respondents 2 to 6 and they are also enjoying the property through their mother by paying kist.

11(ii) The main contention raised by the learned counsel for the appellant/first defendant is that the Expert from the Forensic Lab was not examined before the trial Court and simply marking the opinion of the Expert is not the admissible evidence. He relied upon the Judgment reported in *AIR 2000 SC 1691*.

11(iii) Admittedly, in this case, the property stands in the name of Karukkumalaya Perumal Nadar and he is said to have executed the Will. According to the respondents 1 to 6/plaintiffs, they proved the Will in the manner known to law. Since both the attestors of the Will were not alive and the appellant disputed the Will, the said disputed Will was sent to the Forensic Lab. In the said Will, Karukkumalaya Perumal Nadar put his thumb impression. On an earlier occasion, Karukkumalaya Perumal Nadar is said to have executed a Will in favour of his daughter and the



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said Will was not disputed. Both the disputed Will and the admitted Will were sent to the Forensic Lab and a report was received from the Forensic Lab stating that the thumb impression affixed in the disputed and admitted Will are one and the same. Therefore, the genuineness of the Will was proved. Since it is only a thumb impression, the opinion of the Expert is sufficient. Even though Expert was not examined as witness, that may not be a sole ground to reject the Will, as if the Will was not proved in the manner known to law. If it is signature or handwriting, the Expert should be examined. Whereas, it is a thumb impression as found in the disputed Will. Admittedly, the same was sent along the admitted thumb impression in the admitted Will. Based on that, the Forensic Lab sent opinion. Since the Expert was not examined, it may not be stated that without examining the Expert, the opinion is not admissible. This Court has also found that the Will was proved in the manner known to law. In the absence of the attester, it was proved under Section 69 of the Indian Evidence Act. Therefore, this substantial question of law is answered in favour of the respondents 1 to 6 and as against the appellant.



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WEB COURT **Question (c):**

12(i) Admittedly, the suit property originally belonged to Karukkumalaya Perumal Nadar and as already held, he executed the Will in favour of his grandsons in respect of the suit property and other properties and the sale deed is not binding on the minors and the Will was proved in the manner known to law. The main contention of the appellant is that he was in possession of the suit property based on the sale deed and subsequent release deed. Karukkumalaya Perumal Nadar executed the mortgaged deed in favour of Dharmalingam and he has not redeemed the property. Hence, the said Dharmalingam executed the release deed in favour of the appellant and the appellant had redeemed mortgaged property pursuant to the recitals in the sale deed. Hence, the mere suit for declaration and recovery of possession is not maintainable. In this case, the respondents 1 to 6/plaintiffs have stoutly denied the mortgage deed and Karukkumalaya Perumal never executed any mortgage deed in favour of the Dharmalingam. The appellant has not produced any mortgage deed said to have been executed by the said Karukkumalaya Perumal in favour of Dharmalingam. Therefore, in the absence of the said mortgage deed, the appellant cannot state that the



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Karukkumalaya Perumal Nadar mortgaged the property and he redeemed the property from the Dharmalingam and he got the release deed.

Though the appellant has claimed title through the mortgage deed, he has not produced any mortgage deed. If at all the mortgage is for more than Rs.100/-, it should be a registered document and it should have been produced. Therefore, the appellant has not proved that Karukkumalaya Perumal Nadar mortgaged the property to Dharmalingam and he got the property from the Dharmalingam.

12(ii) The one of the contentions raised by the learned counsel for the appellant is that the plaintiffs have to prove their case on their own strength and they cannot take advantage of the weakness of the defendant. Therefore, the burden of proof cannot be shifted from the plaintiffs to defendant in the absence of the fact that the plaintiffs have to prove their case. The respondents 1 to 6/plaintiffs have categorically stated that the suit property originally belonged to Karukkumalaya Perumal Nadar and he executed the Will in favour of his grandsons, the respondents 2 to 6 under Ex.A1, based on which, patta was transferred to their names and they have also paid kist. Therefore, they specifically stated that the suit property originally belonged to Karukkumalaya



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Perumal Nadar. After the death of the said Karukkumalaya Perumal Nadar, the Will came into force and they are in possession of the property. The 7th respondent is the father of the respondents 2 to 6, who was a drunkard and the appellant is said to have got sale deed in favour of him and the said sale was also challenged and at that time, the respondents 2 to 6 were minors. Unless it is proved by the father that the sale is for the benefit of the family and the minor sons, it will not bind on them. Further, the plaintiffs have proved the Will and the father also admitted the fact that he was not living with the respondents 1 to 6 for more than 15 years and he was away from the family. Further, the appellant has not proved that the sale was obtained for valuable consideration with the free consent. The 7th respondent did not file any written statement and he did not contest the suit. The appellant has also not summoned the 7th respondent or any other witnesses who are witnessed to the sale deed. Though the appellant contended that there was oral partition between Karukkumalaya Perumal Nadar and his son, the 7th respondent, he has not stated any date and he has not produced any records at any point of time. The appellant clearly admitted that there was no document in the name of the 7th respondent at the time of getting the sale deed. None of the documents have been shown that at any point



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of time, the suit property stands in the name of the 7th respondent.

Hence, this Court is of the view that the appellant has not proved the oral partition. Further, the appellant contended that one Dharmalingam executed the release deed, however, the appellant has not proved that Karukkumalaya Perumal Nadar mortgaged the property at any point of time to the Dharmalingam and Dharmalingam was in possession of the property. In view of the above fact, this Court is of the view that the respondents, as the plaintiffs, have clearly proved their case. The appellant has also admitted the original owner of the property. Though he has taken the plea of oral partition, that was not proved and mortgage between the original owner and Dharmalingam was also not proved. No document was shown that the 7th respondent was in possession of the suit property at any point of time. The respondents/plaintiffs have also proved the Will and the death of the original owner Karukkumalaya Perumal Nadar and he has also produced the death certificate of the said Karukkumalaya Perumal Nadar. Ex.C.1 Report of the Forensic Department shows that the disputed thumb impression and the admitted thumb impression are one and the same.

12(iii) Admittedly, at the time of execution of the same sale deed,



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the respondents 2 to 5 were minors and the 6th respondent was not born.

The recital in the Will clearly shows that children born and will be born to the first and 7th respondents are entitled to the property. The father was not alive with the children for more than 15 years and the children are residing with the mother. Therefore, the mother is the natural guardian. According to her, she came to know about the sale only in the year of 1992 and therefore, immediately after ascertaining the facts, she filed the suit. Therefore, as already held that the first respondent/mother is the competent person who is also natural guardian. Since it is proved that the disputed Will and the admitted Will are executed by grandfather of the respondents 2 to 6, from the report of the Forensic Lab and non-examination of the witness is also not fatal to the case of the plaintiffs. The appellant has also not proved the mortgage deed in favour of Dharmalingam. Therefore, the said release deed Ex.B2 is not binding on the appellant and that document is only created for the purpose of this case. The trial Court rightly appreciated the evidence and given answer in favour of the respondents 1 to 6/plaintiffs in all the issues and decreed the suit. The first appellate Court also re-appreciated the evidence and dismissed the appeal and confirmed the decree and judgment passed by the trial Court. Though the appellant raised the several substantial



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questions of law, this Court, after perusal of the materials, has formulated only three substantial questions of law as mentioned above.

12(iv) On perusal of the entire pleadings and oral and documentary evidence as discussed above, this Court finds that the respondents 1 to 6 / plaintiffs have proved their case and they are entitled to the relief as sought for and the appellant, as a defendant, has not proved his defence that the suit is barred by limitation and he has also prescribed title by adverse possession. No doubt, in this case, the respondents 1 to 6/plaintiffs have proved their case on their own strength and they have not taken advantage of the weakness of the appellant/ first defendant. Further, the respondents 1 to 6/plaintiffs have proved their case based on the pleadings that the original owner of the property has executed the Will in favour of the minor grandsons and the 7th respondent/father was for away from the house and he was a drunkard and therefore, the sale deed would not bind the respondents 1 to 6. The 7th respondent has no right whatsoever to execute the sale deed in favour of the appellant. Therefore, the plaintiffs have proved their case on their own strength. The appellant has also admitted that Karukkumalaya Perumal Nadar is the original owner of the property and the appellant has not proved that



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the 7th respondent was having alienable interest. The respondents/plaintiffs proved burden and the onus has been shifted to the appellant. The respondents 1 to 6 have proved that the sale deed is said to have executed by the 7th respondent in favour of the appellant is not valid and the same will not bind the minor respondents. Therefore, all the substantial questions of law are answered accordingly in favour of the respondents 1 to 6 and as against the appellant.

13. In the result, this Second Appeal fails and the same is **dismissed**. No costs. Consequently, connected miscellaneous petition is closed.

13.06.2023

NCC : Yes/No
Index : Yes/No
Internet: Yes
skn

To:

- 1.The Additional District Judge, Kanyakumari at Nagercoil.
- 2.The II Additional District Munsif, Nagercoil.
- 3.The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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P.VELMURUGAN, J.

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and
C.M.P.No.2343 of 2003

13.06.2023