



S.A.Nos.643 & 646 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 27.03.2024

Judgment Pronounced on : 07.06.2024

CORAM : JUSTICE N.SESHASAYEE

S.A.Nos.643 & 646 of 2021
and CMP.Nos.21633 & 6799 of 2022
and CMP. Nos.13226/2021, 16666/2021 & 11656 of 2021

1.A.R.Subramaniam

2.A.S.Ramalingam

.... Appellants in both Second Appeals
Respondents in AS.No.22/2019 &
AS.No.23 of 2019 /
Defendants in O.S.No.60/2018,
Plaintiffs in O.S.No.59 of 2018

Vs

1.M.S.Muthuvel

.... 1st Respondent in S.A.No.643 of 2021
& Sole Respondent in S.A.No.646 of 2019/
Appellant in A.S.No.22 & 23 of 2019 /
Plaintiff in O.S.No.60 of 2018 &
Defendant in O.S.No.59 of 2018

2.The Sub Registrar

Office of the Sub Registrar

Vellakovil - 638 111

Kangeyam Taluk

Tiruppur District.

.... 2nd Respondent in S.A.No.643 of 2021



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[R2 - Impleaded vide Court order dated 02.12.2022 made
in CP.No.17376/2022 in S.A.No.643 of 2021]

Prayer in S.A.No.643 of 2016 : Second Appeal filed under Section 100 of Civil Procedure Code praying to set aside the judgment and decree dated 28.06.2021 made in A.S.No.22 of 2019 on the file of the Principal District Court, Tiruppur, reversing the judgment and decree dated 30.10.2018 made in O.S.No.60 of 2018 on the file of Sub Court, Kangayam by allowing this second appeal.

Prayer in S.A.No.646 of 2016 : Second Appeal filed under Section 100 of Civil Procedure Code praying to set aside the judgment and decree dated 28.06.2021 made in A.S.No.23 of 2019 on the file of the Principal District Court, Tiruppur, reversing the judgment and decree dated 30.10.2018 made in O.S.No.59 of 2018 on the file of Sub Court, Kangayam by allowing this second appeal.

In both S.A.Nos.643 & 646 of 2023 :

For Appellants : Mr.V.Raghavachari
Senior Advocate
Assisted by Mr.N.Manoharan

For Respondents : Mr.A.Palaniappan
for Mr.K.Venkateswaran for R1



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COMMON JUDGMENT

These twin appeals were preferred challenging the decree passed in A.S.22 of 2019 and A.S 23 of 2019 on the file of Principal District Court, Tiruppur. The appellants were successful before the trial court, but suffered a reversal in their fortune before the first appellate court.

1.2 The duel is between the father and one of his sons on one side, the appellants), with his other son on the other side (the respondent). Both the sides filed two separate suits. The details are as below:

- a) The first of the suits is O.S.No.59/2018 (originally O.S.No.62/2009 before District Munsif Court, Kangeyam) and it was laid by the appellants herein before the Sub Court, Kangeyam. This suit is laid for declaration of the title of the plaintiffs based on Ext.A1 and Ext.A30, partition deeds, and for ancillary reliefs of prohibitory injunction. There are two schedules of properties disclosed in the plaint as A and B schedules, and they respectively represent the properties that the first and the second plaintiff had respectively obtained in the



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aforesaid partition deeds.

b) The defendant in the said suit, for his part has laid O.S.No.60/2018 before the Sub Court, Kangeyam (originally O.S.No.178/2011 before Sub Court, Dharapuram) for declaration of his title (not based on Ext.A1 and Ext.A30 partition deeds, but on the basis of Ext.B2 = A10 settlement deed), and for recovery of possession and also for a partial cancellation of Exts.A4 = B12 sale deed dated 22.02.1999 and Ext A5 = B13 sale deeds which his father had executed on the strength of the Power of Attorney documents that he had executed.

1.3 Both the suits were tried together and evidence was recorded in O.S.No.59/2018. After due appreciation of evidence before it, the trial Court decreed O.S.No.59/2018 filed by the appellants, and dismissed O.S.No.60/2018 filed by the respondent.

1.4 The decrees of the trial Court triggered two first appeals at the instance of the respondent. They are A.S.No.23/2019 (against O.S.No.59/2018) and A.S.No.22/2019 (against O.S.No.60/2018). Before the first appellate Court,



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the fortune shifted as both the first appeals came to be allowed.

1.5 Challenging the said decrees of the first appellate court, the present set of second appeals are filed. For narrative convenience, parties would be referred to by their rank before the trial court judgement. Accordingly, appellants would be termed as the plaintiffs and the respondent would be referred to as the defendant.

The Pleadings:

A. Case of the Plaintiffs:

2.1 Facts narration covers two specific period: (a) that which had happened between 1959 and 1972; (b) Between 1993 and till the filing of the suit.

2.2. The facts that fall within 1959 and 1972, and they are:

- a) The suit properties and others originally belonged to a certain Ramasamy Gounder. Ramasamy Gounder was married to Chellathal and they had two children, a son, the first plaintiff herein, and a daughter named Parvathathal.
- b) While so, on 07.07.1959 vide Ext.B1, Ramasamy Gounder, his wife



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Chellathal, and their two children namely, the first plaintiff and Parvathathal entered into a partition. Both the first plaintiff and Parvathathal were minors then.

- c) Under Ext. B1 partition, A-schedule property was allotted to Ramasamy Gounder and B-schedule was allotted to the first plaintiff. While C-schedule was allotted to Parvathathal, D - schedule was allotted to the share of Chellathal.
- d) The A-schedule under Ext.B1 partition deals with several items of properties. Years rolled by. The first plaintiff had married one Bhanumathi, and they had begotten the defendant as their elder son.
- e) While so, on 07.06.1970, vide Ext.B2 = Ext.A10, Ramasamy Gounder settled three items of properties comprised in Sy.Nos: 616/1, 616/3 and 601 with a combined total extent of 16.37 acres out of the various properties that he had obtained under Ext.B1 to the defendant. The defendant was a new born child, barely 17 days old at that time. About a month later, to be precise, on 05.07.1970 Ramaswamy Gounder died.
- f) Without any loss of time, on 11.08.1970, Muthuvel, the defendant, through his mother as guardian had laid O.S.No.259/1970 before Sub Court, Erode. Ext.B3 is the copy of the plaint in that suit. The subject



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matter of the said suit was the properties allotted to the first plaintiff under B schedule to Ext.B1 partition. The cause of action for the suit was that the first plaintiff was irresponsible and reckless in managing the affairs of both his family and also the properties. The defendant in the suit (the first plaintiff herein) entered appearance through a counsel, and on the third day of the institution of the suit i.e on 13.08.1970 filed a memo before the Court submitting to the decree, and accordingly the suit came to an end in three days with the trial court passing a preliminary decree for $\frac{1}{2}$ share of the plaintiff vide Ext.B4.

g) While things stood thus, on 31.12.1971, the first plaintiff begot another child. He is the second plaintiff. Some ten months after the birth of the second plaintiff, on 03.10.1972, pursuant to Ext.B4 preliminary decree, a final decree came to be passed vide Ext.B5 order of the trial court in I.A.769 of 1972. It was a compromise decree. It may be stated that the birth of the second plaintiff had not led to any modification in the shares decreed under Ext.B4, and that Ext.B5 had given effect to Ext.B4.

2.3 The facts in this segment fall between 1993 till filing of the suit. By



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now, both the defendant and the second plaintiff have attained majority. The facts are:

- a) On 25.02.1993, two partition deeds came to be executed. The first partition deed is Ext.A1=Ext.B10, and it deals with the properties of Ramasamy Gounder, which he had obtained under Ext.B1, partition deed. The parties to this document are the first plaintiff, his mother Chellathal (Ramasamy Gounder's widow), and the first plaintiff's two sons, namely the defendant and the second plaintiff. The other partition deed is Ext.A30 = Ext.B9, and it relates to the properties allotted to the share of the first plaintiff under the same Ext.B1 partition, and only the parties hereto were the parties to Ext.A30 partition deed.
- b) What is significant here is that Ext.A1 partition deals with the properties covered under Ext.B2 = Ext.A10 settlement deed which Ramasamy Gounder had executed in favour of a 17 day old defendant. To make it more specific, properties covered under Sy.N.616/1 and Sy.No.616/3 were allotted to the first plaintiff under B-schedule to Ext. A-1. They represent the two out of the three items of properties which Ramasamy Gounder had settled in favour of the defendant under Ext.B2 = A10. The third item of property in Ext.B2 settlement deed is



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the property comprised in Sy.No.601, and it came to be allotted to the defendant himself under Ext.A1.

- c) Now, out of the total extent of 7.95 acres (which, to remind was one of the properties dealt with under Ext.B2 = Ext.A10 settlement deed), the first plaintiff had settled 1.0 acre to his younger son, the second plaintiff under Ext.A2 settlement deed dated 11.10.1996.
- d) According to the plaintiffs, the defendant was engaged in some business, and had walked into a debt trap, and for clearing the debts, on 16.07.1998, he executed a Power of Attorney in favour of his father, the first plaintiff. A copy of the same is available on record as Ext.A3. Now, on the strength of Ext.A3, the first plaintiff had sold 95 cents out of 6.45 acres in Sy.No:601 to the second plaintiff vide Ext.A4 = Ext.B12 sale deed.
- e) On 06.12.2001, the defendant had sold the remaining 5.50 acres in Sy.No. 606/1 to his younger brother, the second plaintiff under Ext.A5 sale deed.
- f) As things stood thus, the defendant is trying to establish title based on Ext.B2 = Ext.A10 settlement deed, ignoring the fact that the said settlement deed had never come into effect. And, he had had laid two



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back to back suits. They are :

- O.S.No.135 of 2005 on the file of Sub Court, Dharapuram, for partition of entire properties covered under Ext.B1, partition deed. Ext.A34 is the copy of the plaint, and it does not disclose either of Ext.A1 or Ext.A30 partition deed. The plaintiffs herein as defendants had entered appearance and filed their written statement disclosing Ext.A1 and Ext.A30 partition deeds. Thereafter, the defendant had filed I.A.No.273/2007 in O.S.No.135 of 2005 for withdrawal of the suit with liberty to file a fresh suit under Order 23 Rule 1 CPC., Ext.A35 and Ext.A36 are the relevant documents. Vide order dated 21.06.2007, O.S.No.135/2005 was allowed to be withdrawn.
- About a month after the dismissal of O.S.No.135/2005, to be precise on 23.07.2007, the defendant laid the second suit in O.S.No.300/2007. This suit was laid for partition, declaration of his title based on Ext.B2=Ext.A10 settlement deed which his grandfather Ramasamy Gounder had executed when he was barely 17 days old. Yet another time, he did not disclose



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Ext.A1 and Ext.A30 partition deeds as could be evidenced from Ext.A11, the copy of the plaint in O.S.No.300/2007. Yet again, the defendants therein (the plaintiffs herein) had filed their written statement (marked as Ext.A12), disclosing Ext.A1 and Ext.A30 partitions.

g) During the pendency of the second mentioned suit filed by the defendant in O.S.No.300/2007, the defendant had mortgaged some of the properties covered under Ext.B2=Ext.A10 settlement deed in favour of certain Palanisamy Gounder under Ext.A6, mortgage deed dated 06.03.2009. The mortgagee later said to have discovered that the mortgagor did not have any title to the mortgaged property. Therefore, both the mortgagor (the defendant herein) and the mortgagee entered into another document Ext.A7, dated 02.04.2009, cancelling Ext.A6 mortgage deed.

2.4 It is in this back drop, during the pendency of O.S.No.300/2007, the present plaintiffs have laid their suit for declaration of their title in O.S.No.62 of 2009 before the District Munsif Court, Kangeyam, which later was transferred to Sub Court, Kangeyam and taken on record as O.S.No.59/2018.



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The cause of action for the suit was Ext.A1 partition deed. The plaint describes the suit properties in two schedules. A – Schedule deals with the properties allotted to the first plaintiff under Ext.A1 less 1.0 acre that he had settled in favour of the second plaintiff under Ext.A2. B-schedule properties in the plaint are those properties that were allotted to the second plaintiff under Ext.A1 + (the properties he had obtained under Ext.A2 settlement deed, plus the properties he had purchased under Exts.A4 and A5 sale deeds for declaration of their respective title and for ancillary reliefs of prohibitory injunction to secure their respective possession over the suit properties.

B. Case of the Defendant:

3. The pleadings of the defendant may be summarised. It is reminded that he not only had filed this written statement to O.S.No.59/2018, but has also filed his own suit in O.S.No.60/2018. The narration below combines his pleadings in both the cases :

- a) Ramasamy Gounder, the father of the first plaintiff and the paternal grandfather of the defendant and the second plaintiff possessed around 120.77 acres of land. It belonged to the coparcenary, of



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which the first plaintiff was the other coparcenor. It is true that vide Ext.B1 partition deed dated 07.07.1959, Ramasamy Gounder, his wife and his two children, which included the first plaintiff, had partitioned the entire joint family properties, in which Ramasamy Gounder was allotted 'A' schedule property, while the first plaintiff was allotted 'B' schedule property.

b) The first plaintiff and his wife Bhanumathi did not share a happy matrimony, as a result Bhanumathi lived on and off from the company of the first plaintiff. It is in this circumstances, two events happened:

- i. On 07.06.1970 Vide Ext.B2 = Ext.A10, Ramasamy Gounder had executed the settlement deed comprising three items of properties, which he had obtained under Ext.B1 partition, in favour of the defendant. As the defendant was barely few days old, he was represented in the document by his mother Bhanumathi. Indeed, at the relevant time when the document was executed, Ramasamy Gounder was hospitalised at Vellore, that the very document itself was executed at Vellore, and the same



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was presented for registration before the jurisdictional Sub-Registry only by the first plaintiff as the Power of Attorney of his father Ramasamy Gounder. Ever since, the mother of the defendant took possession of the property and had also mutated the revenue records in favour of the settlee under the document.

- ii. About 1969-1970, the first plaintiff's life derailed as he became immoral and irresponsible. Indeed, he even executed a document conveying a specific portion of the joint family which he had obtained under Ext.B1 partition in favour of his maternal grandmother Valliammal for her maintenance. As he was seen acting against the interest of the joint family, the mother of the defendant (wife of the first plaintiff) was constrained to institute a suit for partition in O.S.No.259/1970 before the Sub Court, Erode for partitioning 'B' schedule property which the first plaintiff had obtained under Ext.B1. The suit was contested by the first plaintiff and ultimately, on the advise of the relatives of the parties, a compromise was effected



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and based on a compromise memo Ext.B5, final decree came to be passed. In this final decree, the defendant was allotted 'A' schedule property which is roughly about 1/3rd of the suit property and the first plaintiff was allotted 2/3rd share in the suit property under 'B' schedule.

- c) The defendant accordingly became entitle to properties covered under Ext.B2 = Ext.A10 settlement deed (described as 'B' schedule property in O.S.No.60/2018), and also the properties covered under Ext.B5, final decree, (which is described as 'A' schedule). On passing of the final decree under Ext.B5, the joint family property of the first plaintiff and the defendant had come to an end, and at no point of time was there a re-union.
- d) Be that as it may, till 1992, the defendant was studying in Bangalore. The second plaintiff too was then studying. The first plaintiff therefore kept the entire management of the family properties under his thumb. Indeed, he even kept his wife Bhanumathi totally under his control. Therefore, whenever the first plaintiff required their family members to sign any documents or even the blank papers, they did blindly, without knowing the



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purpose for which the signatures or thumb impressions were obtained.

- e) It is in this backdrop, on 25.02.1993, Ext.A1 = Ext.B9, partition deed came to be executed. The defendant was given the impression that the properties which he had obtained under Ext.B2 settlement deed, and also Ext.B5, final decree in O.S.No.259/1970 were not included. Trusting the same, he signed Ext.A1 = Ext.B9, partition deed.
- f) Be that as it may, between 1997 – 2001, the defendant was working in Hosur. The first plaintiff would now convince the defendant that it would be difficult for him to manage his properties and accordingly obtained the registered Power of Attorney dated 16.07.1998 [Ext.A3 = Ext.B11]. On the strength of this Power of Attorney, the first plaintiff went on a selling spree of the defendant's property in favour of the second plaintiff, as could be seen from Ext.A4, dated 22.04.1999; Ext.A31, dated 24.02.199; and Ext.A5, dated 06.12.2001. Besides, he (the defendant) himself had executed Ext.A32, sale deed dated 22.02.2001, in favour of the second plaintiff had executed it. If only the defendant had known that the



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properties that he had obtained under Ext.B2 settlement deed and Ext.B5 final decree, he would not have joined the execution of Ext.A1 partition deed. Ext.A1 partition deed is fraudulently obtained and is not valid under *ab initio void*.

g) Coming to know of these things, this defendant had cancelled the Ext.A3 = Ext.B11 Power of Attorney, vide Ext.B15, cancellation deed dated 27.04.2007. Indeed, the first plaintiff never paid any sale consideration to the defendant, and the entire recitals in the sale deed which the first plaintiff had executed in favour of the second plaintiff are false and concocted. Indeed, the recitals would go to show that the defendant had some debts, but the defendant did not have any debts.

In these circumstances, the defendant has sought for declaration of his title over the properties that he had obtained under Ext.B2 = Ext.A10 settlement deed and also the properties that he had obtained under Ext.30 partition deed. In addition, he also sought cancellation of Ext.A4 = Ext.B12; and Ext.A5 = Ext.B13 sale deeds. And, he has also sought recovery of possession of the above referred to properties.



C. Defence of the Plaintiff's to the Defendant's suit:

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4. The plaintiffs as defendants in O.S.No.60/2018 had filed their written statement, wherein they contend :

- a) Ext.B5, final decree was a collusive decree and that it was intended to save the properties from Land Ceiling Act, and that it had not brought the joint family property to an end. The said compromise decree was never acted upon, nor was used at any time by anybody anywhere. Indeed, the plaintiffs and the defendant were living along with Bhanumathy, the wife of the first plaintiff together. Hence, it is false to state that the defendant and the joint family never reunited as there was no division in the first place. Consequently, it is wrong to state that the second plaintiff was only entitled to a share in the property allotted to the first plaintiff in Ext.B5, final decree.
- b) Turning to Ext.B2 settlement deed, it was never acted upon nor was it accepted by the mother of the second plaintiff. At any rate, the entire property including those properties covered under Ext.B2 and Ext.B5 were enjoyed as a common joint family properties. It is these properties that came to be divided vide Ext.A1 = Ext.B9,



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partition deed dated 25.02.1993. The defendant himself acted on Ext.A1 = Ext.B9 partition and mortgaged the same for obtaining a loan from M/s LVB Bank and failed to repay it. As the bank authorities brought those properties to auction, the defendant himself was constrained to sell some of these properties he had obtained under Ext.A1 partition deed. It is in the said circumstances, he had also executed Ext.A3 = Ext.B11, Power of Attorney.

- c) The suit in O.S.No.60/2018 laid by the defendant is not maintainable without Ext.A1 = Ext.B9 partition deed being set aside, since the defendant is also a party to the same. And vis-a-vis the cancellation of the sale deeds are concerned, the suit is terribly barred by limitation.
- d) Indeed on the very date on which Ext.A1 was executed, Ext.A30, partition deed too was executed. This partition involves the properties allotted to the first plaintiff's mother Chellathal under Ext.B1, partition deed of the year 1959. The parties to the present suit plus the first plaintiff's mother Chellathal were parties to Ext.A30 partition, and each of the parties were allotted separate



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properties and they are being enjoyed separately by the parties thereto. It may be stated that since the date of partition of Ext.A1 = Ext.B9, the plaintiffs have been enjoying the properties openly and to the knowledge of the defendant, they are also paying necessary taxes and rates payable under law.

e) Be that as it may, the defendant had instituted a suit in O.S.No.300/2007, and as he did not know the entire facts at the time he had filed I.A.No.378/2011 for withdrawing the suit to file a fresh suit on the same cause of action. To the written statement filed by the plaintiffs in O.S.No.60/2018, the defendant had filed his rejoinder wherein he had reiterated the facts he had earlier pleaded.

5.1 On the above pleadings, the trial Court framed as many as six issues in O.S.No.59/2018, and six issues in O.S.No.60/2018, of which one issue was an additional issue. The critical issues however are Issue Nos.2 to 4, and the additional issue in O.S.No.60/2018. And they relate to legitimacy of Ext.A1 and Ext.A30 partition deeds, validity of Ext.A4 and Ext.A5 sale deeds executed by the first plaintiff in favour of the second plaintiff, entitlement of the defendant to have Ext.A4 and Ext.A5 sale deeds set aside and also the



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maintainability of the suit in the face of limitation.

5.2 The dispute went to trial. Both the suits came to be tried jointly and as outlined earlier, evidence was recorded in O.S.No.59/2018. The plaintiffs have examined themselves as P.W.1 and P.W.3. Besides they had also examined four other witnesses as P.W.2, P.W.4 to P.W.6. The plaintiffs have produced Ext.A1 to Ext.A43, of which some of the documents have already been introduced in the facts narration above. All the rest of the documents which plaintiffs have produced, Ext.A11 to Ext.A14 relate to O.S.No.300/2007, which includes the interlocutory application and the order passed in I.A.No.1080/2007. Ext.A15, Ext.A16 are some of the tax receipts and Ext.A21 to Ext.A29 are adangal relating to the suit properties. Ext.A35 and Ext.A36 are relate to O.S.No.135/2005 and I.A.No.273/2007. Ext.A39 to Ext.A43 are some of the documents produced to show that the defendant was in debts.

5.3 For the defendant, he examined himself as D.W.1 and produced Ext.B1 to Ext.B22. Most of the documents that he had produced are either copies of the documents which the plaintiffs have produced or relate to the partition suit



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in O.S.No.59/2018, and they already finds a place in the facts narration.

Ext.B14 in particular relates to O.S.No.300/2007.

6. On appreciating the evidence before it, the trial Court accepted the pleadings of the plaintiffs and held that the suit filed by the defendant was barred by limitation. It also proceeded to hold that Ext.A1 partition deed is valid.

7. Aggrieved by the decrees of the trial Court, the defendant preferred twin appeals in A.S.No.22/2019 and A.S.No.23/2019, and that came to be allowed.

The line of reasoning of the first appellate Court is as below :

(a) That there is no evidence to indicate that after the execution of Ext.B2, settlement deed and Ext.B5 final decree, and till the execution of Ext.A1 partition deed that the family stayed united. Indeed, there is no whisper about Ext.B2 and Ext.B5 in Ext.A1, partition deed.

(b) Since Ext.A3 partition deed includes properties covered under Ext.B2 and Ext.B5, the same is void and the defendant could avoid or ignore the document, which implied that he need not seek for



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setting aside Ext.A1 partition deed.

(c) So far as Ext.A3 Power of Attorney is concerned, it cannot create any right in favour of the first plaintiff.

(d) Turning to the alleged loan liability of the defendant is concerned, the sale consideration as stipulated in Ext.A4 and Ext.A5 does not reconcile with the loan liability as established in Ext.B11 to Ext.B13.

(e) Indeed the attesting witness to one of the sale deeds did not speak anything about payment of consideration.

8. Aggrieved by the said decrees of the first appellate Court, the present set of second appeals are preferred by the plaintiffs. The appeals are admitted for considering the following substantial questions of law :

(a) Has not the first appellate Court erred in ignoring the legal presumption under Sections 59 and 60 of the Indian Registration Act, 1908 r/w. Sec.114(e) of the Evidence Act, 1872, more particularly, the respondent is debarred from contradicting the recitals in the registered partition deeds dated 25.02.1993 (Ex.A1 and Ex.A30) in view of Sections 91 and 92 of the Evidence Act, 1872?



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(b) Whether the claim of the respondent is hit by the concept of issue estoppel for his prevaricative stand taken in respect of the sale deeds dated 22.02.1999 (Ex.A4), 06.12.2001 (Ex.A5), 24.02.1999 (Ex.A32) and 22.02.2001 (Ex.A32) executed by the respondent to his brother/2nd appellant?

(c) Has not the first appellate Court erred in ignoring the case of the respondent for declaration and recovery of possession, more particularly, when he himself had executed MoD dated 22.09.1995 (Ex.A41) and the sale deed dated 22.02.2001 (Ex.A32) by tracing his source of title under the partition deed dated 25.02.1993?

(d) Whether the first appellate Court is legally correct in holding that the deed of partition executed even between the co-sharers is not a document of title, particularly, the respondent being a party to the partition deeds dated 25.02.1993 is legally estopped from taking such plea in the absence of any prayer for cancellation under Sec.31(2) of the Specific Relief Act?

(e) Whether the suit filed by the respondent for declaration and possession is maintainable in law, especially in the absence of any prayer for cancellation of the partition deeds dated 25.02.1993 (Ex.A1 and Ex.A30) in which, the respondent is a party?



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(f) Whether the first appellate Court erred in ignoring the concept of blending of the properties covered under Ex.B2 dated 07.06.1970 into the common hotchpots of Ex.B1 dated 07.07.1959, particularly when the respondent had volitionally allowed the common enjoyment between 1970 and 1993?

(g) Is not the first appellate Court in placing burden of proof on the vital facts pleaded by the respondent, especially when the law mandates that a person who asserts something has to prove the said thing under Sections 101 and 103 of the Evidence Act?"

9.1 The question raised are many, but the outcome of this case revolve chiefly around the sustainability and validity of Ext.A1 partition. To remind, the first appellate court had held that Ext.A1 is a void document and this was its primary reason for dismissing the plaintiffs' suit and decreeing the defendant's suit. The second part is about whether the first plaintiff had acted in excess of his authority granted to him under Ext.A3 Power of Attorney when he executed Ext.A4 and Ext.A5 infavour of the second plaintiff. And, since he had also executed Ext.A31 in favour of the same second plaintiff on the strength of Ext.A3, and inasmuch as the defendant had not challenged Ext.A31, how far it would impact the case of the defendant in seeking



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cancellation of Ext.A4 and A5. And, underlining these issues is the point on the bar of suit due to limitation. The arguments which both sides have advanced essentially spins around them. They are now stated.

Arguments for the Appellants/Plaintiffs:

10. Shri V. Raghavachari, the learned Senior Counsel for the Plaintiffs/appellants made the following submissions:

- a) The foundation for the cause of action for the defendant's suit is that he is a divided son. And this division had occasioned under Ext.B5 final decree, and that thereafter there was never a reunion, and hence the inclusion of the properties covered by Ext.B5 final decree in Ext.A1 partition deed is bad in law, and that it was misrepresented to the defendant that the properties covered under Ext.B5 were not included in the partition. This allegation of the defendant stands belied by his stands in two earlier suits that he had laid. They are:
 - O.S.No.135 of 2005 on the file of Sub Court, Dharapuram, for partition of the entire properties covered under Ext.B1 partition deed (which was executed between Ramasamy Gounder and the first



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plaintiff). In his plaint, marked Ext.A34, he had alleged that the properties were ancestral properties and were in joint possession of the parties hereto and this pleading of the defendant in that suit is diametrically opposite to his pleadings in the present case. In the context of the cause of action of the present suit the defendant had pleaded in paragraph 6 of his plaint about his knowledge about the 1993 partition (referred to in the context where he alleged that he faced threat of being dispossessed under the pretext of a partition of the year 1993). He therefore, knew about Ext.A1 partition even when he laid Ext.A34 suit. The plaintiff herein as defendants in that suit had entered appearance and had filed their written statement disclosing Ext.A1 and Ext.A30 partition deeds (**copy of the written statement however, was not marked**) Thereafter, the defendant had filed I.A.No.273/2007 in O.S.No.135 of 2005 for withdrawal of the suit with liberty to file a fresh suit under Order 23 Rule 1 CPC. In the affidavit filed in support of this application (marked Ext.A35), the defendant had averred that he intended to file a suit based on certain information he had received about some additional properties



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and that some of the family members were trying to find an amicable solution. Vide order dated 21.06.2007, O.S.No.135/2005 was allowed to be withdrawn. What is however, contextually significant is that the trial court had not granted any leave to file a fresh suit on the same cause of action (The copy of this order is not **marked**).

- The second suit which the defendant had filed was O.S.No.300/2007. It is a suit for declaration of defendant's title based on Ext.B2 = A10 settlement deed, dated 07.06.1970 and was laid against the present set of plaintiffs/appellants. Yet another time, he did not disclose Ext.A1 and Ext.A30 partition deeds as could be evidenced from Ext.A11, plaint in O.S.No.300/2007. Yet again, the defendants therein (plaintiffs in O.S.No.59/2018) had filed their written statement (marked as Ext.A12), disclosing Ext.A1 and Ext.A30 partitions. In this suit the present defendant as plaintiff took out I.A.No.1080/2007 for an order of interim injunction. It was dismissed by the trial court after a contest vide Ext.A13. Thereafter, on 09.04.2011, the defendant chose to withdraw in O.S.No.300/2007, but not before filing the present suit he had laid



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based on Ext.B2 settlement deed and Ext.B5 final decree.

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Having taken up a position in the earlier suits quite contrary to the present suit, the defendant is estopped from pleading what he had pleaded now. Reliance was placed on the ratio in [1984-2 MLJ 285]. Secondly, in fitness of things, the defendant herein should have tested his case in O.S.300 of 2007 since that was a suit for declaration of plaintiff's title, where he faced resistance from the present plainiffs/appellants based on Ext.A-1 and A30 partition deeds.

b) When Ext-A1 = Ext.B10 partition deed was executed, the defendant was 23 years old and by his own pleading he was educated too. Where the parties of full age execute a legally binding document, then he is bound by the document unless it is pleaded and proved that his consent for executing the document was obtained by fraud. Reliance was placed on the ratio in ***K.M.Mahavakrishnan Vs R.Sami & Others*** [1980 (2) MLJ 398 (DB)].

c) The defendant pleads he was a victim of misrepresentation and fraud



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played on him when he executed Ext.A2. Here, the elements of fraud have not been specifically pleaded as required under Order VI Rule 4 CPC. This apart, that he was not defrauded stands established from the fact that he himself had voluntarily acted on Exts.A1 and A30 partition deeds. They are evidenced as below:

- After his studies the defendant had started a business, a proprietary concern in the name and style of 'Sri Vinayaga Polymers'. He would then approach M/s Lakshmi Vilas Bank for availing a loan. Ext.A39, application form dated 22.08.1995, wherein he had disclosed Ext.A1 and Ext.A30 partition deeds. Ext.A.40, is the letter sanctioning the loan, and Ext.A41 dated 22.09.1995 refers to the copy of the memorandum of deposit of title deeds, and it recites about Ext.A30.
- After the withdrawal of O.S.135 of 2005 and during the pendency of O.S.300 of 2007, on 06.03.2009, the defendant has executed a mortgage deed in favour of one Palanisamy and offered his properties in S.No.616/1 and 616/3 for the loan he had obtained. These are the properties which were originally settled by Ramasamy Gounder in favour of defendant under Ext.B2. However, in Ext.A1



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partition deed, these items of properties were allotted to the share of the first plaintiff. It is in these circumstances, he voluntarily and unilaterally executed Ext.A7, cancellation deed dated 02.04.2009, cancelling Ext.A6, mortgage deed, wherein he recites the he did not have any right over the properties in Sy.No.616/1 and 616/3. On the date he executed Ext.A7, the defendant was around 39 years of age.

- d) The defendant alters his position at will and the fact that he had acted on Ext.A1 leaves him with no right to question this document even collaterally.
- e) The defendant makes a selective dispute vis-a-vis the sale deed executed by the first plaintiff, the father as the Power of Attorney of the defendant. Ext.A3 = Ext.B11 Power of Attorney deals with three items of properties : Sy.Nos.611, 601 and 602/A with a right over a well in Sy.No.602/B. Of these three properties, the property in Sy.No.611 was neither settled in his favour under Ext.B2 nor allotted to him under Ext.B5, final decree, but was allotted to him only under Ext.A1 = Ext.B10, and Ext.A30 = Ext.B9 partition deeds, both dated 25.02.1993.



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Now on the strength of Power of Attorney, the first plaintiff had executed Ext.A4 = Ext.B12 sale deed dated 22.02.1999, as regards the properties in Sy.Nos.601 and 611. In the suit, he has challenged only the sale of Sy.No.601 and not Sy.No.611. If the contention of the plaintiff that father had made the sales without taking the consent of the son has to be accepted, then in fitness of things, the defendant ought to have challenged the sale of both Sy.Nos.601 and 611 as they both share identical character. This apart, under Ext.A31, the first plaintiff father had sold the property comprised in S.No.602-A allotted to the defendant under Ext.A10, to the second plaintiff, and this too was not challenged.

- f) The suit is barred by limitation. In O.S.135 of 2005, the plaintiff had indicated his knowledge to Ext.A1 partition. Therefore, even if the defendant is presumed to have a cause for his action, then limitation starts right at the time when he laid O.S.135 of 2005. Secondly, Ext.A12 written statement in O.S.300 of 207 was filed on 06.11.2007 in which Ext.A1 and Ext.A30 were disclosed. Even if this reckoned,



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limitation expires by 2010 for the defendant to seek cancellation of Ext.A1 partition deed.

Arguments for the Respondent/Defendant:

11. Per contra, Thiru. Palaniappan, the learned counsel for the respondent submitted that his strategy revolves around just establishing two aspects on the substantive right of the plaintiff and one aspect in procedure. Developing his argument further the learned counsel submitted :

- It is an admitted case that vide Ext.B1 - partition deed dated 07.07.1959, Ramasamy Gounder, his wife and their children had partitioned the ancestral properties in the hands of the former. And it is also an admitted fact that under Ext.B2 : Ext.A10 dated 07.06.1970, Ramasamy Gounder had settled the suit properties in favour of the respondent. It also goes as an undisputed fact that a suit was laid on behalf of the respondent for partition in O.S. No.259 of 1970, and that the suit was decreed vide Ext.B4 dated 30.08.1970 preliminary decree followed by Ext.B5 final decree. Accordingly, the respondent had become a divided son and unless a reunion is established Ext.B1 -



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partition cannot bind him.

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- The second aspect on the substantive right is the extent of authority vested in the first plaintiff under Ext.A3 Power of Attorney and its effect on the validity of Ext.A4 and A5 sale deeds
- The flaw on the procedural front is that the trial court did not even frame an issue as to the effect of Ext.B5 - final decree passed in O.S. No.259 of 1970 and also the nature of authority which the father of the respondent had obtained under Ext.A3 = B11 Power of Attorney. This has misdirected the trial court into a wrong finding but the first appellate court has delved deeply into the controversy and framed appropriate points for consideration and directed its approach along the point that it had raised.

12. Developing the argument further, the learned counsel submitted:

- a) That the first plaintiff was a privy to (i) Ext.B1 Partition Deed between him and his father Ramasamy Gounder, (ii) Ext.B2 - Settlement Deed which Ramasamy Gounder had executed in favour of the respondent and (iii) was the defendant in O.S. No.259 of 1970, Ext.B4 preliminary decree passed on 13.03.1970 and also Ext.B5 -



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final decree passed on 03.10.1972. However not one of the facts were pleaded by the plaintiffs in their pleadings and not one of these documents were ever recited in Ext.A1 partition deed. It may be relevant to mention that at the time when Ext.A1 was executed the defendant was still under the care of the first plaintiff.

b) It is relevant to note that when Ext.B4 preliminary decree, followed by Ext.B5 final decree in O.S.No.259/1970 were passed, the defendant was anywhere between few days to couple of years old. Therefore, unless the defendant was informed by the first plaintiff, he would never know about these facts. There is no case for the plaintiffs that when the parties herein entered into Ext.A1 and Ext.A30 partition deeds, he was informed fully about Ext.B4 and Ext.B5 decrees. Therefore, even if the case of the plaintiffs / appellants are presumed to be valid, yet unless it is demonstrated that the defendant knew about the existence of Ext.B4 and Ext.B5 at the time when he executed Ext.A1 and Ext.A30, it could not be said that he had taken a conscious decision to abandon his interest.

c) It might be that the defendant was 23 years old and was educated when Ext.A1 was executed. It is not about whether the defendant was in a



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position to know what he was doing, but was all about whether he trusted his father. Very obviously first plaintiff being the father of the defendant, the latter had very little to suspect him, but had everything to trust him. It is hence the defendant had allowed the inclusion of Ext.A1 and A31 in the Memorandum of Title deeds that he had executed in favour of M/s Lakshmi Vilas bank.

- d) It was pleaded by the plaintiffs that both Ext.B2 settlement deed as well as the suit for partition laid in O.S.259 of 1970 and Ext.B5 final decree passed therein are intended to save the property from the operational purview of Land Reforms Act, 1961 and were not intended to be acted upon. If the intention is to defeat the operation of any law, then it is a fraud on statute or the judicial process, as the case may be, and hence the Court cannot countenance any such contentions. However, the first plaintiff as PW1 has conceded that Ext.B2 settlement deed was executed not with any intention to save the property from the Land Reforms Act and with this has gone the basis of the contention of the plaintiffs. Another fact associated with the above plea is that the plaintiffs have chosen not to plead that Ext.B2, and Ext.B4 and B5 were intended to avoid the implications of the Land Reforms Act in their



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pleadings in their suit in O.S.No.58/2018, but by a belated after thought, have introduced the theory in the written statement in O.S.No.60/2018, which the defendant had filed against them.

- e) Under Ext.B4 preliminary decree, both the first plaintiff and the defendant were granted half share each in the properties, but when it ultimately culminated Ext.B5, final decree, about two years after the passing of the preliminary decree, the share of the first plaintiff was reduced to $1/3^{\text{rd}}$, since the second plaintiff was born by then. This would imply that the intent was to give effect to the partition in the real sense of the term and not otherwise.
- f) Turning to Ext.A4 and Ext.A5 sale deeds, which the first plaintiff has made in favour of the second plaintiff on the strength of Ext.A3 = Ext.B11 Power of Attorney dated 16.07.1998 is concerned, the tenor of the Power of Attorney which the defendant had executed in favour of the first plaintiff would indicate that the intention was only to manage the properties of the defendants and not to alienate. Indeed there is a restriction vis-a-vis the power so executed, where the power stipulates that the first plaintiff / the Power of Attorney Holder was not to alienate without the express consent of the defendant. However, without



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obtaining any consent, his father went on selling spree of the properties to his other sons. Indeed, the father as P.W.1 too has admitted that the Power of Attorney was executed only for managing the property.

g) The contention of the plaintiffs that inasmuch as the defendant was a party to Ext.A1 and Ext.A30 partition deeds could only avoid those documents through a suit for cancellation of these documents is concerned, the same has to be understood in the context of the frame of suit:

- The plaintiffs claim title based on Ext.B5 final decree for partition and Ext.B2 settlement deed executed by the father.
- When there is no evidence to indicate that he has abandoned his right consciously, they ought to prevail. And secondly, Ext.A1 and Ext.A30 themselves are product of undue influence, since the defendant had barely turned major when these documents were executed and at that relevant time, when he was still under the care of his father and depended on him, and when the first plaintiff father occupied a position of absolute confidence, the defendant had very little to suspect. But the father had misused and unduly influenced his son to execute Ext.A1 and Ext.A30 without



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disclosing Ext.B4 and Ext.B5 decrees. When these partition deeds are product of undue influence, the burden is on the plaintiff to establish that they are not. But, the plaintiffs have not chosen to discharge the same.

- h) The plaintiffs have produced several revenue documents to indicate Ext.A1 partition deed had taken effect, but all these documents are post litigation.
- i) It is not that the defendant had challenged only Exts.A4 and A5 selectively. These two documents were challenged essentially because they deal with properties covered either under Ext.B5 or Ext.A10=Ext.B2. The defendant takes a principled position to secure only those properties covered under Ext.B5 and Ext.A10 = Ext.B2 and not others, and hence he did not choose to challenge any of the other documents. It is in this context, it may be relevant to state that the respondent did not challenge Ext.A32 sale deed that he had executed in favour of the second appellant essentially because the property dealt with thereunder is not the subject matter either of Ext.B5 or Ext.A10, and only in Ext.A1.
- j) So far as the plea of bar of suit due to limitation is concerned, Ext.A1 is



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a void document, and the respondent is well entitled to ignore it.

Ext.A10 is void document for the reasons stated earlier above.

Secondly, the limitation for instituting a suit is not three years since the plaintiffs seek recovery of possession based on title. Hence, limitation is twelve years. And the plaintiff did not know the facts and without knowing the facts fully, he instituted O.S.No.135 of 2005 on the file of Sub Court, Dharapuram, and when he knew the fact, he withdrew that suit with leave of the Court to file a fresh suit, which he instituted within 12 years of the withdrawal of O.S.No.135/2005.

Discussion & Decision

13. The plaintiffs are relatively on a safer turf. They trace their title to Ext.A1 partition deed to which the defendant too was a party. Therefore, till Ext.A1 is dislodged in a manner known to law, there is minimum that they need to do since the burden will be on the defendant to prove that he joined the execution of Ext.A1 due misrepresentation and fraud played by his father.

14. Notwithstanding the several substantial questions framed by this court, the



core issue is still pivoted on two overlapping aspects of law: (a) Is Ext.A1 a void document, merely because it includes the properties covered under Ext.B2 and B5? (b) Should the defendant have sought for cancellation of Ext.A1 partition deed? The answers to these questions would lead to the next question: Whether the suit is barred by limitation? The other questions are more on evidentiary aspects that seek answers on the rule of estoppel.

14.2 Here one aspect about the judgement of the first appellate court is intriguing. Even if it is assumed that the case of the defendant is acceptable in the manner which the first appellate court has held, how can it hold that the entire Ext.A1 is void? It may at the best be void to the extent Ext.A1 deals with the properties dealt with under Ext.B2 and B5. But it will pale into insignificance if Ext.A1 is found to be a voidable document in law.

15. Few basic facts are not in dispute. (a) The existence of Ext.B2 settlement deed; (b) Passing of the final decree in O.S.259 of 1970; (c) Execution of Ext.A1 partition deed along with Ext.A30 partition deeds without any reference to Ext.B2 or Ext.B5, but still including the properties in the said two documents; (e) that the defendant had executed Ext.A3 constituting his



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father, the first plaintiff herein, as his power of attorney; and (f) the execution of Ext.A4 and Ext.A31 sale deeds by the first plaintiff in favour of the second plaintiff on the strength of Ext.A3.

16. To start with, the defendant, would now require this court to believe that he joined in the execution of Ext.A1 because he trusted his father, who deliberately did not disclose to him either about Ext.B2 settlement deed or about Ext.B5 final decree. Else where he would allege that his father had made deliberate misrepresentations to him and his trust in his father had led him to sign Ext.A1 or ExtA3 Power of Attorney.

17. This Court is conscious that a document which was executed in 1993 (Ext.A1), faces a challenge some 18 years later, in 2011. If the pleading of the defendant is keenly examined, it is founded on two aspects: (a) the trust he had reposed in his father; and (b) that the father had played fraud on him through misrepresentation, or to state it differently that his father betrayed him. It is therefore, not about the non disclosure of ExtsB2 and B5 in Ext.A1 or to the defendant prior to its execution, but about the defendant's unquestionable trust in his father.



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18. With no intent to turn sentimental to make a moralistic major premise that no father would act against his son, but rather prefer to examine whether this father of the defendant, the first plaintiff had betrayed his son's trust in him and played fraud on him. The year was 1993. Ext.A1 along with A30 were executed. The defendant was a young man of 23 when he executed both Exts.A1 and A30. He had no complaints of bad parenting by his father before that. Indeed this father who he now alleges as the one who did not live up to the trust he reposed on him was the very father who had educated him in Bangalore. As later course of events would indicate that it is the same father who stood as a guarantor for a loan which the defendant had obtained from the bank when he started his business. Now, where are those specific facts which establish that the first plaintiff was keen to cheat his eldest son, the defendant. Somewhere in his pleadings the defendant had alleged that his father had preferred his second son for showering his love and care more. If that is so, how to account for the education the same father had given the defendant, and his willingness to pledge his interest in his properties when he stood as a guarantor to the defendant's loan? The foundational fact that the first plaintiff was keen to act against the interest of his elder son that the



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defendant is, is least convincing. Therefore, except the self serving allegation of the defendant, there is hardly any evidentiary material on record to enable this Court to recreate the circumstances under which Ext.A1 could have been executed in the circumstances which the defendant contends. His pleadings too are not graphic enough to help the court to contemplate a possibility of the defendant's certification about his father being true, something which Order VI Rule 4 CPC requires, is also conspicuously absent. This is first of the circumstances this court finds against the defendant.

19. Now, to the second set of circumstances and they show that the defendant had acted on Ext.A1 and A30. They are:

- a) The defendant had willingly offered the properties that he had obtained under Exts.A1 and A30 as security for the commercial loan that he obtained from M/s Lakshmi Vilas Bank as could be seen from Ext.A39 and A40, both were dated in 1995, when the defendant was around 25 years. (And the father, whom he now accuses and despises, stood as a guarantor, exposing in the process his own interest in his properties to the peril of being lost if the defendant defaulted in repaying his debt). He had no qualms then.



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b) On 22.02.2001, the defendant had executed Ext.A32 sale deed in favour of a property covered in Sy.No:703C (Re.Sy.No56/3),703/D (Re.Sy.No:56/4) and 624. While the defendant did not obtain the properties in Sy.No 703-C or 703-D either under Ext.B2 settlement deed or Ext.B5 final decree, the property under Sy.No:624 was indeed allotted to the first plaintiff under Ext.B5 final decree. But for the first plaintiff offering the property allotted to him under Ext.B5 to be included in Ext.A1 partition, the defendant would not have even obtained this property. And, the defendant is careful enough not to disown Ext.A1 when it comes to Ext.A32 sale deed, but still tries to outmanoeuvre the same document selectively. This is plainly impermissible in law. This apart, the defendant had nowhere disputed the fairness of the allotment made under Ext.A1 partition deed, and this fairness could not have been achieved but for the inclusion of the properties covered in Exts.B2 and B5 in Ext.A1, which it must be said also includes the properties allotted to the share of the first plaintiff in Ext.B5. If the properties covered under Ext.B2 and B5 were excluded from Ext.A1, then it upsets the fairness of allotment made under Ext.A1



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partition to all the parties thereto, and seen in the context, if the defendant relies on Ext.A1 to feed him the title to execute Ext.B32 sale deed in favour of his younger brother, then it could be derived from his conduct that he had taken a conscious decision to allow the properties covered under Ext.B2 and B5 to be part of Ext.A1. The defendant is therefore estopped from selectively impugning Ext.A1 and trying to keep alive Exts.B2 and B5.

c) The defendant wants this court to believe that he was misled by his father into believing that Ext.A1 did not include those properties covered under Ext.B2 and B5, till 2011 when he laid his present suit. This Court believes that it is not hearing any bedtime stories from the defendant.

d) On 06.03.2009 the defendant executed Ext.A6 mortgage deed as regards the properties that were part of the properties in Ext.B2=A10 settlement deed in his favour, but were not allotted to him under Ext.A1 partition. In the following month, to be precise, on 02.04.2009, he was forced to discharge the mortgage-debt and had obtained a receipt from



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the mortgagee wherein the latter had accused the former of deceiving him by offering the properties which as per documents did not belong to him. A receipt for discharge of a mortgage-debt could have been issued even without an accusation over the mortgagor's claim of title over the mortgaged-property, but this mortgagee chose to make it, and the defendant as mortgagor had accepted it without any resistance. This conduct of the defendant is contrary to ordinary course of human conduct which guides the court in appreciating the evidence and hence it cannot be ignored. More so because, this document was executed when O.S.300 of 2007 was still pending. The defendant could have explained it, but not this defendant. Silence is a virtue of the wise, but not in courts when an onus to speak is cast, even for the wise.

20. Here was a young man, educated, who believed in his entrepreneurial kills, commenced a business and tried to raise finance on the security of the properties he had. This is believable. But to say that he included Ext.A1 and A30 in the memorandum of deposit of title deeds because his father told him to do so is nothing short of a joke in a stand up comedy. Does the defendant mean to say that he was not matured enough to take any intelligent decision



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himself? As already stated that if only the first plaintiff was ill-motivated and was bent upon to cheat his elder son, then why should he expose his interest to the peril of being proceeded against in the eventuality of the defendant defaulting to pay the loan? The explanation which the defendant now comes forward with, when filtered through the mind of the reasonable man of law appears to be a baggage of bluff, as the same does not conform to the ordinary course of human conduct.

21. The probability is that the defendant had no qualms over the execution of Ext.A1 till 2005 and to challenge it he had founded a limb in Ext.B2 and B5, since they were not even recited in Ext.A1. His case is that he was a baby when both these documents came into existence and hence unless he was informed about it by his father there was no opportunity for him to know it. It may be true in 1993, but not in 2005 when he instituted O.S.135 of 2005. Has he not even checked the encumbrance certificate at any time before 2011? Not even when he obtained commercial loan for his business from M/s Lakshmi Vilas Bank?

22. Irrespective of exploring whether the inclusion of properties covered



under Ext.B2 and B5 in Ext.A1 would amount to fraud, it is required to be considered what options had the defendant even if it constituted a fraud? The first appellate court had come up with a solution. It says Ext.A1 itself is rendered void due to the non-disclosure of Exts.B2 and B5 and hence the defendant could ignore Ext.A1. This would mean that the defendant could avoid Ext.A1 without instituting a suit for avoiding it. The sustainability of this line of reasoning of the first appellate court will be now considered.

23. Under Sec.19 of the Contract Act, when consent of a party is procured through misrepresentation or fraud, it only renders what was done voidable and not void. Sec.19 of the Contract Act reads:

“Section 19. Voidability of agreements without free consent:-

When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.”



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After referring to Salmond on Jurisprudence, the Supreme Court in ***Murugan Vs Kesava Goundder (dead) through Lrs*** [(2019)20 SCC 633] has captured the idea behind a valid, void and voidable documents as below:

“15. Salmonds on Jurisprudence, 12th Edition, has noticed the distinction between valid, void and voidable in the following passage:

“.... A valid agreement is one which is fully operative in accordance with the intent of parties. A void agreement is one which entirely fails to receive legal recognition or sanction, the declared will of the parties being wholly destitute of legal efficacy. A voidable agreement stands midway between these two cases. It is not a nullity, but its operation is conditional and not absolute.”

Accordingly where a party pleads that he would not have lent his consent to the execution of a document but for the misrepresentation or fraud, he has to take a conscious decision to avoid it. This necessarily implies that the party who claims himself to be a victim of misrepresentation or fraud should seek the cancellation of the document in terms of Sec.31 of the Specific Relief Act.

It reads:

“Section 31. When cancellation may be ordered:- (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it



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adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his book the fact of its cancellation.”

Therefore, if only the defendant has to succeed he should have instituted a suit for cancellation of Ext.A1, more so when he himself is a party to the said document. He has not done it.

24. The game for the defendant is over now. And, today he cannot institute a suit either for limitation intervenes. Even if *terminus quo* for instituting a suit for avoiding Ext.A1 is reckoned from the date of knowledge of the alleged fraud or misrepresentation involved in its execution, then time runs at least from the date on which O.S.135 of 2005 was instituted, for in paragraph of 6 of the plaint (marked Ext.A34), the defendant had already indicated his knowledge about the partition of the year 1993, and hence any suit for avoiding Ext.A1 should have been filed within three years from the date of



institution of O.S.135 of 2005.

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25. This brings to the final leg of the appeal. Should Ext.A4 and A5 sale deeds dated respectively 22.02.1999 and 06.12.2001, which the first plaintiff had executed in favour of the second plaintiff on the strength of Ex.A3 Power of Attorney should be set aside in a suit filed in 2011? It is not in dispute that under Ext.A3 Power of Attorney, the defendant had granted only qualified power of alienation to his father. It says that the Power Holder, namely the first plaintiff, should obtain the consent of the defendant before he alienates the latter's properties. Clause 1 of the Ext.A3 reads: *“To sell the property morecarefully described hereunder to any Purchaser at such price which my said attorney in his absolute discretion think property with my consent.”* This clause however, does not stipulate that the consent which the first plaintiff was required to obtain must be a written consent of the defendant. It may have to be emphasised here, besides Ext.A4 and Ext.A5, on the strength of the same Power of Attorney, the first plaintiff had executed another sale deed in Ext.A31 in favour of the second plaintiff as regards some other property of the defendant. And, this sale deed was not challenged.



26. The point is not about the right of the defendant to seek cancellation of setting aside Ext.A4 and A5, but about when it should have been done. It should have been done within three years from the respective dates on which Exts.A4 and A5 were executed. Here the defendant comes out with an explanation that since the suit was also filed for recovery of possession, he has 12 year period to institute the suit. Here the defendant has entertained considerable misconception in law. First, he is not entitled to seek recovery of possession unless Exts.A4 and A5 sale deeds are set aside. This implies the prayer for recovery of possession is consequential or conditional upon the cancellation of Exts.A4 and A5. And, he has made prayer for recovery of possession as a consequential relief to his prayer for declaration of his title over suit properties based on Ext.B2 and B5. But he cannot achieve it unless he had laid a suit for avoiding Ext.A1. Therefore, the defendant cannot telescope his prayer for recovery of possession into his prayer for cancellation of Exts.A4 and A5 ingeniously. The suit for cancellation of these documents are also badly barred by time.

27. Moving next to the implication of defendant's choice not to challenge Ext.A31. Here, the defendant's explanation is that he challenged Exts.A4 and



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A5 because they deal with properties covered under Exts.B2 or B5, and since Ext.A31 does not deal with those properties he did not challenge it. The issue here does not relate to the properties covered by any of Exts.A4, A5 or A31, but about the extent of authority the first plaintiff was granted under Ext.A3 to sell the properties of the defendant, based on his allegation that he had not given any absolute power of alienation to his father to execute Exts.A4 and A5. By the same token, has the father obtained any written consent for executing Ext.A31? The defendant has no case that he had given one. What therefore can be inferred is that the defendant has lent his tacit assent to his father when he executed Exts.A4, A5 and A31, or he should have waived the very condition that he had imposed for the sale of his properties by his power holder.

28. From whichever angle these appeals are viewed, this Court comes to an irresistible conclusion that the defendant has not been able to convince this Court that he could obtain the relief he has sought by overlooking Ext.A1, or sidelining limitation involved in instituting a suit for avoiding Ext.A1. Necessarily, all the substantial questions of law have to be held in favour of the appellants.



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29. In conclusion, these appeals are allowed with costs through out. The judgment of the first appellate Court in A.S.No.22 of 2019 and A.S.No.23 of 2019 are hereby set aside. Consequently, connected miscellaneous petitions are closed.

07.06.2024

Index : Yes / No
Internet : Yes / No
Speaking / Non-speaking
ds



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To:

1. The Principal District Court
Tiruppur.
- 2.The Sub Court
Kangayam.



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