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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 29.09.2023

Pronounced on : 26 .04.2024

CORAM

THE HONOURABLE **DR.JUSTICE ANITA SUMANTH**
AND
THE HONOURABLE **MR.JUSTICE R.VIJAYAKUMAR**

A.S.(MD)No.127 of 2013
M.P.(MD)Nos.1 of 2013, 1 of 2014 and
C.M.P.(MD)No.9949 of 2023

- 1.Anandavalli
- 2.Rajalakshmi
- 3.Santha Devi (Died)
- 4.Mahalingam
- 5.Balasubramanian
- 6.Vijayakumar
- 7.Subramania Karayalar
- 8.Ponnulakshmi
- 9.Piramma Nayaki
- 10.V.Ganesa Subramanian

...Appellants

-Vs.-

- 1.Kuppusamy
- 2.Shunmugasundari
- 3.Rajalakshmi (Died)
- 4.Sattakumari
- Aymani (Expired)
- 5.Subbulakshmi



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6.Shunmugalatha

7.Ayudaiammal @ Indira

8.Murugan

9.Pon Srimani

10.Iyyappa Rajendran

11.Ponmani

12.Narayani

13.Srinivasa Karayalar (Died)

Sethulakshmi (Expired)

14.Shencottai Sattanatha Karayalar Trust

through its Secretary,

Padmanabha Karayalar,

West Car Street, Shenkottah.

15.P.Vasanth Kalyani

16.Diwan Mohideen

17.Arumugam Karayalar

18.Subamanian

19.Arumugam Karayalar

20.Ameenah

21.Velu Mudaliyar

22.Saravanan

23.Muthoot Finance Corp Limited,

through its Branch Manager,

Door No.2-3-61, 1st Floor,

Opp.Bus Stand,

Shencottah, Tirunelveli District.

24.S.Sattanathan

25.S.Sriram



26.S.Selvaraj

27.Harihara Priya

28.Vidhyalakshmi

...Respondents

(10th appellant was brought on record as legal heir of the deceased third appellant vide order dated 15.09.2022 in C.M.P.(MD)Nos.6240 to 6242 of 2016)

(Appellants/Plaintiffs are exempted from substituting the legal heirs of the deceased R3 vide Court order dated 10.08.2023 in CMP(MD).No. 9943 & 9949 of 2023)

(R13 died and the appellants are exempted from substituting the legal heirs of the deceased R13 as R13 remained exparte in the original instance vide Court order dated 04.07.2023 in CMP(MD).No.9514 of 2019)

PRAYER:- Appeal Suit filed under Section 96 of Code of Civil Procedure, against the judgment and decree passed in O.S.No.43 of 2009 dated 18.12.2012 on the file of the 3rd Additional District and Sessions Court, Tirunelveli.

For Appellant -1 :Mr.B.Micheal Sebastin

For Appellants 2, 4 to 6,
8 to 10 :Mr.H.Arumugam

For R1 and R2 :Mr.M.Vallinayagam
Senior Counsel
for Mr.D.Nalla Thambi

R3 and R13 :Died

R4 to R12, R14, R20
R23, R26 to R28 :Dispensed with

R15 to R19, R21,R22,
R24 and R25 :No Appearance



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JUDGMENT

(Judgment of the Court was delivered by **R.VIJAYAKUMAR, J.**)

The plaintiffs are the appellants. The suit in O.S.No.43 of 2009 was filed on the file of the III Additional District and Sessions Court, Tirunelveli for the relief of declaration that the plaintiffs 1 to 6 are entitled to 1/5th share and plaintiffs 7,8 and 9 are entitled to 2/15th share in suit items 1 to 4. They have further prayed for passing of a preliminary decree granting partition and separate possession of 5/15th share. The plaintiffs have further prayed that 16th defendant in the suit should account for and pay the income from the 5th schedule property relating to their 5/15th share. The plaintiffs have further prayed that defendants 17 to 24 being the tenants of the 6th schedule property, may be directed to deposit the rent before the Court. The trial Court after full-fledged trial, had dismissed the suit in entirety. Challenging the same, the present appeal has been filed by the plaintiffs.

(A). The Summary of the plaint averments are as follows:

2. Item Nos.1 to 4 of the suit schedule properties originally belonged to one S.Rathinavel Karayalar as ancestral property. His first wife namely Thangammal had predeceased him. The said Rathinavel



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Karayalar was bedridden for a period of two years before his death and he died intestate in the year 1994. The said Rathinavel Karayalar's second wife namely Muthulakshmi died intestate on 26.01.2008. The said Rathinavel Karayalar was not blessed with any children through either of the wives.

3.The plaintiffs had further contended that after the death of the second wife namely Muthulakshmi, the property had devolved upon the plaintiffs and the defendants 3 to 15 who are the Class-II legal heirs of the deceased Rathinavel Karayalar. The defendants 1 and 2 do not have any right, title or possession over the said property. The second defendant was a house maid during the life time of Rathinavel Karayalar and the first defendant is the husband of the second defendant. The first and second defendants are no way related either to Rathinavel Karayalar or through any one of the wives of Rathinavel Karayalar. The defendants 1 and 2 were managing the properties on behalf of Muthulakshmi during her life time. The plaintiffs are the children of Auvadaiammal and Vaikunda Rama Karayalar who are the siblings of the deceased Rathinavel Karayalar. The plaintiffs, defendant 3 to 15 are in possession of the property as co-owners.



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4.The 5th schedule property belongs to Sattanatha Karayalar Trust. One Padmanabha Karayalar was the the Secretary of the said Trust and from and out of the income of the Trust properties, Rathinavel Karayalar was receiving 1/15th share. Therefore, the plaintiffs and the defendants 3 to 15 are also entitled to receive the said share.

5.The plaintiffs had further contended that they had issued an Advocate notice to the defendants 1 and 2 on 19.01.2009 instructing them to admit the title and possession of the plaintiffs and the defendants 3 to 15. Though the defendants 1 and 2 have received the said legal notice, they have not responded and therefore, it should be deemed that they admit the contentions of the plaintiffs.

6.In the sixth schedule property, there are several shops in the ground floor and the first floor which are in occupation of the defendants 17 to 24 in the capacity of tenants. Hence, the plaintiffs 1 to 6 have prayed for declaration of 1/15th share, plaintiffs 7 to 9 have prayed for 2/15th share and in total 5/15th share and for a consequential prayer for partition and separate possession.



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(B). Summary of the written statement filed by the defendants 1 and 2 is as follows:

7.The suit schedule properties were allotted to the share of Rathinavel Karayalar in a partition suit in O.S.No.33 of 1961 on the file of the Subordinate Court, Tirunelveli. According to the defendants, since Rathinavel Karayalar was not blessed with any issues, he had adopted the second defendant. At the time of death of Rathinavel Karayalar, only the defendants 1 and 2 performed the last rites.

8.The defendants have further contended that right from childhood, the second defendant was treated as the foster child of Rathinavel Karayalar and his wives. Only the said couple had arranged the marriage of the second defendant with the first defendant on 17.04.1981.

9.The first item of the property belongs to Rathinavel Karayalar and he had executed a Will on 08.09.1993 in favour of his wife Muthulakshmi and the foster daughter, the second defendant and her husband namely the first defendant.



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10. The second item of the property was jointly purchased by Rathinavel Karayalar and his wife Muthulakshmi. After the death of Rathinavel Karayalar, Muthulakshmi Ammal had executed a registered Will on 20.01.1995 in favour of defendants 1 and 2 and another portion of the said property was bequeathed under a registered Will dated 19.09.2005 in favour of the defendants 1 and 2.

11. The 3rd item belonged to Rathinavel Karayalar and he had sold away all the properties during his life time except the properties in Survey Nos.348, 347/1, 351/1, 352/2 and 353/3. The said Rathinavel Karayalar had executed a registered Will for the properties retained by him on 12.04.1990 in favour of the defendants 1 and 2 and their daughter Sutharsanarathana. The wife of Rathinavel Karayalar namely Muthulakshmi had executed another registered Will on 19.09.2005 for certain survey numbers in favour of defendants 1 and 2. Some other properties in the said schedule were bequeathed in favour of defendants 1 and 2 by Muthulakshmi under a registered Will dated 20.01.1995 in favour of defendants 1 and 2 and their daughters Sutharsanarathana and Thangam Senbag.



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12.As far as the 4th schedule is concerned, it jointly belongs to Rathinavel Karayalar and Muthulakshmi. Rathinavel Karayalar had executed two gift deeds on 12.09.1986 and 16.09.1986 in favour of the second defendant. The said Muthulakshmi had executed another gift deed on 06.03.1982 in favour of the second defendant for some portions of the property. As far as the 5th item is concerned, it is a trust property and relating to the said trust, a suit in O.S. No. 55 of 2006 is pending on the file of Sub Court Tenkasi. For the said trust property, Rathinavel Karayalar and his two wives namely Thangammal and Muthulakshmi have executed a registered Will in favour of the defendants 1 and 2 with regard to their share on 20.01.1995.

13.As far as the 6th schedule property is concerned, Muthulakshmi had executed a registered Will on 19.09.2005 in favour of the second defendant. Even during the life time of Muthulakshmi, the second defendant with a permission of the said Muthulakshmi had put up construction after obtaining approval from the Municipality.

14.The defendants have further contended that the contention of the plaintiffs that Rathinavel Karayalar and his wives have passed



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away intestate and therefore, the properties remain undivided is not factually correct. The said Rathinavel Karayalar and his wives have treated the second defendant as the foster daughter and they have executed a Will and gift deeds referring to the second defendant as a foster daughter. Therefore, in such circumstances, the question of declaration of the shares of the plaintiffs or partition or permanent injunction could not arise.

15. The defendants have further contended that the Court fee paid by the plaintiffs for the declaration prayer is not correct. They have further contended that there is no cause of action and the suit is barred by limitation. The 25th defendant had filed a written statement claiming ignorance about the dispute relating to the title of the property, but contended that he has been regularly paying the rent to the second defendant. The 26th defendant who is the legal heir of the 15th defendant had filed an independent written statement claiming 1/4th share.

(C). Summary of the reply statement filed by the Plaintiffs is as follows:

16. The Plaintiffs have strongly denied the fact that the second defendant was treated as the foster daughter of Rathinavel Karayalar.



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The suit properties are co-parcenary properties belonging to Rathinavel Karayalar and his brothers and therefore, these properties cannot be gifted away by Rathinavel Karayalar in his individual capacity. These properties were not partitioned by metes and bounds by the decree in O.S.No. 33 of 1961 on the file of the Sub Court, Tirunelveli. The plaintiffs have also disputed the fact that some of the survey numbers in 3rd schedule were sold away by Rathinavel Karayalar during his lifetime. The plaintiffs have disputed all the Wills and gift deeds relied upon by the defendants.

17.The plaintiffs have further contended that those documents are neither true nor genuine and they have been procured by defendants 1 and 2 for the purpose of claiming untenable title. They had further contended that all the alleged Wills are not valid in the eye of law and they are shrouded with suspicion. The plaintiffs had further stated that though Muthulakshmi Ammal is described as second wife of Rathinavel Karayalar in the plaint, in fact Muthulakshmi ammal is not a legally wedded wife of Rathinavel Karayalar. The alleged marriage of Rathinavel Karayalar with Muthulakshmi during the lifetime of Thangammal is not legally valid. Hence, the settlement deed said to have



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been executed by Rathinavel Karayalar or by Muthulakshmi are not valid in the eye of law. That apart Rathinavel Karayalar was not in a sound state of disposing mind in the year 1990 and he was bed ridden. The plaintiffs had further contended that Rathinavel Karayalar and his wives have no right whatsoever to bequeath the trust properties in favour of the defendants 1 and 2. Therefore, the defendants 1 and 2 have no right whatsoever to put up any construction in the plaint schedule properties including the 6th schedule property.

(D) Summary of the additional written statement filed by the Defendants 1 and 2 is as follows:

18.The 7th defendant in the suit had participated in O.S. No.33 of 1961 on the file of Sub Court, Tirunelveli and the same was finally compromised in High Court in A.S. No. 242 of 1972. The 7th plaintiff having knowledge about the said proceedings has suppressed the same in the plaint. During the lifetime of the Rathinavel Karayalar, 7th plaintiff had sold out his respective portion of land independently. The defendants had further contended that Rathinavel Karayalar married one Muthulakshmi with the consent of his wife Thangammal. Since Rathinavel Karayalar did not have any issue through either of the wives,



all three of them jointly decided and brought up the 2nd defendant as their foster daughter. The 7th plaintiff has also participated in the marriage function of the 2nd defendant.

19.The defendants have further contended that five family members of earlier Rathinavel Karayalar's family are necessary parties to decide the issues with regard to the trust properties which is shown as the 5th schedule property and therefore, the suit is bad for non-joinder of necessary parties of all Karayalar's families. All properties of Rathinavel Karayalar's family have not been included in the suit for partition and therefore, the suit is bad for partial partition. The entire properties of Rathinavel Karayalar's family had already been partitioned between the family members in O.S. No.33 of 1961 and therefore, the suit for partition is not maintainable.

(E) Proceedings before the trial Court:

20.On the side of the plaintiffs, one Subramanian was examined as P.W.1. On the side of the defendants, 15 witnesses were examined. Plaintiffs have marked Exhibits A1 to A11. Defendants have marked Exhibits B1 to B49. Exhibits X1 and X2 have been marked through two witnesses.

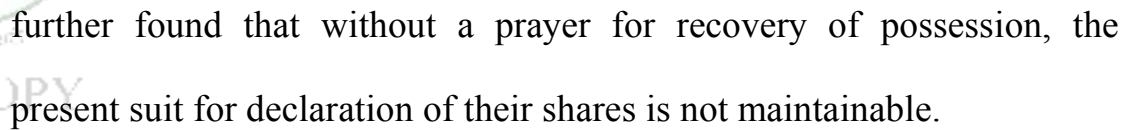


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21.The trial Court had framed six issues and two additional issues relating to oral partition and non-joinder of necessary parties. The trial Court had first taken up the additional issues for consideration.

22.The trial Court found that the properties have already been partitioned between Rathinavel Karayalar and his brothers and therefore, the allegation of oral partition in the written statement stands proved. The trial Court further found that Rathinavel Karayalar had executed a Will in favour of defendants 1 and 2 and their daughters namely Sutharsanarathana and Thangam Senbag. The non-impleading of Sutharsanarathana and Thangam Senbag was pointed out in the written statement. Even thereafter, they have not been impleaded in the suit and without their presence, the suit cannot be decided effectively and completely. With the said observations, the trial Court had arrived at a finding that the suit is bad for non-joinder of necessary parties.

23.As far as the issue relating to the prayer for declaration is concerned, the trial Court found that the plaintiffs having admitted the possession and enjoyment of defendants 1 and 2, the suit having been filed after a period of 15 years is barred by limitation. The trial Court



(F).Contentions of the learned counsel appearing for the appellants
are as follows:

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through two wives. Therefore, the properties would automatically devolve upon Class-2 heirs. When the defendants 1 and 2 claim right over the properties by way of Will and settlement deeds, the entire burden is upon them to establish the same. Therefore, the trial Court was not right in shifting the burden upon the plaintiffs.

26. Rathinavel Karayalar had passed away in the year 1994 and his second wife Muthulakshmi had passed away on 26.01.2008. The suit has been filed on 23.04.2009. Therefore, the findings of the trial Court that the suit is barred by limitation is not legally sustainable.

27. The second defendant was house-maid in the residence of Rathinavel Karayalar and they have not produced any document whatsoever to establish that she was treated as a foster daughter. The defendants 1 and 2 are utter strangers to the family and therefore, they have no right to be in possession of the suit schedule properties. A legal notice was issued to the defendants to admit the title of the plaintiffs. However, they are not chosen to respond to the same and therefore, it is treated as admission of title of the plaintiffs by the defendants 1 and 2.



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28. In the reply statement filed by the plaintiffs, they have categorically disputed the Exhibits B18 to B20 Will and the settlement deeds. They have also disputed the sound and disposing state of mind of Rathinavel Karayalar from the year 1990 onwards. Therefore, the entire burden is upon the defendants to prove the said documents. However, none of the disputed documents have been proved in accordance with law. When the defendants were not able to establish their title or right to be in possession of the property, the trial Court ought to have declared the share of the plaintiffs and granted a preliminary decree for partition and separate possession.

29. Even assuming that there are no pleadings challenging the above said documents, the parties have understood the issue and they have let in evidence. Therefore, technical objection cannot be raised that due to lack of pleadings, evidence cannot be relied upon. In fact, the First Appellate Court has got every power to re-appreciate the evidence on record and arrive at a different conclusion.

30. The trial Court has arrived at a finding that the non-impleading of the children of the defendants 1 and 2 who are the



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beneficiaries under certain documents is fatal. Pending first appeal, an interim application in CMP(MD).No.9949 of 2023 has been filed to implead the two daughters of defendants 1 and 2 namely Sutharsanarathana and Thangam Senbag as proposed respondents 29 and 30. Therefore, the defect pointed out by the trial Court has been rectified and such a plea cannot be raised again in the first appeal.

31.The Will and the settlement deeds are suspicious, especially due to the inclusion of trust properties in those documents. When the testator namely Rathinavel Karayalar was more than 85 years old, when he had executed the disputed documents and the plaintiffs have questioned his sound and disposing state of mind, the entire burden is upon the defendants 1 and 2 to establish the sound state of mind of the testator during the relevant point of time.

32.As far as Exhibit B40 Will is concerned, the attester has not been examined. Exhibit B20 has been superseded by Exhibits B18 and B19 relating to the first item of the 4th schedule property. The children of the first defendant have sought to be impleaded in the first appeal and they are not connected with all the properties. Therefore, the plea of



limitation relating to the belated impleading of the said parties would not affect the entire suit for partition. If the children of defendants 1 and 2 are impleaded for the first time in the first appeal, for granting an opportunity to the said newly added parties, the judgement and decree of the trial Court may be set aside and it may be remitted back to enable the newly added parties to file the written statement. Hence, he prayed for allowing the appeal and to remit back to the trial Court for fresh consideration.

(G).Contention of the learned Senior Counsel appearing for the respondents 1 and 2 are as follows:

33.The defendants 1 and 2 are utter strangers to the family of Rathinavel Karayalar. The second defendant was treated as the foster daughter by Rathinavel Karayalar and his two wives, and the documents were executed during the life time of Rathinavel Karayalar and during the life time of second wife namely Muthulakshmi in favour of the defendants 1 and 2 and their children. The defendants 1 and 2 and their children are claiming right under certain registered documents which were executed during the life time of the original owners. Therefore, without setting aside those documents and without seeking a prayer for declaration of title, the present suit for partition is not maintainable.



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34.A suit for partition can be filed only as against the co-owners and not against the strangers to the family who claim title to the properties under a registered document. Therefore, the plaintiffs have to pray for setting aside those documents and the entire burden is upon them to disprove those documents. Hence, the contentions of the learned counsel appearing for the appellants that the burden is upon the defendants 1 and 2 is not correct.

35.The suit has been framed in such a manner as if it is a partition suit. The prayers 1 and 2 in the main suit are one and the same. In the first prayer, the plaintiffs had sought to declare their shares and in the second prayer, they sought for partition and separate possession. Therefore, there is no prayer for declaration of title or to set aside the documents which are relied upon by the defendants 1 and 2.

36.It was specifically pointed out in the written statement that one of the documents has been executed in favour of the children of the defendants 1 and 2 and they have not been made as parties. The written statement contending that the suit is bad for non-joinder of necessary parties was filed on 19.07.2010. The suit was also dismissed on the



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ground of non-joinder of necessary parties. The first appeal has been filed on 07.08.2013 and an application to implead the children of the defendants 1 and 2 has been filed on 07.08.2023 in CMP(MD).No.9949 of 2023. Therefore, the suit is clearly barred as against the proposed parties.

37.A specific defence has been raised in the additional written statement that all the members of Rathinavel Karayalar's family have not been impleaded especially in view of the allegation of the plaintiffs that the properties are co-parcenary properties of Rathinavel Karayalar and his brothers in the reply statement. Even as on today, the other brothers of Rathinavel Karayalar or their legal heirs have not been impleaded, especially with regard to the 5th schedule property which is a trust property.

38.The plaintiffs have claimed that the cause of action for filing the suit has arisen on 26.01.2008 when the second wife of Rathinavel Karayalar namely Muthulakshmi Ammal had passed away. However, in the reply statement, the plaintiffs have disputed the marital status of the said Muthulakshmi Ammal and have questioned the validity of the said marriage. Therefore, the cause of action for filing the suit



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would arise on the date of death of Rathinavel Karayala namely in the year 1994. The suit for declaration and possession of share having been filed on 20.10.2011 is clearly barred by limitation.

39.The additional evidence application relates to the trust property which is the subject matter of another suit. Therefore, the said application is no way relevant for disposing of the present appeal. In fact, the first and second defendants are not claiming any right over the 5th schedule property. Exhibits B19, B20 and B40 have been proved by the endorsement made by the concerned Sub-Registrar. Not sending reply to the legal notice would not amount to admission of the contention of the said notice. In fact, it not a notice for partition, but it is a notice calling the defendants 1 and 2 to admit the title of the plaintiffs. When no reply is issued, it is only means that the defendants 1 and 2 have not come forward to admit the title of the plaintiffs. Even though there is no pleading in the original written statement relating to partial partition, in the additional written statement, it has been specifically pointed out that all the properties of Rathinavel Karayalar have not been included. The said defence has been accepted by the trial Court and the suit has been dismissed for not including the other properties. Therefore, the first



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appeal should also be dismissed on the ground of partial partition. The genealogical table would clearly indicate that only some of the Class-2 heirs have filed the suit for partition and the other Class-2 heirs have been left out. Therefore, it is clear that the suit is bad for non-joinder of necessary parties. Hence, he prayed for dismissing the appeal and to confirm the judgment and decree of the trial Court.

40. We have carefully considered the submissions made on either side and perused the material records.

(H).Discussion:

41. The present suit for declaration of respective shares in the suit schedule properties and for a preliminary decree for partition and separate possession relates to the property of one Rathinavel Karayalar, son of Subramaniya Karayalar and a grandson of Sattanatha Karayalar. Subramaniya Karayalar had three sons namely Sattanatha Karayalar, Vaikunda Rama Karayalar and Rathinavel Karayalar and three daughters namely Ponnammal, Avudaiyammal and Chellathaiammal. The first wife of Rathinavel Karayalar is one Thangammal and the second wife is one Muthulakshmi. Both of them have passed away without any issues.



42.The plaintiffs 1 to 6 are the legal heirs of Avudaiammal. The plaintiffs 7 to 9 and defendants 8 to 10 are the legal heirs of Vaikunda Rama Karayalar. The defendants 3 to 7 and the defendants 29 and 30 are the legal heirs of Sattanatha Karayalar. The defendants 11 to 13 are the legal heirs of Ponnammal. The defendants 14 and 15 and the defendants 26 to 28 are the legal heirs of Chellathaiammal. There is no dispute about this genealogy.

43.The second defendant claims that she is the foster daughter of Rathinavel Karayalar and his two wives. The first defendant is the husband of the second respondent. The 16th defendant in the suit is the trust by name Senkottai Sattanatha Karayalar Trust. The defendants 17 to 27 are the tenants in the 6th schedule property. The 25th defendant is a Bank. The defendants 26 to 28 are the children of 15th defendant and the 7th plaintiff. Defendants 29 and 30 are the legal heirs of the 5th defendant.

44.The second defendant claims to be the foster daughter of the Rathinavel Karayalar and his two wives. According to the plaintiffs, since Rathinavel Karayalar had died issueless and intestate, all the suit items would devolve upon his Class-2 heirs who are the legal



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heirs of the brothers and sisters of Rathinavel Karayalar. However, it is the case of the defendants 1 and 2 that during the life time of Rathinavel Karayalar and his second wife Muthulakshmi, they have executed Exhibits B10, B18 to B20, B31 and B40 to B42 relating to items Nos. 1 to 6 of the suit schedule properties. The defendants 1 to 2 have further contended that during the life time, they have executed documents not only in their favour, but also in favour of daughters of defendants 1 and 2. Thus, the defendants 1 and 2 claim absolute title over the said items.

(i).Frame of Suit:

45.The learned Senior Counsel appearing for the respondents 1 and 2 /defendants 1 and 2 had raised a preliminary objection with regard to the maintainability of the suit for declaration of shares and partition on the ground that the same is not maintainable as against the defendants 1 and 2 who are the third parties to the family of Rathinavel Karayalar. Without filing a suit for declaration of title and to set aside the documents executed by Rathinavel Karayalar and his second wife Muthulakshmi, the present suit is not maintainable. Therefore, even without going into the merits of the appeal, the suit could be decided on the preliminary issue considering the frame of the suit.



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46. In pre-suit notice and in the averments in the plaint, it has been specifically contended that defendants 1 and 2 are not family members and they are third parties. These third parties claim absolute title to the property on the basis of settlement deeds executed during the life time of the concerned owner of the property and also rely upon testaments executed by them. When the settlement deeds were executed during the life time of the original owner and they have not chosen to cancel the same during their life time, the plaintiffs without seeking to set aside those documents, cannot file a suit for partition, especially, when those documents are in favour of the third parties to the family. Unless these documents are challenged, the plaintiffs cannot contend that the burden is upon the defendants 1 and 2 to prove the execution and validity of those documents. Therefore, the present suit as framed is not maintainable.

(ii) Admission of title by silence:

47. Exhibit A2 is the pre-suit notice sent by the plaintiffs to the defendants on 19.01.2009. In the said legal notice, the plaintiffs have traced the genealogy and claimed title to the property on the ground that they are the Class-II heirs of Rathinavel Karayalar and his second wife Muthulakshmi. In the said notice, the plaintiffs have called upon



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defendants 1 and 2 to admit the title of the Class-II heirs of Rathinavel Karayalar and Muthulakshmi in writing within a period of 10 days. Therefore, it is clear that the defendants 1 and 2 have disputed the title of Class-II legal heirs of Rathinavel Karayalar and Muthulakshmi and they were called upon to admit the title. However, no reply was sent for the said pre-suit notice.

48.It was contended by the learned counsel for the appellants that since defendants 1 and 2 have not sent any reply to the legal notice, it is to be presumed that the defendants have admitted the title of the plaintiffs.

49. The Hon'ble Supreme Court in a judgement reported ***in (2006) 10 SCC 696 (M.P.Wakf Board Vs. Subhan Shah (D) by Lrs. and Others)*** in paragraph No.14 has held as follows:

“14.....An admission of a party must be clear and explicit in a case where an inference is required to be drawn in regard to the fact that thereby he had admitted the title of the other. Generally speaking, even no title can be created by admission...”



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50.The Hon'ble Supreme Court in a judgment reported in **(2007) 6 SCC 737 (Ramchandra Sakharam Mahajan Vs. Damodar Trimbak Tanksale (Dead) and others)** in paragraph No.13 has held as follows:

“13.The suit is for recovery of possession on the strength of title. Obviously, the burden is on the plaintiff to establish that title. No doubt in appreciating the case of title set up by the plaintiff, the Court is also entitled to consider the rival title set up by the defendants. But the weakness of the defence or the failure of the defendants to establish the title set up by them, would not enable the plaintiff to a decree. There cannot be any demur to these propositions.”

51.A perusal of the legal notice makes it clear, that in case of non reply to the legal notice, the plaintiff would initiate appropriate legal proceedings. Hence, it is clear that the silence was not expected as an acceptance, but silence was to be treated as non-acceptance and they would proceed to initiate legal proceedings.

52.The plaintiffs have filed a suit for partition on the ground that they are Class-II legal heirs of Rathinavel Karayalar. However, the



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defendants 1 and 2 trace their title through the documents executed by the said Rathinavel Karalayar and his wife Muthulakshmi. When the third parties to the family set up title, the entire burden is upon the plaintiffs to establish the fact that the title vests with the family, before seeking a prayer for partition. Merely not replying to the pre-suit notice, will not reverse or discharge the burden of proof on the plaintiffs.

53. Viewed from any angle, the non reply to the legal notice could never be considered to be an admission of title of the plaintiffs by silence. Therefore, such a contention is not legally sustainable.

(iii) Non-joinder of necessary parties:

54.. Though it was pointed out in the written statement that some of the properties have not only been settled in favour of defendants 1 and 2, but also in favour of the daughters of the defendants 1 and 2, the plaintiffs have not chosen to implead them as parties to the suit. The suit was filed on 23.04.2009. The written statement was filed on 20.10.2011. The trial Court while delivering the judgement on 18.12.2012 in Paragraph No.38 has categorically found that the suit is bad for non-joinder of parties.



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55. The present first appeal has been filed on 07.08.2013. 10 years after the filing of the first appeal, the present application in CMP(MD).No.9949 of 2023 to implead the daughters of defendants 1 and 2 has been filed on 07.08.2023. Therefore, it is clear that the plaintiffs/appellants were not interested in prosecuting the suit or the appeal as against the daughters of defendants 1 and 2 who are also the beneficiaries under the settlement deeds and the Wills executed by Rathinavel Karayalar and Muthulakshmi. Only when the appeal was listed for hearing, the present impleading application came to be filed. Therefore, we are of the considered opinion that the impleading application has been filed to get over the legal plea of non-joinder of necessary parties and to seek an order of remand to the trial Court. The dates and events captured above will clearly show that the suit had become time barred as against the proposed parties. Therefore, the impleading application does not merit consideration and the same is liable to be dismissed.

(iv) Limitation:

56.The plaintiffs in paragraph No.3 of the plaint have categorically admitted that Muthulakshmi is the second wife of



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Rathinavel Karayalar. In the cause of action paragraph, they have specifically mentioned that the cause of action has arisen on 26.01.2008, when the second wife of Rathinavel Karayalar namely Muthulakshmi had passed away. However, the plaintiffs in their reply statement filed on 20.01.2011, have taken a 'U' turn and contended that the said Muthulakshmi is not the legally wedded wife of Rathinavel Karayalar. If such a stand is taken, the cause of action for filing the suit would have arisen even on the date of death of Rathinavel Karayalar namely in the year 1990.

57. In the plaint, the plaintiffs have nowhere contended that they are in possession of the suit schedule property. However, the defendants in their written statement had specifically claimed that they are in possession of the property pursuant to the settlement deed and the Will. Exhibits A7, A8 and A9 patta only reflect that the suit schedule properties were standing in the name of Rathinavel Karayalar and not in the name of plaintiffs. The defendants have filed Exhibit B17 patta passbook dated 01.12.1994 which stands in the name of the defendants 1 and 2 and their daughter. Therefore, it is clear that the possession of the suit schedule properties are in the hands of the defendants 1 and 2 and their daughter right from the year 1990, not as a co-owner, but claiming



right, title and possession over the suit schedule property. The present suit for partition having been filed on 23.04.2009 nearly after 19 years is clearly barred by limitation.

(v) 5th Schedule – Trust Properties

58. Pending first appeal, the appellants have filed M.P(MD).No. 1 of 2014 to receive five documents as additional evidence. According to the appellants, the 5th schedule of property in the suit is a trust property. Therefore, even if the defendants 1 and 2 are able to prove the Will, they will not be entitled to alienate the property. However, they have alienated item Nos.3 and 6 of the 5th schedule property in the year 2011 and 2012. Challenging the same, a suit was filed in O.S.No.55 of 2006 on the file of the Sub Court, Thenkasi by one of the trustees for declaration that the properties are trust properties and the alienation was void.

59. The trial Court had dismissed the suit holding that it is only a charge for the performance of charity and the title was retained by the family of the founder. An appeal was filed in A.S.No.62 of 2011 and a cross objection was filed by the trustees. The main appeal was dismissed for default, but the cross objection was allowed on 30.09.2013 holding that the properties are trust properties and the same cannot be alienated. Therefore, the sale deeds executed by the defendants, judgment in the



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suit and the judgement and decree in the first appeal are relevant documents to decide the issue arising out of the present first appeal. Hence, they have prayed for receiving the said documents as additional evidence.

60. In the present suit, the plaintiffs have prayed that they are entitled to receive 1/5th share in the income of the 5th schedule property. They have also prayed for accounting and payment of the said amount by the 16th defendant who is one of the trustees of the Shenkottai Sattanatha Karayalar Trust. The plaintiffs have not placed on record any document to establish the right of Rathinavel Karayalar to receive 1/5th share of income from the trust property or whether in actuality the said Rathinavel Karayalar was receiving income from the said trust property. We are of the considered opinion that as far as the trust properties are concerned, it is for the plaintiffs to work out their remedies in the appropriate proceedings. As far as the prayer as against one of the trustees for rendition of account is concerned it has nothing to do with the partition of item Nos. 1 to 4 and 6 of the suit schedule properties. Therefore, the said documents are not necessary for disposal of this first appeal. Hence, M.P(MD).No.1 of 2014 stands rejected.



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61.As far as the trust properties are concerned, they are the subject matter of O.S.No.55 of 2006 on the file of the Subordinate Court, Tenkasi. In appeal in A.S.(MD).No.62 of 2011on the file of Principal District Court, Tirunelveli, the alienation of the trust property has been held to be not valid. Therefore, the plaintiffs have to workout their remedy based upon the judgement of the First Appellate Court in A.S(MD).No.62 of 2011.

(vi) Conclusion:

62.The plaintiffs have miserably failed to establish their title over Item Nos. 1 to 4 and 6 of the suit schedule properties and the suit is bad for non-joinder of necessary parties and barred by limitation.

63.In view of the above said deliberations, we do not find any illegality or irregularity in the judgement and decree of the trial Court. The First Appeal stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

[A.S.M.J.,] & [R.V.J.,]

26 .04.2024

NCC :Yes/No
Index :Yes/No
Internet :Yes/No
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The 3rd Additional District and Sessions Court, Tirunelveli.



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DR.ANITA SUMANTH, J.
AND
R.VIJAYAKUMAR, J.

msa

A.S.(MD)No.127 of 2013
M.P.(MD)Nos.1 of 2013, 1 of 2014 and
C.M.P.(MD)No.9949 of 2023

26.04.2024