



A.S.(MD)No.136 of 2013

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the Judgment	Date of Pronouncing the Judgment
11.01.2024	01.02.2024

CORAM:

**THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN
and
THE HONOURABLE MR.JUSTICE C.KUMARAPPAN**

**A.S.(MD)No.136 of 2013
and
M.P.(MD)Nos.2 & 3 of 2013**

Venkatesan, S/o.Sambandham Manniyar @ Nallamuthu

... Appellant

vs.

- 1.Marimuthu (Died)
- 2.Ramalingam (Died)
- 3.Bashyam
- 4.Valarmathi
- 5.V.Jothiraman
- 6.Paulraj
- 7.Jeseeph Xavier
- 8.Rajamani
- 9.Muthuselvi
- 10.Vanitha
- 11.Manimekalai
- 12.Elavarasi
- 13.Senthilkumar
- 14.Jagaseelan
- 15.Kaliyanasundari

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- 16.Devaraj
- 17.Narayanasamy
- 18.K.Rajendran
- 19.Shanthi
- 20.Sivashankaran
- 21.Nandhakumar
- 22.Sundar
- 23.Chithralekha
- 24.Malligapathi
- 25.S.Sridhar
- 26.Hemalatha

(R5 to R23 and R26 are ex parte in the
lower Court, hence, notice dispense with)

- 27.M.Krishnaveni
- 28.Senthilkumar
- 29.Selvakumari

[R27 to R29 are brought on record as LR.s. of the deceased
1st respondent, vide order dated 10.11.2022, made in
C.M.P.(MD)Nos.3383 and 4209 of 2022]

- 30.Umadevi
- 31.R.Rajarajan
- 32.Janaki Devi
- 33.R.Sivakumar

... Respondents

[R30 to R33 are brought on record as LR.s. of the deceased
2nd respondent, vide order dated 10.11.2022, made in
C.M.P.(MD)Nos.3383 and 4209 of 2022]

PRAYER : Appeal Suit filed under Section 96 of C.P.C., against the judgment and decree, dated 28.09.2012, made in O.S.No.90 of 2004, on the file of the I Additional District Court (PCR), Thanjavur.



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For Appellant

: Mr.T.Antony Arulraj
for Mr.D.Rajkumar

For R27 to R33

: Mr.J.Karmegakannan
for Mr.B.Sudha Sathiyananth

For R25

: No Appearance

JUDGMENT

**DR.G.JAYACHANDRAN, J.
and
C.KUMARAPPAN, J.**

The appeal is directed against the judgment and decree passed by the trial Court in the suit filed for partition and rendition of accounts.

2. The appellant herein is one of the legal heirs of the deceased first defendant, who was impleaded as 26th defendant in the suit on the demise of the first defendant pending suit.

3. The facts leading to the appeal is capsulated below:-

(i) The plaintiff and the defendants 1 and 2 are brothers. The suit schedule properties [initially, in the plaint, five items were shown, later, Item No.2 was deleted and parties contested only in respect of four properties,

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renumbered as Item Nos.1 to 4] claimed to be the properties of the joint family. It is specifically pleaded that the first item of suit schedule property was purchased by the mother of the parties in the year 1946 and rest of the Items 2 to 4 are ancestral in nature. The plaintiff's case is that their father predeceased their mother and mother died intestate in the year 1984, leaving behind her three sons, who are the plaintiff and the two defendants and each entitled for 1/3rd share. The plaintiff and the second defendant were employed in Chennai and residing away from the suit schedule properties. The properties were under the administration of the first defendant. While so, the first item of the suit schedule property, measuring an extent of 5 Acres and 26422 sq.ft., was plotted out as a layout. The layout consists of 27 approved plots and 19 unapproved plots. To facilitate the promotion of the layout, the plaintiff and the second defendant gave a Power of Attorney to the first defendant in the year 1986. Based on the Power Deed, some of the plots were sold to the defendants 3 to 24 as plots. In the year 1992, another Power of Attorney was executed by the plaintiff and the second defendant in favour of S.Sridhar, the 25th defendant, who is none other than the son of the first defendant. Being aggrieved by non-rendition of accounts by the defendants 1 and 25 for the plots sold, on the strength of Power of Attorney Deeds, suit was filed



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seeking 1/3rd share in the suit properties, rendition of accounts in respect of the plots sold based on the Power of Attorney and future profits in respect of the properties described as Item Nos.2 to 4 till the delivery of possession.

(ii) The suit was contested by the first defendant and on his demise, his legal heirs namely, the defendants 25 to 27 continued the suit. As far as the second defendant is concerned, he sailed with the plaintiff and paid necessary Court fee, seeking 1/3rd share in the suit schedule properties. The 24th defendant, who is one of the purchasers of plot, filed written statement pleading that he is not a necessary party and he has purchased the property for value based on the Power of Attorney and had put up construction over the plot and he is in possession of the property.

4. The trial Court based on the pleadings, framed the following issues:-

"(i) Whether plaintiff is entitled to 1/3 share in respect of Item Nos.3, 4 and 5 of the suit schedule?

(ii) Whether plaintiff is a Trustee of Item 2 of the suit schedule?

(iii) Whether first defendant has to render accounts in respect of Items 1 and 3 of the schedule?



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(iv) Whether plaintiff is entitled to have past and future mesne profits as claimed in the suit?

(v) Whether defendant No.24 is not a necessary party in the suit?

(vi) Whether the suit is hit by misjoinder of parties?

(vii) What relief plaintiff is entitled for?"

5. On the side of the plaintiff, the plaintiff Marimuthu himself was examined as P.W.1 and 13 documents were marked as Exs.A.1 to A.13. On the side of the defendants, defendants 1 and 2 were examined as D.W.1 and D.W.2 and 28 documents were marked as Exs.B.1 to B.28.

6. The trial Court, on appreciating the evidence and taking note of the fact that the plaintiff has given up his claim in respect of 2nd item property and amended the plaint deleting Item No.2 from the schedule of property, held that the relationship of the plaintiff and the defendants 1 and 2 as brothers is not in dispute. The suit schedule properties are admitted to be joint family properties and the parties have no dispute over the claim that the said properties are inherited by them and they are entitled for 1/3rd share each. However, the dispute is only with regard to first item of suit schedule property, which was partly

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alienated to third parties, based on the Power of Attorney Deeds executed Ex.A.3 and Ex.A.2 in favour of the first defendant and his son, the 25th defendant, respectively. While the defendants 1 and 25 claim that as and when the plots sold, the shares of the plaintiff and the second defendant were distributed and there is no due payable to the plaintiff or the second defendant in respect of plots already sold. Regarding the other items of suit schedule properties, namely, Item Nos.2 to 4, the plea of the first defendant is that they were under cultivation by tenants for quite long time, but for past five to six years, these lands stay barren and there is no income from the lands. Hence, the prayer for mesne profits is not sustainable.

7. However, the trial Court found that in the absence of evidence that the plaintiff and the second defendant were paid their shares in the plots sold in Item No.1 of the suit schedule and in the absence of proof of income from Item Nos.2 to 4, which are ancestral properties in the Village, after ascertaining their 1/3rd share in the properties, ordered rendition of accounts and the parties were relegated to work out their remedy regarding mesne profits in the final decree proceedings. Further, the trial Court recording the fact that in Item No.1, Plot



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Nos.1 to 3 are presently held by the first defendant and he had constructed house upon it and in possession, had observed that while apportioning the land in the final decree, the allocation may be done, accordingly, the parties were directed to work out their remedy in the final decree proceedings.

8. Being aggrieved by the judgment and decree, the 26th defendant, who is one of the legal heirs of the first defendant, has preferred the first appeal on the ground that the trial Court failed to take note of the fact that the sale consideration for the plots sold by the first defendant to the defendants 3 to 24 based on the Power of Attorney, was shared among the brothers immediately on completion of sale. The suit seeking rendition of accounts has been initiated belatedly with an oblique motive and the same has not been taken note by the trial Court. The admission of the plaintiff that he has received part of sale consideration has not been taken note by the Court below. Further, for promoting the land as a layout, the first defendant has spent more than Rs.3,00,000/- and without taking note of that, the trial Court has allowed the suit holding that the plaintiff is entitled for 1/3rd share in the property and for rendition of accounts.

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9. In the course of argument, the learned counsel for the appellant submitted that, it is a luxurious suit initiated belatedly by suppressing vital facts. By not including the necessary parties to whom the plots jointly sold and the tenants who were cultivating the land, the suit is hit by non-joinder of necessary parties. The first defendant had constructed house in Plot Nos.1 to 3 and living for a long time. The plaintiff and the second defendant were given their portion of the share from the sale consideration received from the buyers and they are entitled for 1/3rd share in unsold portion of the 1st item, save the three plots over which the first defendant has already constructed house and residing.

10. The learned counsel for the appellant further submitted that the plaintiff and the second defendant, who were employed in Government service and residing at Chennai with their family, executed registered Power of Attorney [Ex.A.3] on 22.01.1986 in favour of the first defendant for the purpose of selling the property, which is more fully described as Item No.1 in the plaint. Subsequently, the first defendant spent his money to develop the property into plots and got planning approval for the portion of the property. Under Ex.A.9 and Exs.B.23 to B.28, plots were sold to various third parties. However, all those



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purchasers were not impleaded as defendants in the suit. The sales were effected between 1988 and 1992 when the Power of Attorney was in force executed in favour of the first defendant. Thereafter, the plaintiff and the defendants 1 and 2 jointly had executed Power of Attorney dated 28.05.1992, in favour of the 25th defendant for the very same first item property, measuring an extent of 5 Acres and 26422 sq.ft. excluding the plots already sold and this Power of Attorney was in respect of unsold 21 plots specifically mentioned the numbers as Plot Nos.6 to 8, 15, 16, 22 to 28, 31 to 37, 52 and 54, measuring an extent of 78000 sq.ft. Contending that by executing the subsequent Power of Attorney in favour of the 25th defendant in respect of unsold plots, which could be inferred that as far as the plots already sold by the first defendant on the basis of the Power of Attorney executed in his favour had come to an end and the parties had no dispute regarding rendition of accounts for the plots sold prior to 28.05.1992. For the first time, the plaintiff thought fit to cause notice through Counsel on 29.08.2001, which is marked as Ex.A.4 with untenable facts and the same was duly replied by the first defendant through his counsel, vide Ex.A.9. Thereafter, the suit was laid on 2nd May, 2002, seeking rendition of accounts for the transactions, which got completed before 28.05.1992.

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11. Therefore, the counsel contended that the suit for rendition of accounts which was filed 20 years after supersession and the Power of Attorney executed in favour of the first defendant is hopelessly barred by limitation. Though no issue was framed by the trial Court, the said plea being a question of law, the same has to be considered.

12. Per contra, the learned counsel for the respondents 27 to 33 submitted that the Power of Attorney Deeds, which were marked as Exs.A.2 and A.3, clearly mandates the Power Agents, namely, the defendants 1 and 25 to render accounts for the transactions carried by them. No document produced by these defendants to show that after selling the property based on the Power of Attorney Deed, they have rendered accounts. Further, over and above the purchase value mentioned in the sale deeds, the defendants 1 and 25 had collected money from the purchasers. Hence, the trial Court has rightly passed decree against the defendant to render accounts. The learned counsel also contended that the admission of the first defendant that he is maintaining the suit schedule properties mentioned as Item Nos.2 to 4 fastens on him the liability to share the past and future mesne profits derived from the joint family property till the property is divided by metes and

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bounds. Therefore, the learned counsel contended that the appeal has to be dismissed.

13. The points for determination in this appeal are,

(i) Whether the trial Court correct in holding that the defendants 1 and 25 are liable to render accounts for the plots sold based on the Power of Attorney Deeds, marked as Exs.A.2 and A.3?

(ii) Whether the decree in favour of the plaintiff holding that he is entitled for 1/3rd share in the unsold plots in Item No.1 and also in rest of the properties namely, Item Nos.2 to 4, is legally sustainable?

(iii) Whether the trial Court erred in granting the relief of rendition of accounts 20 years after termination of the Power of Attorney executed in favour of the first defendant?

14. Neither in the course of exchange of pre-suit notice nor in the pleadings the parties have not denied the relationship or their 1/3rd share each in the suit schedule property. After the demise of Jeganatha Mannaiyar and his wife Rajammal, the suit schedule properties have devolved upon their three sons,

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namely, Marimuthu [plaintiff], Sambandham Mannaiyar @ Nallamuthu [first defendant] and Ramalingam [second defendant].

15. Rajammal had purchased the first item of suit schedule property under Ex.A.1 on 28.11.1946 and on her demise, it has been devolved upon her three sons. It is an admitted fact that the plaintiff and the second defendant were employed in the Police Department and Railways respectively, and living with their family at Chennai. This fact is also found place in both the Power of Attorney Deeds, which are marked as Exs.A.2 and A.3.

16. Three documents namely, Ex.A.2 Power of Attorney executed by the plaintiff and the defendants 1 and 2 in favour of the 25th defendant S.Sridhar and the sale deeds marked as Exs.B.27 and B.28, are all executed on the same day, *i.e.*, on 28.05.1992, this fact is highly relevant in this case to decide whether the plea of the plaintiff that no account was rendered by the first defendant for the plots sold by him. These three documents, which were executed on the same day and got registered go to show that the earlier Power of Attorney [Ex.A.3] executed in favour of the first defendant on 22.01.1986 got superseded and for



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the plots which were unsold, all the three brothers who are the joint owners of the property, have appointed the 25th defendant as their Power Agent. There is no material placed by the plaintiff that subsequent to this Power of Attorney Deed, the 25th defendant sold any of the plots based on the Power of Attorney Deed [Ex.A.2]. By executing the subsequent Power of Attorney for the unsold property on 28.05.1992, the earlier Power of Attorney executed in favour of the first defendant, who had acted upon the said Deed and sold a portion of the property, had come to an end. While so, for rendition of accounts, the plaint has been presented on 7th May, 2022 before the Sub Court, Thanjavur, and the same got numbered as O.S.No.67 of 2022. The pre-suit notice Ex.A.4 was caused only to the first defendant on 29.08.2001, *i.e.*, after 9 years of termination of the Power of Attorney. No notice caused to the 25th defendant, who was holding subsequent Power of Attorney and the plaintiff had not mentioned in the plaint which property covered under the Power of Attorney Ex.A.2, sold by the 25th defendant. In the said circumstances, the trial Court erred in holding that the first defendant failed to produce the documents for rendition of accounts and therefore, he has to render accounts for the plots sold by him on the strength of the Power of Attorney executed by the plaintiff and the second defendant. The subsequent execution of



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Power of Attorney [Ex.A.2] jointly by the plaintiff along with the defendants 1 and 2 and the inordinate delay in seeking rendition of accounts after termination of the Power of Attorney not been considered by the Court below.

17. Article 5 of the Limitation Act, 1963, Part - I – Suits relating to accounts reads as follows:-

Description of suit	Period of limitation	Time from which period begins to run
5. For an account and a share of the profits of a dissolved partnership.	Three years	The date of the dissolution.

Because the Principal and the Power Agent being brothers and co-sharers, the trial Court has failed to take note of the law governing limitation. Further, the plaint being camouflaged with larger relief of partition, while considering the rights of the parties and their proportionate share, the trial Court failed to take note of the limitation to grant relief of rendition of accounts for the properties sold on the strength of Power of Attorney which was superseded 20 years prior to instituting the suit.



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18. The law of limitation is a question of law, which can be raised at the appellate stage also and the same can be considered even without pleadings. In this case, this Court is of the view of that, it is appropriate to consider the law of limitation as far as the relief of rendition of accounts. It is unjust to direct a person to render accounts 20 years after termination of the Power of Attorney. The plaint is unspecific and vague as far as the transactions based on the Power of Attorney Ex.A3. Insofar as the unsold portion of the land, the parties agreed that they are entitled for 1/3rd share and there cannot be any further review of this matter, except to protect the superstructure put up by the first defendant in Item No.1 identified as Plot Nos.1 to 3. As suggested by the trial Court at the time of final decree proceedings, the parties may ensure the portion upon which the first defendant has put up the construction shall be allotted to the first defendant without disturbing his possession and enjoyment and without prejudice to the rights and interest of other sharers.

19. As far as the relief regarding the mesne profits in respect of Item Nos.2 to 4, this Court finds that there is no plea of tentative income derived from this property except the allegation of letting out the property to one tenant, later



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evicting him and substituting him with somebody else. When there is no element of plea to indicate that the income been derived from Item Nos.2 to 4 except fixing the tentative value of the profit due to the plaintiff for the purpose of fixation of Court fee, it may not be proper to relegate the parties to work out the remedy in the final decree proceedings. There must be some foundational fact pleaded and proved for passing a preliminary decree. In this case, as far as the right of the parties and the proportionate share alone has been pleaded and proved. As far as the income from Item Nos.2 to 4, there is no evidence worthy to hold that the first defendant who was in possession of Item Nos.2 to 4, derived income to be shared with other co-owners. Hence, this Court holds that the decree in respect of mesne profits also has to be disallowed. Accordingly, the judgment and decree of the trial Court is modified as under:-

(i) The plaintiff and the defendants 1 and 2 are entitled for 1/3rd share in the unsold plots falling under Item No.1 of the suit schedule.

(ii) The plaintiff and defendants 1 and 2 are entitled for 1/3rd share in Item Nos.2 to 4.

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(iv) The decree to seek mesne profits from Item Nos.2 to 4 is restricted from the date of judgment passed in the first appeal till passing of the final decree.

20. Accordingly, the Appeal Suit is disposed of. Considering the relationship of the parties, no order as to costs. Consequently, connected Miscellaneous Petitions are closed.

Index : Yes / No
NCC : Yes / No
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[G.J., J.] [C.K., J.]
01.02.2024

To

1.The I Additional District Judge (PCR),
Thanjavur.

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2. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court.
Madurai.



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DR.G.JAYACHANDRAN, J.
and
C.KUMARAPPAN, J.

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PRE-DELIVERY JUDGMENT MADE IN
A.S.(MD)No.136 of 2013

01.02.2024

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