



WEB COPY



A.S.(MD).Nos.23 of 2017, 18 of 2018

IN THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 28.03.2024

PRONOUNCED ON : 21.06.2024

CORAM:

THE HONOURABLE MR. JUSTICE P.DHANABAL

A.S.(MD) Nos.23 of 2017, 18 of 2018
and C.M.P.No.632 of 2018

A.S.No.23 of 2017:

Aandaperumal

... Appellant

-VS-

1.Lakshmiammal

2.Pudiyavan Karaiyalar

3.Muthammal

... Respondents

(The 2nd and 3rd respondents are *ex parte* in lower Court. Hence notice may be dispensed)

A.S.No.18 of 2018:

Pudiyavan Karaiyalar

... Appellant

-VS-

1.Lakshmiammal

2.Aanda Perumal

3.Muthammal

... Respondents



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

PRAYER in A.S.No.23 of 2017: The Appeal Suit is filed under Section 96 read with Order 41 Rule 1 and 2 of CPC, pleased to allow the appeal by setting aside the judgment and decree passed in O.S.No.64 of 2014 on the file of the Principal District Court, Tirunelveli dated 11.08.2016.

PRAYER in A.S.No.18 of 2018: The Appeal Suit is filed under Section 96 read with Order 43 Rule 1 and 2 of CPC, pleased to call for the records and set aside the decree and judgment passed in O.S.No.64 of 2014 on the file of the Principal District Court, Tirunelveli dated 11.08.2016.

For Appellant : Mr.S.Meenakshi Sundaram
in A.S.23 of 2017 for Mr.N.G.A.Nataraj

For Respondent 2 : Mr.V.M.Balamohan Thampi
in A.S.23 of 2017

For Appellant : Mr.V.M.Balamohan Thampi
in A.S.18 of 2018

For Respondent 2 : Mr.S.Meenakshi Sundaram
in A.S.18 of 2018 for Mr.N.G.A.Nataraj



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

For Respondent 1 : Mr.S.Ramesh @ Ramaiah
in both Appeals

COMMON JUDGMENT

These appeals have been preferred as against the decree and judgment passed in O.S.No.64 of 2014 on the file of the Principal District Judge, Tirunelveli dated 11.08.2016, wherein the first respondent in both the appeals has filed a suit for partition in respect of the suit schedule properties and to declare that the settlement deed dated 15.04.1991 is null and void and the same is not binding upon the plaintiff. The trial Court has decreed the suit.

2. Aggrieved by the said decree and judgment the first defendant has preferred an appeal in A.S.No.23 of 2017 and the second defendant has preferred an appeal in A.S.No.18 of 2018. During the pendency of the appeal the appellant in A.S.No.18 of 2018 has filed the civil miscellaneous petition in C.M.P.No.632 of 2018 to receive the documents as additional evidence in that appeal.



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

3. Since both the appeals are arising out of the same judgment, both the appeals have been heard together and passed common judgment.

The brief averments of the amended plaint are as follows:

The plaintiff and the defendants are the children of one Balasubramania Karaiyalar and he inherited the properties through a partition deed dated 31.05.1988. After the partition the said Balasubramania Karaiyalar was enjoying the said property. He died intestate on 27.02.2008 leaving behind the plaintiff and the defendants as his legal heirs to succeed his estate. As such the plaintiff is entitled to $\frac{1}{4}$ share over the suit properties. The first defendant with malafide intention trying to alienate and encumber the properties. Therefore the plaintiff demanded partition from the month of February 2014. The second and third defendants agreed for partition but the first defendant was not conceded and oppose the same. Thereafter the plaintiff sent a legal notice dated 02.04.2014 to the defendants demanding for partition of her $\frac{1}{4}$ share over the suit properties. The defendants received the notice but



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

failed to give reply. The first defendant only in his written statement stated that the plaint 2nd and 3rd schedule properties belongs to him by virtue of settlement deed dated 15.04.1991. In fact the said Balasubramania Karaiyalar never executed any such settlement deed, during his lifetime and the alleged settlement deed has been invented and forged for the purpose of the suit. The alleged settlement deed never came into force and it was not acted upon. The plaintiff does not admit the execution and existence of the settlement deed dated 15.04.1991. The settlement deed is null and void and not binding upon the plaintiff.

4. The brief averments of written statement filed by the first defendant are as follows:

The suit is not maintainable either in law or on facts and the same is liable to be dismissed in limini. The plaintiff is never been in joint possession with the defendant. The relationship of the parties and the partition between the defendants and his father dated 31.05.1988 are admitted. In fact the Balasubramania Karaiyalar executed a settlement deed in favour of the first



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

defendant in respect of second and third items of the properties through settlement deed dated 15.04.1991. The plaintiff has no right, title and interest over the 2 and 3 items of the suit properties after the settlement deed was executed by Balasubramania Karaiyalar. Therefore, the plaintiff is not entitled to $\frac{1}{4}$ share over the suit properties. The averments that the alleged demand of partition and issuance of suit notice dated 02.04.2014 are false. After the settlement deed in favour of the first defendant, he has been in possession and enjoyment of the suit 2 and 3 properties as his absolute properties by paying kist and patta also stands in the name of the first defendant in respect of suit 2 and 3 items of the properties. Therefore, the suit is liable to be dismissed.

5. The brief averments of additional written statement filed by the first defendant is as follows:

The relief sought for by the plaintiff in respect of declaration of settlement deed is not maintainable and the same is liable to be dismissed. The claim of declaration is barred by limitation. The settlement deed was duly executed by Balasubramania Karaiyalar.



A.S.(MD).Nos.23 of 2017, 18 of 2018

The averments that the settlement deed was not executed by Balasubramania Karaiyalar and it was not acted upon and the same is null and void are denied as false. The plaintiff is very well know about the above said settlement deed, therefore the suit is liable to be dismissed.

6. The other defendants had not filed any written statement. Based on the above said pleadings, the trial Court has framed the following issues and additional issues:

Issues:

1. *Whether Gift Deed dated 15.04.1991 is true and acted upon?*
2. *Whether the plaintiff is entitled to the relief of partition of 1/4th share and separate possession of suit 2nd and 3rd schedule properties?*
3. *To what relief the plaintiff is entitled to?*

Additional Issues:

1. *Whether the 2nd prayer is barred by limitation?*
2. *Whether the plaintiff is entitled to the relief of declaration of settlement deed dated 15.04.1991 is null and void?*



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

7. Before the trial Court on the side of plaintiff, he was examined as P.W.1 and marked Exs.A1 to A5. On the side of the defendants the first defendant was examined as D.W.1 and D.W.2 was also examined and marked Exs.B1 to B8.

8. After considering the evidences adduced on both sides, the trial Court has decreed the suit. Aggrieved by the decree and judgment the first defendant has preferred the appeal in A.S.No.23 of 2017 in respect of 2 and 3 items of the properties. The second defendant has preferred the appeal in A.S.No.18 of 2018 in respect of 1st item of the suit property.

9. The grounds of appeal in A.S.No.23 of 2017 are as follows:

(i) The judgment of the trial Court is against law weight of evidence and probabilities of the case.

(ii) The trial Court had erred in granting the decree of partition regarding the entire second schedule property of the decree.

(iii) The trial Court had erred in not properly appreciating the evidence of D.W.1 and D.W.2 in the light of Ex.B3.



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

(iv) The trial Court had failed to note that deceased Balasubramania Karaiyalar had executed Ex.B3 and the trial Court ought to have believed the genuineness and validity of the said document. The trial Court ought to have come to the conclusion that the execution of Ex.B3 had been proved by examination of D.W. 2.

(v) The trial Court ought to have come to the conclusion that the said Ex.B3 had been acted upon in view of Ex.B7 and Ex.B8, since those documents have come into existence long before the suit notice Ex.A2 and as well as long before the institution of the suit filed on 18.06.2014.

(vi) The trial Court had erred in disbelieving the Ex.B4 to Ex.B6 by giving extraneous reasons. The trial Court had erred in disbelieving Ex.B3 which had come into existence nearly 23 years ago long prior to the institution of the suit.

(vii) The trial Court had erred in fixing the burden of proof even after the onus of proving Ex.B3 had been properly done by the appellant though examination of attesting witness D.W.2.



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

(viii) The trial Court had erred in fixing the burden of proof that the signature is a forged one is that of the plaintiff as he sets up the case of forging in his evidence.

(ix) The trial Court had erred in coming to the conclusion that the relief of declaration is not barred by limitation when the right to sue had accrued on the first respondent / plaintiff even on 15.04.1991 as she had got knowledge of the same through her father.

(x) The trial Court ought not to have granted the decree of partition in respect of second and third item (second item as per decree) of the suit schedule properties.

10. The grounds of appeal in A.S.No.18 of 2018 are as follows:

(i) The decision of the lower Court contrary to law and unsustainable.

(ii) The trial Court has failed to appreciate that the suit property was partition prior to Hindu Succession Amendment Act 39 of 2005 and decreed father suit in respect father, and without considering the gift deed in favour of second defendant. After the execution of



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

gift deed in favour of second defendant father has no right and possession over the first schedule property.

(iii) After the execution of gift deed in favour of second defendant, the second defendant sold the property to stranger and that the above said sale deed the second defendant deceased father Balasubramania Karaiyalar is one of the witnesses.

(iv) The trial Court should not have decreed the suit after giving finding that the Balasubramania Karaiyalar gifted 6 cents to second defendant.

(v) The trial Court failed to see that before the demise of second defendant father all the property are gifted to his son at the time of death no properties with the second defendant father.

(vi) The trial Court failed to see that the appellant not able to contest the suit due to his illness and the trial Court erred in law and held that the plaintiff is entitled to the share in the suit property without impleading the purchaser.

(vii) The trial Court ought to have dismissed the suit on the ground that there is no cause of action to file the suit against the second defendant even though the second defendant is *ex parte*.



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

(viii) The trial Court failed to see that the suit is not maintainable on the ground that of non-joinder of necessary parties.

(ix) The other reasons assigned by the learned District Judge by way of decreeing the suit is against law and facts and it is unsustainable in law. At any rate the decision of lower Court required reconsideration.

11. During the pendency of the appeal the appellant in A.S.No. 18 of 2018 has filed petition to receive the documents as additional evidence in the appeal.

12. The brief facts of the affidavit filed by the petitioner in A.S.No.18 of 2018 are as follows:

The petitioner is the appellant herein and he filed the present petition to receive the documents as additional evidence. In the year 1988 there was a partition between the petitioner / second defendant, his brother second respondent / first defendant and their father Balasubramania Karaiyalar. After the partition the properties allotted to the Balasubramania Karaiyalar was enjoyed by him and



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

he executed a gift deed dated 08.02.1989 in respect of first schedule of the property. After the gift deed he had been enjoying the property as absolute owner. Pursuant to the gift deed he sold 6 cents to Vijaya Amma and Maruthi through sale deeds dated 05.05.1989 and 13.02.1989 respectively. In the said documents the deceased Balasubramania Karaiyalar was stood as attesting witness. After the sale deeds the said Vijaya Amma and Maruthi have been enjoying the properties as absolute owners and also the constructed buildings thereon. The plaintiff after knowing the above said facts filed the main suit for partition by suppressing the material facts. During the period of 2014 the petitioner was admitted in the hospital due to his illness. So he was unable to defend the case. He came to know about the case only on 03.04.2017, therefore he filed the appeal and the partition deed, gift deeds executed by him in favour of Vijaya Amma and Maruthi dated 05.05.1989 and 13.02.1989 are all essential to decide the case. Therefore those documents have to be received as additional evidence and marked as documents on the appellant side.



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

13. The respondent filed counter stating that the petitioner has not stated any reasons for the belated submission of the documents at the appellate stage and the petitioner does not at all fulfil any of the requirements under Order 41 Rule 27 of CPC and the petition is not maintainable in law and on facts. Already the first respondent / plaintiff issued legal notice and the same was received by him but no reply was filed. Even after the summon issued to the appellant they did not choose to contest the case and they remained *ex parte*. In pursuant of the decree passed by the trial Court the first respondent / plaintiff filed a petition for passing final decree and this petitioner entered in appearance through Advocate and later was set *ex parte*. Subsequently, the said proceedings are transferred to Additional District Judge, Tirunelveli and renumbered and advocate commissioner was appointed to divide the suit properties. At the time of inspection of the advocate commissioner the petitioner and other respondents were also present in the spot. Already the petitioner filed petitions before the Additional District Court, Tirunelveli in I.A.No.166 of 2017 to set aside the *ex parte* order in the final decree proceedings and I.A.No.1 of 2017 and



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

I.A.No.167 of 2017 to set aside the *ex parte* order passed in I.A.No.91 of 2017 which was filed by third respondent. Therefore the documents sought to be received are not at all necessary for determination of the appeal. Hence the petition is liable to be dismissed.

14. The learned counsel appearing for the appellant in A.S.No. 23 of 2017 would contend that the suit properties originally belonged to father of the appellant and other respondents through partition deed dated 31.05.1988. The suit properties were allotted to the said Balasubramania Karaiyalar through the said partition. The appellant and other respondents are children of Balasubramania Karaiyalar. The said Balasubramania Karaiyalar out of love and affection executed the settlement deed dated 15.04.1991 in favour of the appellant / first defendant regarding 2 and 3 items of the suit schedule properties. After the settlement deed the appellant / first defendant has been in possession and enjoyment of the said properties. He also paying kist and also he obtained patta in his favour in respect of second and third items of the suit schedule



A.S.(MD).Nos.23 of 2017, 18 of 2018

properties. The plaintiff also very well know about the said settlement deed in favour of the plaintiff and she filed the suit for partition by suppressing the material facts and thereafter amended the plaint for the relief of declaration in respect of the said settlement deed dated 15.04.1991 in favour of the first defendant. The date of settlement deed is 15.04.1991 and the suit was filed in the year 2014 and after filing the written statement only the prayer in respect of the settlement deed was amended, therefore the suit is barred by limitation. Since the said Balasubramania Karaiyalar had executed a settlement deed in respect of second and third items of the suit schedule properties, the plaintiff has no any right, title and interest over the suit schedule properties. In order to prove the settlement deed the appellant / first defendant had examined the attesting witness, thereby he proved the execution and attestation of the settlement deed. But the trial Court has not considered the evidence adduced by the defendants and erroneously decreed the suit. Therefore, the decree and judgment passed by the trial Court are unsustainable and the same are liable to be set aside by allowing this appeal.



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

15. The learned counsel appearing for the appellant in A.S.No. 23 of 2017 relied upon the judgments as follows:

- (i) *Puniyavathi v. Pachaiammal and 9 others* in **2022(4) CTC 590**.
- (ii) *Khatri Hotels Private Limited and another v. Union of India and another* in **(2011) 9 Supreme Court Cases 126**.
- (iii) *Mariammal and another v. P.Indirani and 5 others* in **2010(1) CTC 652**.

16. The learned counsel appearing for the appellant in A.S.No. 18 of 2018 would contend that originally the suit properties belonged to Balasubramania Karaiyalar through partition deed dated 31.05.1988. Thereafter, the said Balasubramania Karaiyalar executed the gift deed in favour of the second defendant dated 08.02.1989 after the above said gift deed the appellant / second defendant had been in possession and enjoyment of the properties and thereafter he sold the said properties to one Vijaya Amma and Maruthi through separate sale deeds dated 05.05.1989 and 13.02.1989 respectively. Now the properties are under their



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

enjoyment respectively. By suppressing the above said facts the plaintiff has filed the suit for partition. Before the trial Court the appellant / second defendant was unable to contest the case due to his illness and he came to know about the preliminary decree passed against him in the year 2017 and immediately he filed this appeal. Further he filed an application to receive the said gift deed and the sale deeds as additional evidence and the same are to be received as additional evidence. The trial Court erroneously decreed the suit by granting preliminary decree to divide the suit property into $\frac{1}{4}$ share and to allot one such share to the first respondent / plaintiff. In fact the plaintiff has no any right, title and interest over the first item of the property since the same was gifted to the second defendant as early as on dated 13.02.1989. Therefore the trial Court has failed to consider the above said aspects and erroneously decreed the suit, thereby the decree and judgment of trial Court are liable to be set aside. Further the learned counsel appearing for the appellant submitted that since he filed the petition to receive the documents in order to defend the case and to mark documents and the case may be remitted back to the trial Court for



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

fresh consideration to adduce oral evidence in respect of the documents.

17. The learned counsel appearing for the appellant in A.S.No. 18 of 2018 relied upon the judgments as follows:

(i) *North Eastern Railway Administration, Gorakhpur v. Bhagwan Das (D) by L.Rs. in AIR 2008 Supreme Court 2139.*

(ii) *B.R.Chandrasekaran and others v. Subramanian and another in (2010)6 MLJ 242.*

(iii) *Jayaramdas and sons v. Mirza Rafatullah Baig and others in AIR 2004 Supreme Court 3685.*

18. The learned counsel appearing for the first respondent / plaintiff in both the appeals would contend that originally the suit properties belonged to Balasubramania Karaiyalar through partition deed dated 31.05.1988. Thereafter the said Balasubramania Karaiyalar died intestate on 27.02.2008 leaving behind the first respondent / plaintiff and the appellant in both appeals and the third respondent in both appeals as his legal heirs to succeed his



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

estate As such the first respondent / appellant is entitled to $\frac{1}{4}$ share over the suit properties. The first defendant in the main suit has filed written statement alleging that the said Balasubramania Karaiyalar executed a settlement deed in favour of the first defendant through settlement deed dated 15.04.1991. The said settlement deed was stoutly denied by the first respondent / plaintiff and the said settlement deed is created and forged and the same was not acted upon, therefore the plaintiff has sought for the relief of partition over the suit properties and to declare that the settlement deed dated 15.04.1991 is null and void and not binding on the plaintiff. In order to prove the case of the plaintiff she herself examined as P.W.1 and marked Exs.A1 to A5. The first defendant has examined as D.W.1 and D.W.2 was also examined and marked Exs.B1 to B8 and no oral or documentary evidences adduced on the side of second and third defendants and they were set *ex parte*. The D.W.2 is said to be the attesting witness of the settlement deed dated 15.04.1991. Before the trial Court the first defendant has failed to prove the execution and attestation of the settlement deed dated 15.04.1991 thereby the trial Court has disbelieved the



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

evidence of D.W.1 and D.W.2 and accepted the evidence of P.W.1 and decreed the suit in favour of the plaintiff. Therefore, the decree and judgment are passed by the trial Court are in accordance with law and the present appeals are liable to be dismissed.

19. The learned counsel appearing for the first respondent in both appeals relied upon the judgments as follows:

(i) *Bhanu Kumar Jain v. Archana Kumar and another* in (2005)1 **Supreme Court Cases 787.**

(ii) *N.Mohan v. R.Madhu* in (2020)1 **MLJ 138(SC).**

(iii) *Rajendran and another v. Radhakrishnan and 2 others* in 2023(6) **CTC 732.**

(iv) *MD.Noorul Hoda v. Bibi Raifunnisa and others* in (1996)7 **Supreme Court Cases 767.**

(v) *Kewal Krishan v. Rajesh Kumar and others etc.* in 2021(3) **MWN (Civil) 825.**

(vi) *Bulakram and another v. Ganga Bishun Chaudhuri* in **AIR 1940 Patna 133.**



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

20. This Court heard both sides and perused the records. For the sake of convenience and brevity the parties herein after will be referred to as per their status / ranking in the trial Court.

21. Upon hearing both sides and perusing the records the points for determination in A.S.No.23 of 2017 are as follows:

1. *Whether the suit is barred by limitation?*
2. *Whether the settlement deed dated 15.04.1991 was executed in favour of the first defendant by the Balasubramania Karaiyalar and the same was acted upon?*
3. *Whether the plaintiff is entitled to the decree of partition over the second and third schedule properties?*
4. *Whether the plaintiff is entitled to the relief of declaration in respect of settlement deed dated 15.04.1991 as null and void and not binding upon the plaintiff?*
5. *Whether the decree and judgment passed by the trial Court are sustainable in law and on facts?*
6. *Whether this appeal has to be allowed or not?*



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

22. The points for determination in A.S.No.18 of 2018 are as follows:

1. *Whether the C.M.P.No.632 of 2018 is liable to be allowed or not?*
2. *Whether the plaintiff is entitled to relief of partition in respect of first item of suit property?*
3. *Whether the decree and judgment of trial Court are sustainable in law and on facts?*
4. *Whether this appeal has to be allowed or not?*

23. Point No.1 in A.S.No.23 of 2017:

The suit is filed by the plaintiff for the relief of partition and separate possession and declaration that the settlement deed dated 15.04.1991 executed by Balasubramania Karaiyalar in favour of the first defendant is null and void and not binding upon the plaintiff. It is admitted fact that the properties originally belonged to one Balasubramania Karaiyalar and he is entitled to the properties through partition dated 31.05.1988. There is no dispute in respect of relationship of the parties. According to the plaintiff the Balasubramania Karaiyalar died intestate leaving behind the



A.S.(MD).Nos.23 of 2017, 18 of 2018

plaintiff and the defendants as his legal heirs to succeed his estate.

WEB COPY

According to the first defendant while the said Balasubramania Karaiyalar was alive he executed a settlement deed in his favour on 15.04.1991. The said fact was pleaded by the defendant in the written statement. The written statement was filed on 27.10.2014. Thereafter the plaint was amended on 14.09.2015 as per the order passed by the trial Court. The plaintiff stated in the pleading that the first defendant only in his written statement has surprisingly stated that the plaint 2 and 3 properties belongs to him by virtue of settlement deed dated 15.04.1991, but the said Balasubramania Karaiyalar never executed any such settlement deed during his lifetime and the said settlement deed has been invented and forged for the purpose of the suit and the said settlement deed never came into force and was not acted upon. Therefore plaintiff nowhere stated about the knowledge of the alleged settlement deed either in the pleadings or in the oral evidence. The settlement deed is dated 15.04.1991.



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

24. As per Section 3 of the Transfer of Property Act once the document is registered it is considered as constructive notice when the document is compulsorily registrable. The plaintiff nowhere stated about the date of knowledge and only stated that in the written statement only surprisingly stated about the settlement deed. The plaintiff also in the cause of action para nowhere stated about the cause of action for the declaration of settlement deed. Therefore in the absence of any plea with regard to the knowledge of the settlement deed it is the presumption that the plaintiff had knowledge about the settlement deed on the date of settlement deed, since the same is registered document. The said settlement deed is dated 15.04.1991 and the suit was filed in the year 2014. As far as the declaration in respect of documents is concerned the limitation is three years as per Article 59 of Limitation Act. Therefore the suit is barred by limitation in respect of relief of declaration of settlement deed dated 15.04.1991. As far as partition is concerned the father of plaintiff died in the year 2008 but the suit is filed in the year 2014 within the period of limitation. The trial Court failed to consider that the plaintiff nowhere stated about the



A.S.(MD).Nos.23 of 2017, 18 of 2018

knowledge of the settlement deed. There is no mention about the cause of action for the relief of settlement deed and erroneously held that the suit is not barred by limitation and further held that the plaintiff issued notice through Ex.A2 and no reply was sent by the defendants and in the first time it was disclosed about the settlement deed in the written statement and thereby the declaration prayer is within the period of limitation. The trial Court failed to consider that the documents was registered on 15.04.1991 and the father of the plaintiff died in the year 2008 and the suit was filed in the year 2014.

25. The learned counsel appearing for the appellant relied in Judgments in

(i) Khatri Hotels Private Limited and another v. Union of India and another (2011)9 SCC 126.

(ii)Puniyavathi and others v. Pachaiaammal and others 2022(4) CTC 590.



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

26. On a careful perusal of the above said judgments it is clear that successive violation of rights will not give rise to fresh cause and the suit will be liable to be dismissed if it is beyond the period of limitation counted from the date when the right to sue first accrued and as per Article 65 of the Limitation Act it prescribes 12 years period as limitation for possession of immovable property or any interest therein based on title and the time from which the period begins to run is when the possession of the property become adverse to the other party and the rights gets extinguished under Section 27 of Limitation Act. In the case on hand the father of the plaintiff died in the year 2008 and the suit is filed in the year 2014 and thereby the said case laws will not be applicable to the present facts of the case.

27. Per contra, learned counsel appearing for the first respondent argued that the period of limitation starts running from the date of knowledge about the document and he relied the judgment in *MD.Noorul Hoda v. Bibi Raifunnisa and others (1996)*



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

7 SCC 767, wherein the Hon'ble Supreme Court held in para 6 is as follows:

“6. The question, therefore, is as to whether Article 59 or Article 113 of the Schedule to the Act is applicable to the facts in this case. Article 59 of the Schedule to the Limitation Act, 1908 had provided inter alia for suits to set aside decree obtained by fraud. There was no specific article to set aside a decree on any other ground. In such a case, the residuary Article 120 in Schedule III was attracted. The present Article 59 of the Schedule to the Act will govern any suit to set aside a decree either on fraud or any other ground. Therefore, Article 59 would be applicable to any suit to set aside a decree either on fraud or any other ground. It is true that Article 59 would be applicable if a person affected is a party to a decree or an instrument or a contract. There is no dispute that Article 59 would apply to set aside the instrument, decree or contract between the interse parties. The question is whether in case of person claiming title through the party to the decree or instrument or having knowledge of the instrument or decree or contract and seeking to



WEB COPY



A.S.(MD).Nos.23 of 2017, 18 of 2018

avoid the decree by a specific declaration, whether Article 59 gets attracted? As stated earlier, Article 59 is a general provision. In a suit to set aside or cancel an instrument, a contract or a decree on the ground of fraud, Article 59 is attracted. The starting point of limitation is the date of knowledge of the alleged fraud. When the plaintiff seeks to establish his title to the property which cannot be established without avoiding the decree or an instrument that stands as an insurmountable obstacle in his way which otherwise binds him, though not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded. Section 31 of the Specific Relief Act, 1963 regulates suits for cancellation of an instrument which lays down that any person against whom a written instrument is void or voidable and who has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, can sue to have it adjudged void or voidable and the court may in its discretion so adjudge it and order it to be delivered or cancelled. It would thus be clear that the word 'person' in Section 31 of the



WEB COPY



A.S.(MD).Nos.23 of 2017, 18 of 2018

Specific Relief Act is wide enough to encompass a person seeking derivative title from his seller. It would, therefore, be clear that if he seeks avoidance of the instrument, decree or contract and seeks a declaration to have the decrees set aside or cancelled he is necessarily bound to lay the suit within three years from the date when the facts entitling the plaintiff to have the decree set aside, first became known to him."

28. On a careful perusal of the said judgment it is clear that the period of limitation starts running from the date of knowledge about the fraud. There is no iota of doubt that the limitation starts running from the date of knowledge about the document and the fraud, but in the case on hand the plaintiff nowhere stated about the date of knowledge of the settlement deed, even in the cause of action para no reference about the knowledge of the settlement deed and in the plaint merely stated that the first defendant only in his written statement has surprisingly stated that the plaintiff's 2 and 3 properties belong to him by virtue of a settlement deed dated 15.04.1991 but the said averments are not sufficient to hold that the



A.S.(MD).Nos.23 of 2017, 18 of 2018

plaintiff had knowledge only after filing of written statement.

Therefore, the said case law will not be applicable to the present facts of the case. Therefore as discussed above, this Court is of the opinion that the suit is barred by limitation in respect of relief of declaration of settlement deed, thus the point is answered.

29. Point No.2 in A.S.No.23 of 2017:

According to the plaintiff the Balasubramania Karaiyalar died intestate leaving behind the plaintiff and the defendants as his legal heirs to succeed his estate and thereby she is entitled to the share of the properties. According to the first defendant the said Balasubramania Karaiyalar during his lifetime due to love and affection executed a settlement deed in his favour in respect of 2 and 3 items of the suit properties on 15.04.1991. The plaintiff denied the execution of settlement deed, however, she pleaded that the settlement deed was forged one and it was not acted upon and the same was created for the purpose of the suit. The settlement deed is dated 15.04.1991 but the suit was filed in the year 2014. Once the plaintiff taken plea of forgery it is her duty to prove the alleged



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

forgery. In order to prove the said forgery she has not examined any witness and not produce any documents to prove the same.

30. Per contra, the first defendant has examined as D.W.2 who is one of the attesting witness of the said settlement deed dated 15.04.1991. The D.W.2 in his evidence categorically stated about the execution and attestation of the settlement deed Ex.B3 dated 15.04.1991. The trial Court in the judgment observed that the D.W.2 has not deposed about the family circumstances of the Balasubramania Karaiyalar and he is not a relative to the Balasubramania Karaiyalar and the door number and street has not mentioned in the deed whereas in the summons the street number and door number was mentioned and the attesting witness not even know about the family details of the deceased Balasubramania Karaiyalar and thereby disbelieved the evidence of D.W.2 as to whether he is the original attesting witness or not. Once the plaintiff taken a plea that the document is forged, it is for her to prove the alleged forgery, but there is no any sufficient evidence adduced by her to prove the alleged forgery. In this context the



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

learned counsel appearing for the appellant has relied judgment in ***Mariamammal and another v. P.Indirani and others 2010(1) CTC 652***, wherein this Court held in para 43 as follows:

“43. As rightly pointed out by the learned counsel appearing for the second defendant, the First Appellate Court has unnecessarily shifted the burden of establishing the forgery of the Will on the second defendant. It is the fundamental law of evidence that the person who pleads forgery should come out with cogent evidence to establish the plea of forgery. The second defendant, who has come to establish the Will, Ex.B6 cannot be expected to prove the negative. It is only the person who alleges forgery will have to lead evidence touching upon such a plea. No evidence is available on record to establish that Ex.B6 was forged by defendants 1 and 2.”

31. On a careful perusal of the said judgment it is clear that the person who pleads forgery should come out that cogent evidence to establish the plea of forgery. In the case on hand also the plaintiff has taken plea of forgery that the release deed was forged one, but



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

she has not adduced cogent evidence to prove the plea of forgery pleaded by her.

32. The learned counsel appearing for the first respondent argued that the settlement deed was not acted upon and no name transfer was effected in the revenue records and to support his contention he relied judgment in

(i) Rajendran and another v. Radhakrishnan and others 2023(6)

CTC 732, wherein the Hon'ble Division Bench of this Court in para Nos.65 and 66 held as follows:

“65. As we had already pointed out that the Settlement Deeds are written on Stamp Papers that were purchased on 22.2.2000. But the Settlement Deeds were executed on 30.1.2002. The evidence of DW4 an attesting Witness is contrary to the actual facts. DW4 in his evidence would further depose that the Third Defendant- Thangapappu is an illeterate lady. DW6 is the other attesting Witness, who has been examined to prove the Settlement Deeds. He has in his cross-examination deposed that Thangapappu, the



WEB COPY



A.S.(MD).Nos.23 of 2017, 18 of 2018

Third Defendant, gave instructions for preparation of the document. He also deposed that the Stamp Papers for the documents were with Thangapappu. This contradiction in the evidence of DW4 & DW6 coupled with the fact that the documents have been written on the Stamp Papers purchased 2 years ago makes the very execution of those documents highly doubtful. Moreover, the documents do not contain a recital to the effect that the properties settled were purchased by Rajendran in the name of Thangapappu as deposed by DW4 in his cross-examination.

66. We are, therefore, of the opinion that it will be highly unsafe to uphold these documents. We, therefore, conclude that the execution of the Settlement Deeds-Exs.B32 & B33 have not been proved in accordance with law."

(ii) *Bulakram and another v. Ganga Bishun Chaudhuri AIR*

1940 Patna 133, wherein the Hon'ble Division Bench of the Patna High Court held as follows:

"In a Full Bench case of five Judges, 54 All 812. At p.820 of this latter case, the learned Judge observed:



WEB COPY



A.S.(MD).Nos.23 of 2017, 18 of 2018

The Illustrations to the Section make it obvious that the relief is available even to persons other than parties to an instrument, and in respect of both void and voidable instruments. It is equally clear that a plaintiff need only ask for the instrument to be adjudged void or voidable and need not in express terms ask for it to be delivered up and cancelled. Even though no relief for cancellation is asked for, a Court may grant cancellation also. But this does not prevent a plaintiff from also asking in express terms a relief for its being delivered up and cancelled, if he feels that having it merely adjudged void or voidable would not be adequate for his purpose."

33. On a careful perusal of the said judgments there will not be applicable to the present facts of the case because in this case the defendants have proved the execution and attestation of the settlement deed through sufficient evidences in accordance with law and the plaintiff failed to prove the forgery as pleaded by her. The



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

evidence of D.W.2 clearly shows the attestation and execution of the Ex.B3 settlement deed. As per Section 3 of T.P.Act attestation refers the process of verifying the execution of a legal document by a person who is authorized to do so and the object of the attestation is to protect the executant from being required to execute a document by other party thereto by fraud, force or undue influence. Attestation means attested by two or more witnesses each of whom as seen the executant sign or affix his mark to the instrument or has seen some other person sign the instrument. Therefore, the reasons stated by the trial Court in respect of identity of D.W.2 is unsustainable and the same is liable to be set aside.

34. Further the trial Court gone into the aspects of recitals made in the original partition dated 31.05.1988 and there is no dispute in respect of that partition deed and the plaintiff also admitted the said partition deed and thereby only claimed the share by admitting the partition deed dated 31.05.1988. But the trial Court erroneously gone into the aspect of recitals made in the partition deed in the year 1988 and for the flimsy reasons disbelieved the evidence of D.W.2



A.S.(MD).Nos.23 of 2017, 18 of 2018

and failed to consider the forgery plea taken by the plaintiff.

Therefore as discussed above this Court is of the opinion that the first defendant has proved that the settlement deed dated 15.04.1991 has been executed by his father in accordance with law. Thus the point is answered.

35. Point No.3 in A.S.No.23 of 2017:

The suit is filed by the plaintiff for the relief of partition and separate possession over the suit properties. The trial Court has decreed the suit in respect of the 1 to 3 items of suit schedule properties. According to the plaintiff she is entitled to 1/3 share of the properties as the properties belonged to her father Balasubramania Karaiyalar. According to the first defendant the said Balasubramania Karaiyalar executed a settlement deed in respect of 2 and 3 items of the properties in his favour through settlement deed dated 15.04.1991. This Court in the previous point elaborately discussed and decided that the settlement deed dated 15.04.1991 was duly proved by the first defendant and thereby the



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

plaintiff is not entitled to the relief of partition in respect of 2 and 3 items of the suit schedule properties.

36. Point No.4 in A.S.No.23 of 2017:

The plaintiff has sought for the relief of declaration declaring that the settlement deed dated 15.04.1991 is null and void and not binding on the plaintiff. This Court in the previous point decided that the said settlement deed was duly executed by the Balasubramania Karaiyalar in favour of the first defendant and the same was proved through sufficient evidence and also this Court in the previous point decided that the relief sought for by the plaintiff in respect of declaration of the settlement deed is barred by limitation.

37. The learned counsel appearing for the first respondent argued that the settlement deed need not be challenged since it is obtained by fraud and also he relied judgment in *Kewal Krishan v. Rajesh Kumar and others* 2021(3) MWN (Civil) 825.



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

38. On a careful perusal of the judgment it will not be applicable to the present facts of the case because in that case the sale deeds were obtained without consideration and thereby those sale deeds are void and no declaration as null and void is required. In the present case on hand the plaintiff has taken a plea of forgery and the same has not been proved by the plaintiff therefore the said case law will not be applicable to the present facts of the case. Therefore, the plaintiff is not entitled to the relief of declaration in respect of the settlement deed dated 15.04.1991 as null and void and not binding upon the plaintiff. Thus the point is answered.

39. Point No.1 in A.S.No.18 of 2018:

During the pendency of the appeal the appellant has a petition filed under Order 41 Rule 27 to receive the documents as additional evidence in this appeal. According to the petitioner, the properties originally belonged to Balasubramania Karaiyalar through partition deed dated 31.05.1988 and thereafter he gifted 1st item of the properties in favour of the second defendant through gift deed dated 08.02.1989 based on the above said gift deed he had been in



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

possession and enjoyment of the properties in respect of first item of the suit property. Pursuant to the gift deed he sold the 1st item of the suit property to one Vijaya Amma and Maruthi through sale deeds dated 05.05.1989 and 13.02.1989 respectively. Therefore, those documents of gift deed and the sale deeds are essential to decide the case and the same have to be received as additional evidence. According to the respondents, before the trial Court the appellant / second defendant was set *ex parte* and he never appeared before the trial Court and the preliminary decree was passed. Pursuant to the preliminary decree he filed a petition for passing of final decree and the Advocate Commissioner was appointed and these documents are no way helpful to decide the case.

40. It is admitted fact that the petitioner / appellant / second defendant was set *ex parte* before the Court and not filed any written statement and not adduced any oral or documentary evidences. Now he filed the petition stating that he is entitled the 1st item of the suit property through gift deed dated 08.02.1989 and thereafter he



A.S.(MD).Nos.23 of 2017, 18 of 2018

sold the properties to one Vijaya Amma and Maruthi. Since the petitioner himself admitted that he sold the properties to Vijaya Amma and Maruthi, he has no any right over the property after the sale deeds dated 05.05.1989 and 13.02.1989 respectively. Without any pleadings the documents sought to be received are no way helpful to decide the case even according to the petitioner / appellant / second defendant he also sold the properties in the year 1989 itself. Therefore, those documents are not essential to prove the case since the purchasers are not parties to this case.

41. The learned counsel appearing for the appellant relied judgments in

(i) North Eastern Railway Administration Gorakhpur v. Bhagwan Das AIR 2008 Supreme Court 2139.

(ii) B.R.Chandrasekaran and others v. Subramanian and another (2010)6 MLJ 242.

(iii) Jayaramdas and sons v. Mirza Rafatullah Baig and others AIR 2004 Supreme Court 3685.



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

42. On a careful perusal of above said judgments they will not be applicable to the present facts of the case because in the case on hand the petitioner already sold the properties to third parties before filing of the suit and the petitioner has not stated valid reasons to satisfy the conditions of Order 41 Rule 27 of CPC and also no pleadings in respect of those documents.

43. The learned counsel appearing for the first respondent has argued that the appellant is not filed any petition to set aside the *ex parte* decree passed against him under Order 9 Rule 13 of CPC and in the appeal he cannot plead about the ground for setting aside the *ex parte* decree and to separate his contention he relied judgment in

(i) *Bhanu Kumar Jain v. Archana Kumar and another* (2005)1 SCC 787.

(ii) *N.Mohan v. R.Madhu* (2020)1 MKJ 138 (SC).

44. On perusal of the said judgments it is clear that question of correctness of order passed in petition under Order 9 Rule 13 cannot be raised in the appeal under Section 96(2) of CPC, but in the case



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

on hand no petition was filed by the appellant before the trial Court to set aside the *ex parte* decree under Order 9 Rule 13 of CPC. Hence the said case laws will not be applicable to the present facts of the case. Therefore, the petition is filed by the petitioner has no merits and deserves to be dismissed. Thus the point is answered.

45. Point No.2 in A.S.No.18 of 2018:

According to the plaintiff, all the items of the suit properties belonged to Balasubramania Karaiyalar through partition deed dated 31.05.1988. According to the second defendant the said Balasubramania Karaiyalar executed a gift deed in respect of first item of the property in favour of second defendant through gift deed dated 08.02.1989 and based on the gift deed he sold the properties to one Vijaya Amma and Maruthi through sale deeds dated 05.05.1989 and 13.02.1989 respectively. But the appellant / second defendant has not filed any written statement before the trial Court and failed to adduce any oral or documentary evidences. Since he was set *ex parte*. There is no any evidence to substantiate the contention of the appellant in respect of first item of the



A.S.(MD).Nos.23 of 2017, 18 of 2018

property, even according to the appellant the property was sold by him in the year 1989 itself. While so it is for the plaintiff to prove that the properties are available for partition and the plaintiff has produced the documents in the name of the deceased Balasubramania Karaiyalar i.e., partition deed dated 31.05.1988. As per the said partition deed dated 31.05.1988 the properties were allotted to him and in respect of first item of the property there is no contra evidences adduced by the defendant to substantiate that the properties were sold to third parties. Now the case is posted for passing of final decree. Even if it is true that the properties were sold to third parties, without impleading the said third parties it is not appropriate to decide the case, but the plaintiff has not chosen to take steps to implead the parties and it is for the plaintiff to decide whether the preliminary decree is executable or not and at the time of passing final decree if any, the trial Court has to decide whether the first item of the property is available for division or not. Therefore, as per the available documents the plaintiff is entitled to partition over the first item of the property. The trial Court also based on the pleadings and the documents decreed the suit in



A.S.(MD).Nos.23 of 2017, 18 of 2018

respect of first item of the property. Therefore the plaintiff is entitled to partition over the first item of the suit property and there is no dispute in respect of the relationship of the parties and the said Balasubramania Karaiyalar has two daughters and two sons. The plaintiff and the third defendant are daughters, 1 and 2 defendant are sons of the Balasubramania Karaiyalar. Therefore plaintiff is entitled to $\frac{1}{4}$ share and each the defendants are entitled to $\frac{1}{4}$ shares over the first item of the suit property, thus the point is answered.

46. Point Nos.3 and 4 in A.S.No.18 of 2018 and Point Nos.5 and 6 in A.S.No.23 of 2017:

The plaintiff has filed the suit for relief of partition of the suit properties and the declaration in respect of the settlement deed dated 15.04.1991. Before the trial Court on the side of the plaintiff P.W.1 was examined and Exs.A1 to A5 were marked, on the side of defendants D.W.1 and D.W.2 were examined and marked Exs.B1 to B8. The trial Court considered the evidences on both sides and decreed the suit by holding that the settlement deed dated 15.04.1991 is not acted upon and the first defendant has failed to



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

prove execution of settlement deed dated 15.04.1991 and the plaintiff is entitled to partition over the suit properties. The trial Court failed to consider that the claim in respect of declaration of settlement deed is barred by limitation. The date of the settlement deed is 15.04.1991 and the date of suit is 14.09.2015 and there is no pleading in respect of date of knowledge by the plaintiff in respect of the settlement deed dated 15.04.1991. There is no mention about the date of knowledge in the cause of action in the pleadings. Further the plaintiff pleaded that the settlement deed was forged one. Once the plaintiff had taken the plea of forgery she has to prove the forgery by adding sufficient evidence, but no sufficient evidence adduced by the plaintiff. But the trial Court failed to consider the said aspect and erroneously decreed the suit that the settlement deed dated 15.04.1991 is null and void and granted partition in respect of second and third items of properties.

47. As far as the first item of the suit property is concerned the appellant in A.S.No.18 of 2018 / second defendant has not filed any written statement and there is no pleadings and no evidence



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

adduced by him and he was set *ex parte*. Per contra, the plaintiff has filed documents and examined as P.W.1 and based on the evidence the trial Court has decreed the suit in respect of first item of the property. According to the appellant in A.S.No.18 of 2018 he sold the properties in the year 1989 itself to the third parties but those purchasers have not been added as parties to the suit and it is for the plaintiff to face the consequences for non impleading the necessary parties. The trial Court has to decide whether the first item of the property is available for division at the time of final decree proceedings. Therefore, the decree and judgment passed by the trial Court in respect of first item of the property is confirmed and in respect of second and third items of the properties and the relief of declaration in respect of settlement deed dated 15.04.1991 are unsustainable and the same are liable to be set aside, by allowing this appeal. Thus the points are answered.

48. In the result,

(i) A.S.No.23 of 2017 is allowed and the decree and judgment passed by the trial Court in O.S.No.64 of 2014 in respect of



A.S.(MD).Nos.23 of 2017, 18 of 2018

WEB COPY

settlement deed dated 15.04.1991 and the decree in respect of partition over the 2 and 3 items of the suit properties are set aside and the suit is dismissed in respect of partition over the 2 and 3 items of the properties and relief of declaration in respect of settlement deed dated 15.04.1991 are dismissed.

(ii) C.M.P.No.632 of 2018 in A.S.No.18 of 2018 is dismissed.

(iii) A.S.No.18 of 2018 is dismissed with the said observations.

(iv) There shall be no order as to costs.

21.06.2024

rna

Internet : Yes

Index:Yes/No

Neutral Citation:Yes/No

To

The Principal District Court, Tirunelveli.



WEB COPY



A.S.(MD).Nos.23 of 2017, 18 of 2018

P.DHANABAL,J

rna

Pre-delivery judgment in
A.S.(MD) Nos.23 of 2017, 18 of 2018
and C.M.P.No.632 of 2018

21.06.2024