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SA No. 401 of 2015



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05-02-2026

CORAM

THE HONOURABLE MR.JUSTICE P. DHANABAL

SA No. 401 of 2015

and

M.P.No.1 of 2015

1. Subbaiah Gounder

2. Palanisamy

Appellant(s)

Vs

1. Palanisamy Gounder (died)

2. Balasubramaniam

3. Mayilathal

4. Kanna Alias Kannathal

Respondent(s)

R1 died

R2 LR of the deceased R1

R3 and R4 brought on record as LRs of the deceased R1

vide Court order dated 21.06.2021 made in CMP 3395/2018

in SA.No.401 of 2015

PRAYER: This Second Appeal filed under Section 100 of C.P.C., against the Judgment and Decree of the Learned III Additional District Judge, Dharapuram in A.S.No.20 of 2011 dated 23.02.2015 reversing the Judgment and Decree of the Learned Subordinate Judge, Dharapuram in O.S.No.117 of 2008 dated 08.11.2010.



For Appellant(s): Mr.A.K.Kumarasamy
for Mr.S.Kaithamalai Kumaran

For Respondent(s): R1-Died
Mr.S.Parthasarathy
Senior Counsel
for M/s.P.Dinesh Kumar for R2
to R4

ORDER

This Second Appeal has been preferred against the judgement and decree passed in A.S.No.20 of 2011 dated 23.02.2015 on the file of III Additional District Judge, Dharapuram, wherein the respondents herein had preferred an appeal against the judgment and decree passed in O.S.No.117 of 2008, dated 08.11.2010 on the file of Subordinate Judge, Dharapuram.

2. The respondents 1 and 2 herein being the plaintiffs have filed a suit for the relief of partition and the same was dismissed. Aggrieved by the said judgement and decree, the plaintiffs have preferred the first appeal. The first Appellate Court reversed the judgment and decree dated 08.11.2010 and allowed the appeal suit. Aggrieved by the same, the present second appeal has been filed.

3. The parties are referred to as per their own ranking before the trial Court for the sake of convenience.



The brief averments of the plaint are as follows:

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4. Originally, the suit properties belonged to one Kuppayammal, who is the maternal grand-mother of the first plaintiff and she died intestate 35 years back and the mother of the 1st plaintiff pre-deceased her. After the demise of Kuppayammal, her properties were divided among her sons Chinnasamy, Kuppusamy and the son of a pre-deceased daughter namely Palaniyammal, thereby, the 1st plaintiff has succeeded the estate of Kuppayammal amounting to 1/6 share each of the property. The second plaintiff is the son of the 1st plaintiff. The remaining undivided half share in the suit properties were originally belonged to one Sellappagounder, who died intestate 60 years back. The said Sellappa Gounder had two daughters, namely, Kuppathal and Samiyathal and they are entitled to 1/4 share over the property. After the demise of the mother of the 1st plaintiff, his father Sellakumara gounder re-married Kuppathal and begotten two daughters, namely Valliyathal and Samiyathal. Kuppathal also died intestate leaving behind her 1/4 share to be succeeded by her daughters Valliyathal, Samiyathal and her husband Sellakumara gounder. Therefore, the plaintiffs are entitled to 1/12 share over the property. Since the husband of Kuppathal died, his daughters, Valliyathal and Samiyathal are equally entitled to his property, and therefore, the 1st plaintiff is entitled to 1/36 share over the



properties. It is stated that through grand mother Kuppayammal, the 1st plaintiff has got his 1/6 share and through his father Sellakumara gounder, the 1st plaintiff is entitled to 1/36 share and in all 7/36 share of the property.

4.1 While the facts are being so, the first defendant suppressing the share of the plaintiffs had purchased the property from other sources who are having only 29/36 shares through two sale deeds dated 31.07.1991 and 30.01.1992 respectively. The above said sale would not binding upon the 7/36 share of the plaintiffs. The plaintiffs sent a notice to the defendants through their counsel on 23.02.1995 and the first defendant issued a false reply dated 23.02.1995. Thereafter, the plaintiffs have filed a suit in O.S.No.437 of 1995 on the file of the District Munsif Court, Dharapuram for the relief partition and the same was dismissed for non-prosecution on 06.08.1997. Since the extent of the share has been wrongly mentioned in the said suit and in order to file a fresh suit, the plaintiffs have not taken any steps to restore the said suit which was dismissed for default. As the said decree is *ex parte* one and has not been passed after trial, the same is no way affect the present suit. After the dismissal of the said suit, the first defendant through the mediator approached the plaintiffs to amicable settlement for which the plaintiffs also agreed. Despite the same, the defendants have not come forward and prolonged the settlement and also refused for partition of the properties. Therefore, the plaintiffs have filed the present suit.



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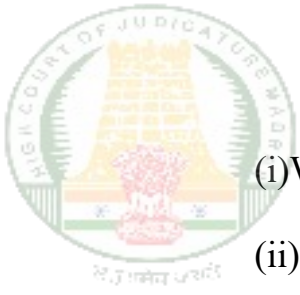
The brief averments of the written statement filed by the defendants are as follows:

5. The suit is not maintainable either in law or in facts. It is true that the property originally belonged to Kuppayammal, and it is not correct to state that after the demise of Kuppayammal, his sons Chinnasamy, Kuppusamy and the 1st plaintiff, who is the grandson of Kuppayammal are in joint possession of the property and the 1st plaintiff is entitled to 1/6 share of the property. The plaintiffs are not entitled to any share over the suit properties. In fact, the mother of the 1st plaintiff died long back 68 years ago. At that time, the 1st plaintiff was only two years old child. On 02.07.1942, the Kuppayammal and Sellappagounder have purchased the suit properties through valid sale deed. Therefore, both of them were entitled equally i.e., 1/2 share over the properties. It is stated that after the demise of 1st plaintiff's mother, Kuppayammal had purchased the property. Therefore, the mother of the 1st plaintiff has no right over the properties. After the demise of Kuppayammal, her two sons Chinnusamy gounder and Kuppusamy gounder have enjoyed the properties and revenue records were mutated in their favour. While so, Kuppusamy gounder and his sons namely, Thangamuthu and Nattudurai have executed a sale deed on 30.01.1992 in respect of their share in favour of the 1st defendant. The another



son of Kuppayammal by name Chinnusamy gounder and Palaniyammal executed a sale deed in respect of their shares to the 1st defendant on 31.07.1991 and put the 1st defendant in possession of the properties. Thereafter, the 1st defendant is in possession and enjoyment of the suit properties through sale deed for 18 years. The 1st defendant executed a Settlement deed on 08.05.2008 in favour of the 2nd defendant and pursuant thereto, the 2nd defendant is in possession and enjoyment of the properties. When the plaintiffs attempted to interfere with the possession and enjoyment of the 2nd defendant, he filed a suit for permanent injunction in O.S.No.260 of 2008 before the District Munsif Court, Dharapuram and the same is pending. The plaintiffs filed a suit in O.S.No.437 of 1995 on the file of District Munsif Court, Dharapuram, against the Chinnasamy, Kuppusamy and Palaniyammal for partition and the same was dismissed for default. Therefore, the plaintiffs are not entitled to any relief. After knowing very well that the properties of Kuppayammal were sold to the 1st defendant, the plaintiffs have filed the suit and therefore, the suit is liable to be dismissed.

6. Based on the above pleading and upon hearing both sides and perused the material records of the case, the following issues have been framed for trial:



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- (i) Whether the plaintiffs are entitled to 7/36 share in the suit properties.
- (ii) What other relief the plaintiffs are entitled to?

7. On the side of the plaintiffs, PW1 was examined and marked Exs.A1 to A3. On the side of the defendants, they examined DW1 and DW2 and marked Exs.B1 to B9.

8. After analysing the evidence adduced on both sides, the trial Court dismissed the suit. Aggrieved by the said judgment and decree, the plaintiffs have preferred the first appeal in A.S.No.20 of 2011 on the file of III Additional District Court, Dharapuram.

9. The first appellate Court after hearing both sides, framed the following point for determination:

- (i) Whether the suit is bared by limitation.

After analysing the evidence on both sides, the first Appellate Court came to a conclusion that the suit is not bared by limitation and the plaintiffs are entitled to 7/36 share over the suit property. Accordingly, the judgment and decree of the trial Court was set aside by the first Appellate Court and granted



relief of partition as prayed for. Aggrieved by the said judgment and decree, the present second appeal has been filed.

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10. This Court at the time of admitting the second appeal has formulated the following Substantial Questions of law:

(i) Are not the judgment and decree passed in O.S.No.437 of 1995 (Ex.B9) between the parties for the same relief operate as *res judicata* for the present suit?

(ii) When admittedly the plaintiffs/respondents herein are not in possession and enjoyment of the suit properties for well over the statutory period, is not the present suit barred by limitation?

11. The learned counsel for the appellant would submit that originally the suit properties belonged to Kuppayammal and Sellappagounder through registered sale deed dated 02.07.1942. The said Kuppayammal had two sons and one daughter. The said Sellappagounder had two daughters. After the demise of Kuppayammal, her sons Kuppusamy and Chinnasamy had sold the properties in favour of the first defendant. Similarly, the grand-daughters of Sellappagounder, namely Valliyathal and Samiyathal have sold the properties through sale deeds. As such, the first defendant is in possession and enjoyment



of the properties. The mother of the 1st plaintiff died before purchasing of the property by Kuppayammal. Therefore, the plaintiffs have no right over the property. Already, the plaintiffs have filed the suit for partition on the file of the District Munsiff Court, Dharapuram in O.S.No. 437 of 1995. But the said suit was dismissed for default and thereafter, they filed the present suit that too after a long time. Therefore, the suit is barred by limitation. He further submitted that the trial Court after analysing the evidence came to a fair conclusion that the suit is bared by limitation and the plaintiffs ought to have filed the suit within 12 years from the date of dismissal of the previous suit. However, the first appellate Court allowed the appeal and set aside the judgment and decree passed by the trial Court and decreed the suit holding that the suit is not barred by limitation. Therefore, the said judgment and decree passed by the first Appellate Court are liable to be set aside.

12. The learned counsel for the respondents would submit that there is no dispute in respect to the relationship between the parties. The said Kuppayammal had two sons and one daughter. The first plaintiff is the grandson of Kuppayammal. The first defendant had purchased the property from the sons of Kuppayammal and no any sale deed was executed either by Palaniyammal or by legal heirs of the said Palaniyammal. It is also an admitted fact that the Kuppayammal and Sellappagounder have jointly



purchased the property and they are each entitled to 1/2 share. After the demise of Kuppayammal, her two sons and daughter, who is the mother of the 1st plaintiff are entitled to 1/6 share over the property. After the demise of Sellappagounder, her daughters Kuppathal and Samiyathal are equally entitled to the property from the father of the 1st plaintiff. After the demise of Palaniyammal, the 1st plaintiff's father married to Kuppathal and had two daughters, namely Valliyathal and Samiyathal. After the demise of mother of 1st plaintiff, viz., Palaniyammal, her share would devolve on her husband Sellakumara gounder and the 1st plaintiff. Since the father of the 1st plaintiff was married to the daughter of Sellappagounder, namely Kuppathal and after the demise of Kuppathal, her property has to be divided between the father of the 1st plaintiff and the daughters of Kuppathal, thereby the 1st plaintiff is entitled to 7/36 share of the property. The trial Court has dismissed the suit on the ground that the suit is barred by limitation. Earlier, the suit was filed for partition and the same was dismissed for default. As far as the partition is concerned, there is no bar to file a fresh suit, even after the dismissal of the previous suit. The previous suit has not adjudicated on merits. Therefore, *res judicata* will not arise. There are no pleadings in respect of *res judicata* in the case in hand. The trial Court has dismissed the suit on the ground of limitation. Therefore, the first Appellate Court has rightly appreciated the fact and allowed the appeal holding that the suit is not barred by limitation. While answering the issue no.1, and



setting aside the decree and judgment of the trial Court, the first appellate observed that the plaintiffs are entitled to 7/36 share of the properties. The trial Court has erroneously dismissed the suit on the ground of limitation. The first Appellate Court held that the appellants are entitled to pay the Court fee under Section 37(2) of Tamil Nadu Court Fees and Suit Valuation Act (in short, TNCF & SV Act) and held that once there is a joint possession, there is no question of limitation. Therefore, the first Appellate Court has rightly decreed the suit and the second appeal is liable to be dismissed.

13. This Court heard both sides and perused the material records of the case.

14. In this case, there is no dispute in respect to the relationship between the parties. It is also an admitted fact that originally the properties belonged to Kuppayammal and Sellappagounder, and they had jointly purchased the properties in the year 1942. In pursuance thereto, the said Kuppayammal and Sellappagounder are entitled to 1/2 share each. The said Kuppayammal died intestate leaving behind her sons Chinnasamy and Kuppusamy and one daughter, Palaniyammal who married to Sellakumara gounder, who had one son viz., 1st plaintiff. After the demise of Kuppayammal, two sons and one daughter are equally entitled to the property. Since the daughter of Kuppayammal,



namely Palaniyammal died, her property has to be devolved to 1st plaintiff and his father, and already the sons of Kuppayammal, namely Chinnasamy and Kuppasamy sold the properties to the 1st defendant. Therefore, the share of Palaniyammal, devolved on her husband Sellakumara gounder and her son 1st plaintiff Palanisamy. After the demise of Palaniyammal her husband Sellakumara gounder was re-married to the daughter of Sellappagounder namely, Kuppathal and she had two daughters namely Valliyathal and Samiyathal and the 1/2 share of Kuppathal would devolve on two daughters, namely Valliyathal and Samiyathal. Since Sellakumara gounder, who is the father of the 1st plaintiff got re-married the said Kuppathal and had two daughters Valliyathal and Samiyathal, after the demise of Kuppathal, Sellakumara gounder is entitled to a share along with her daughters. After the demise of Sellakumara gounder his share has to be devolved between the 1st plaintiff and his two daughters born through the second wife namely, Valliyathal and Samiyathal. Therefore, the plaintiffs are entitled to 7/36 share of the suit properties. The defendants also not disputed the relationship and the entitlement of the share.

15. However, according to the defendants, already the plaintiffs filed a suit in O.S.No.437 of 1995 on the file of District Munsif Court, Dharapuram for partition and the same was dismissed for default and after the dismissal of the



above said suit, the present suit has been filed only in the year 2008, after a lapse of 12 years. Therefore, the suit is barred by limitation. The above said plea

has not been taken before the trial Court and there are no issues in this regard.

The issues are the issues in respect of limitation and also *res judicata*. The trial Court has dismissed the suit on the ground of limitation. The trial Court has not discussed about the exclusion of the joint possession and once again the trial Court came to the conclusion that the plaintiffs are entitled to the share over the properties without framing issues and without any findings cannot adjudicate the matter based on the limitation period. When the trial Court came to the conclusion that the plaintiffs are not in joint possession of the property, it ought to have directed to pay the Court fee as per the TNCF & SV Act. Whereas, the trial Court accepted the Court fee under Section 37(2) of the TNCF & SV Act and admitting the joint possession of the properties. Therefore, the trial Court has wrongly come to the conclusion that the suit is barred by limitation.

16. In judgement in the case *Venkataramana and 6 others Vs. Munuswany Naidu and 4 others reported in 2010 (4) CTC 640*, this Court came to the conclusion that the suit is barred by limitation. In the case of *Venkataramana (supra)*, this Court held that the right of the plaintiffs to claim partition in the suit property has been woefully barred by limitation, they are estopped from claiming right in the suit property and the suit is bad for non-



joinder of necessary parties, on the ground that the plaintiff failed to raise any objections before the authorities, though they had the knowledge of mutation of Revenue Records. In the case on hand, the first appellate Court held that without any pleadings and evidence, the trial Court came to the conclusion that the defendants are entitled to adverse possession and the plaintiffs have not filed the suit within the limitation period.

17. In this case, the defendants have not raised any plea in respect of adverse possession and the defendants have also not taken any plea in the previous suit whether they denied the partition or not. Per contra, the plaintiffs themselves have produced the suit extract in O.S.No.437 of 1995, wherein the partition suit was filed against the defendants and one Palaniyammal.

18. On a careful perusal of Ex.A3, the previous suit has been filed as against one Chinnasamy and Kuppusamy and one Palaniyammal and Subbiah gounder, who is the first defendant in the suit. There are no records filed by the defendants that what was the stand taken by them in that suit, whether they denied the share of the plaintiffs or not. Therefore, without any documents, the trial Court came to the conclusion that the suit is barred by limitation. In the case on hand, there are no pleadings on the side of the defendants for mutation of revenue records made by them, after the purchase of the properties and not



even produced any documents relating to what was the stand of the defendants taken in the previous suit. Therefore, mere filing the partition suit and dismissed for default of the previous suit is not sufficient to hold that the present suit is barred by limitation, that too, without any issues, the trial Court decided that the suit is barred by limitation. As rightly pointed out by the Appellate Court, once the trial Court came to the conclusion that the suit filed by the plaintiffs alleging that they are in joint possession of the properties and accepting the Court fee paid under Section 37(2) of the TNCF & SV Act and without any documents, the trial Court came to the conclusion that the suit is barred by limitation and the same is perverse. Therefore, the first appellate Court has rightly come to the conclusion and decreed the suit for partition. The respondents/defendants have not preferred any appeal as against the findings of the trial Court that the plaintiffs are entitled to share over the properties. Even after the first appeal preferred by the appellants/plaintiffs, the respondent/defendants failed to file any cross objections against the findings of the trial Court in respect of the entitlement of the shares of the parties. Therefore, the first Appellate Court has rightly come to a fair conclusion.

19. As far as the first Substantial Questions of law that:

(i) Are not the judgment and decree passed in O.S.No.437 of 1995 (Ex.B9) between the parties for the same relief operate as res judicata for the



present suit? is concerned- There are no pleadings in respect of *res judicata* and the defendants have not even filed any documents in respect of the previous suit in O.S.No.437 of 1995. Per contra, the plaintiffs have produced the suit extract of the suit in O.S.No.437 of 1995. On a careful perusal of the above said document, it shows that the suit was filed by the plaintiffs for the relief of partition. However, the same was dismissed for default. The mere dismissal of the suit for default will not operate as *res judicata* and there should be the pleadings to attract the principle of *res judicata* and the Courts below ought to have framed issues in respect of *res judicata* and limitation, but the trial Court has also not framed any issues in respect of *res judicata* and limitation. Therefore, the judgment and decree passed in O.S.No.437 of 1995, which was dismissed for default cannot operate as *res judicata* for the present suit. Thus, the first substantial question of law is answered, accordingly.

20. As far as the second Substantial Question of Law that (ii) *When admittedly the plaintiffs/respondents herein are not in possession and enjoyment of the suit properties for well over the statutory period, is not the present suit barred by limitation?* is concerned - There is no evidence that the plaintiff were excluded from the possession of the property and as per the pleadings, the plaintiffs are in joint possession of the property, thereby the Court fee paid under Section 37(2) of the TNCF & SV Act, stating that they are in the joint



possession and enjoyment of the property along with the defendants. There is no contra evidence and no issues framed in respect of the exclusion of the joint possession from the suit property. Once the trial Court has accepted the Court fee under Section 37(2) of the TNCF & SV Act, admitting the joint possession of the property, the Court cannot dismiss the suit, on the ground of limitation merely because the earlier suit which was filed in the year 1995 was dismissed for default in the year 1997. The trial Court not even referred the date of dismissal of the suit for default and there are no pleadings that the defendants are in hostile possession of the property. Without pleadings, the trial Court rendered its findings about the adverse possession and the limitation. Therefore, the present suit is not barred by limitation. Thus, the second substantial question of law is answered.

21. In view of the above said discussions and the answers to the substantial questions of law, this Court is of the opinion that the second appeal has no merits and deserves to be dismissed. Accordingly, the second appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

05-02-2026

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Index: Yes/No

Speaking/Non-speaking order

Internet: Yes

Neutral Citation: Yes/No



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SA No. 401 of 2015



P.DHANABAL J.
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To

1. III Additional District Judge, Dharapuram.
2. The Subordinate Judge, Dharapuram.

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05-02-2026