

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30TH DAY OF JANUARY 2018

BEFORE

THE HON'BLE MR. JUSTICE B.VEERAPPA

WRIT PETITION No. 44632 OF 2017(GM-CPC)

BETWEEN:

SRI GNANA PREMA KUMAR
S/O LATE G. MOSES SUDARSHAN
AGED ABIYT 48 YEARS
R/AT 'PRANATHI'
1ST MAIN, 2ND CROSS,
SHANTHINAGARA,
HASSAN-573 201

... PETITIONER

(BY SRI. NATARAJ H.T., ADVOCATE)

AND:

1. SMT J HEMALATHA
W/O LATE SHANTHAKUMAR,
AGED ABOUT 68 YEARS
RETIRED TEACHER
R/AT SANTHEPALYA,
D.C.BUNGALOW, TUMKUR-572 101
2. SMT. ASHA V K
D/O LATE SHANTHAKUMAR,
AGED ABOUT 44 YEARS

R/AT SANTHEPALYA,
D.C.BUNGALOW, TUMKUR-572 101

3. SRI. EDWIN V K
S/O LATE SHANTHAKUMAR,
AGED ABOUT 42 YEARS
R/AT SANTHEPALYA,
D.C.BUNGALOW, TUMKUR-572 101

4. SMT. ELEZIBATH V K
D/O LATE SHANTHAKUMAR,
AGED ABOUT 42 YEARS
R/AT SANTHEPALYA,
D.C.BUNGALOW, TUMKUR-572 101

5. SMT. PUSHPA V K
D/O LATE SHANTHAKUMAR,
AGED ABOUT 38 YEARS
R/AT SANTHEPALYA,
D.C.BUNGALOW, TUMKUR-572 101

6. SMT. MARY V K
D/O LATE SHANTHAKUMAR,
AGED ABOUT 35 YEARS
R/AT SANTHEPALYA,
D.C.BUNGALOW, TUMKUR-572 101

...RESPONDENTS

(BY SRI R. A. DEVANAND, ADV., FOR C/R1:
V/O DTD 30.01.2018, NOTICE TO R2 TO R6 IS
DISPENSED WITH)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE ORDER DTD:26.8.2017 ON I.A.NO.10 IN O.S.NO.2649/2010 PASSED BY THE LEARNED THE XLII ADDL. CITY CIVIL AND SESSIONS JUDGE AT BANGALURU CITY [CCH 43] IN SO FAR AS REJECTING THE PRAYER OF THE PETITIONER, VIDE ANNEXURE-G.

THIS WRIT PETITION, COMING ON FOR PRELIMINARY HEARING, THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

The present writ petition is filed against the order dated 26.08.2017 on I.A.No.10 made in O.S.No.2649/2010, dismissing the application filed by the plaintiff under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure, 1908.

2. The petitioner who is the plaintiff before the trial court, has filed the suit for partition and separate possession in respect of 1/8th share in the suit schedule property and to declare that the execution and

registration of gift deed dated 11.04.2008 executed in favour of defendant Nos.2, 4, 5 and 6 is illegal, null and void and not binding on the plaintiff's legitimate rights.

3. The plaintiff has contended that the plaintiff and defendants 1 to 7 are in the joint possession of suit schedule property and therefore, he is entitled to a share and has also sought to declare the alleged gift deed dated 11.04.2008 as not binding on him.

4. The defendants filed written statement denying the plaint averments and contended that the suit filed by the plaintiff is not maintainable and further contended that the defendants have been in possession and enjoyment of suit property, ultimately after the death of her husband in the year 2008, she took a decision to gift the entire schedule property in favour of her daughters who are defendant Nos.4, 5 and 6 under

registered gift deed and the same was registered in Sub Registrar's office. Therefore, sought for dismissal of the suit filed by the plaintiff.

5. When the matter was posted for examination of the defendants, at that stage the plaintiff filed the application under Order VI Rule 17 read with Section 151 of Code of Civil Procedure to amend Para -11 (b) and Para (b) (i) of the plaint, contending that the defendants during examination has produced gift deed, which are marked as at Ex. D-7 & D-8 and has already sought a prayer in respect of gift deed i.e., Ex.D-7 dated 11.04.2008 and since non-availability of details gift deed dated 05.08.2011, relief was not sought for. The gift deed dated 05.08.2011 came to be marked as Ex.D-8 through the 1st defendant, while cross-examination of PW1 and the counsel had noticed with regard to the execution and registration of the gift deed in favour of

the defendant Nos.2 to 5, then only the plaintiff came to know the alleged gift deed dated 05.08.2011.

6. Therefore, he filed application to amend the pleadings in respect of gift deed and prayer at Para -11 (b) and Para (b) (i) of the plaint. The said application was opposed by the defendants by filing objections. The trial court considering the application and objections by the order dated 26.08.2017 dismissed the application mainly on the ground that the amendment sought is barred by the limitation in view of the provision of Article 59 of the Limitation Act. Hence, the present writ petition.

7. I have heard the learned counsel for the parties to the lis.

8. Sri. Nataraj H.T, learned counsel for the petitioner vehemently contended that the impugned

order passed by the trial Court rejecting the application for amendment mainly on the ground of limitation is erroneous and contrary to the material on record. He further contended that the written statement came to be filed on 04.12.2010, wherein the defendants did not disclose the details of the gift deed dated 05.08.2011 and even in the additional written statement filed on 06.07.2015 the said gift deed was not disclosed. The plaintiff came to know the existence of the gift deed dated 05.08.2011 only on 09.03.2015. When PW.1 was cross examined immediately filed application I.A.No.10 on 22.10.2016 for amendment within the time prescribed under Article 59 of the Limitation Act. The trial Court erroneously proceeded to reject the application. Therefore, he sought to quash the impugned order dated 26.08.2017 passed by the trial Court and allow the writ petition.

9. Per contra Sri. Devanand, learned counsel for Caveator- respondent No.1 sought to justify the impugned order and contended that in para-20 of the original written statement, it is specifically stated about the execution of gift deed dated 05.08.2011, which is marked as Document No.3. Therefore, the application filed for amendment on 22.10.2016 is clearly barred by limitation as rightly held by the trial Court in the impugned order. Therefore, he sought for dismissal of the writ petition.

10. Having heard the learned counsel for the parties, it is not in dispute that plaintiff filed a suit for partition of 1/8th share and to declare the execution and registration of gift deed dated 11.04.2008 in favour of defendant Nos.2, 4, 5 and 6 is illegal, null and void and not binding on the plaintiff. The defendants filed written

statement denying the entire plaint averments and contended that the very suit filed by the plaintiff is not maintainable

11. It is also not in dispute that during the cross-examination of PW.1, the plaintiff immediately filed I.A.No.10 on 22.10.2016 for amendment within the time prescribed under Article 59 of the Limitation Act. On dismissal of the said I.A. present writ petition is filed. It is specifically contended in para-2 and 3 of the memorandum of writ petition itself that the plaintiff came to know the existence of the gift deed dated 05.08.2011, which is marked as Ex.D-8 only on 09.03.2015. Though the said application was opposed, the fact remains that as on the date of filing of written statement dated 04.12.2010, there could not have been gift deed dated 05.08.2011. Even in additional written statement dated 06.07.2015 filed by the defendants,

they have not disclosed the gift deed dated 05.08.2011 (Ex.D-8) marked through DW-1 from the date of knowledge of the applicant, which came to be filed within three years, as contemplated under the provision of Article 59 of the Limitation Act, which clearly reads as under:

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Description of suit	Period of limitation	Time from which period begins to run
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PART IV-SUITS RELATING TO DECREES AND INSTRUMENTS

59. To cancel or set aside an instrument or decree or for the rescission of a contract	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him.”
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XXX

12. The plain reading of the said provision makes it clear that three years to cancel or set aside an instrument or decree or for the rescission of a contract

and when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him.

13. According to the plaintiff, he came to know the existence of the alleged gift deed dated 05.08.2011 only on 09.03.2015 and the application was filed on 22.10.2016 within the time stipulated under Article 59 of the Limitation Act. The trial Court has proceeded on a wrong assumption that “the proposed amendment by the plaintiff seeking relief of declaration/cancellation of gift deed dated 05.08.2011 is not binding on the plaintiff. As per the Article 59 of the Limitation Act, within three years from the date of knowledge, the party has to seek for cancellation of document. In the present case on 15.11.2010, the defendant has filed written statement notifying the execution of the gift deed. The plaintiff ought to have filed amendment application

within three years from the date of filing of the written statement, but the plaintiff has filed application I.A.No.10 on 22.10.2016 and therefore the same is barred by limitation”.

14. Learned Judge has failed to notice that on the date of written statement i.e., 15.11.2010, the document disclosed was only the gift deed dated 11.04.2008 and not 05.08.2011. Since in written statement filed on 15.10.2011 and even in additional written statement dated 06.07.2015, they have not disclosed the original gift deed dated 05.08.2011. The plaintiff came to know the existence of the alleged gift deed dated 05.08.2011 only in the year 2015 and the application for amendment is filed within the time stipulated under Article 59 of the Limitation Act. Therefore, trial Court has committed an error in coming

to the conclusion that the application filed for amendment is without any basis.

15. For the reasons stated above, the writ petition is **allowed**. The impugned order passed by the trial Court dated 26.08.2017 on I.A.10 filed under Order 6 Rule 17 is allowed. In view of allowing the application for amendment, it is open for the defendants to file additional written statement within the period of two weeks from the date of copy of this order.

16. The suit is of the year 2010 and we are in the year 2018. Hence, the trial Court is directed to expedite the matter, subject to co-operation of both the parties to the lis.

**Sd/-
JUDGE**

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