

(1955) 02 MAD CK 0021

In the Madras High Court

Case No : Second Appeal No. 524 of 1950

Chovvakkaran Pazhukkath Assankeyi

APPELLANT

Vs

Puhathil Veluthan Cheria Ummer and others

RESPONDENT

Date of Decision : 24-02-1955

Acts Referred:

Citation : (1955) 02 MAD CK 0021

Hon'ble Judges : Govinda Menon, J

Bench : Single Bench

Advocate : D.A. Krishna Variar, for the Appellant; K. Kuttikrishna Menon, V. Balakrishna Eradi and K.P. Ramakrishna Iyer, for the Respondent

Final Decision : Dismissed

Judgement

Govinda Menon, J.—The suit out of which this second appeal arises was for partition and recovery of possession of a half share in the property, the acquisition of which was admittedly under Ex. A. 1 dated 6-1-1896, in the name of defendant 1 and his two younger brothers, Kunhi Hasan Kutti and Hasan Kutti of whom the last; two. are dead. Defendant 2 is the son of Kunhi Hasan Kutti. Hasan Kutti died long ago and his widow and children do not come on the scene at all.

The plaintiff is an assignee of the rights from defendant 2 and on the footing that under Ex. A-1 the three brothers acquired the property as tenants in common & when Hasan died and nobody claimed his share the surviving brothers alone were entitled to the property, the plaintiff being entitled to the half share of defendant 2 claims his assignor's rights. Defendant 3 is a mortgagee from defendant 1 on the basis that on the death of his brothers defendant 1 became solely entitled to the property in question and as such could deal with it as his own property. Defendant 4 is the purchaser of the equity of redemption of defendant 1.

In the trial court the defence was set up that there was an oral partition between

defendant 1 and his brother. Kunhi Hasan and as such the present suit for partition is not maintainable. It was also alleged that the acquisition under Ex. A-1 was Putravakasam Property in which case Kunhi Hasan and his personal heirs has no right to it at all. There were pleas regarding limitation as also in regard to the liability to pay mesne profits.

2. Both the lower courts have decreed the suit on the footing that the plaintiff is entitled to a half share in the suit property. On the question of mesne profits the lower appellate court has held that the cause of action arises only when the right of the plaintiff is denied or from the time when there was ouster. Such: being the case the plaintiff was given a decree for mesne profits as claimed in the plaint for ten years prior to the date of the suit, the amount; to be decided at the time of the final decree proceedings. Defendant 3 is the appellant.

3. The main contentions raised in this court are the same as were urged in the lower appellate court. In the lower appellate court it was not seriously contended that the property belonged to any Putravakasam tavazhi and therefore it is pointless to agitate the question afresh in this second appeal. Even otherwise neither defendant 1 nor defendant 3 has put forward the Putravakasam nature in their written statements though there was an issue raised about it. In para. 3 of defendant 1's written statement he admits that the plaint schedule property belonged jointly to himself and his brothers, Kunhi Hasan Kutti and Hasan Kutti.

To the same effect is the averment contained, in para. 5 of the written statement of defendant 3.

Since the matter has not been seriously contended in the lower appellate court I shall not be justified in acceding to the contention of Mr. Krishna Variar that on a construction of Ex. A-1 it should be deemed that the acquisition was made for and on behalf of the Putravakasam tavazhi. Exhibits A-5 to 12 do not show that defendant 1 purported to act as the kamavan of the tavazhi.

What is urged on behalf of the respondent is that at the time of the acquisition which admittedly was with the funds of the father of the three brothers there was their mother alive as also their sister & since the acquirer excluded the mother and the sister from the document it should be deemed that he intended the three named individuals alone to be the sole beneficiaries. To this, the appellant counters by stating that there is no clear evidence regarding the existence of the sister and the exclusion of the mother would not show that the intention of the father was not to benefit the tavazhi as such.

Learned counsel relied upon the Full Bench decision in - Machikandi Parkum Maramittath Tharuvil Mootha Chettiam Veetil Chakkara Kannan Vs. Varayalankandi Kunhi Pokker and Others, , which supports the point of view urged by him. Mr. Krishna Variar contends that the absence of any serious contention regarding the Putravakasam nature of the property was due to the fact that in - "Thath Amma v. Thankappa", AIR 1947 Mad 137 (B) it has been held that if the gift is in favour of some of the children by the father without the

others being named "eo nomine" then it must be deemed that it is not for the tavazhi but only for the individuals concerned departing to a certain extent from the decision in *Machikandi Parkum Maramittath Tharuvil Mootha Chettiam Veettill Chakkara Kannan Vs. Varayalankandi Kunhi Pokker and Others*, .

I do not think that the learned Judges in AIR 1947 Mad 137 (B) could have in any way whittled down the Full Bench decision in *Machikandi Parkum Maramittath Tharuvil Mootha Chettiam Veettill Chakkara Kannan Vs. Varayalankandi Kunhi Pokker and Others*, . But whatever that might be, in view of the pleadings in the case it is too late in the day to contend that the property is Putravakasam property.

4. The second question is as regards mesne profits. It is clear from Ex. B-1 that deft. 2's father died on 28-10-1933 and the mortgage in favour of defendant 3 by defendant 1 Ex. B-2 was on 13-10-1934. The suit itself was filed on 9-10-1946. Though it cannot be stated that from that date onwards there has been any denial of the right of defendant 2 or that he had been ousted from enjoyment of the property it is urged on behalf of the appellant that at least from the date when defendant 1 purported to mortgage the property as his own it should be deemed that the rights of defendant 2 have been denied.

But Mr. Kuttikrishna Menon for the respondent relying on the decision in - *Vaiyapuri Chettiar Vs. Subramania Chettiar and Others*, , contends that the mortgage by a co-owner on the assertion that the property belongs to him absolutely cannot be taken as an indication of ouster of the other co-owner or denial of his title. I do not think that that proposition need be disputed. In the present case it is not the case of defendant 2 that he was not aware of the transaction evidenced by Ex. B. 2 but what he says is that during his father's lifetime his share of the income was being received and after his death defendant 2's brothers were taking the income from defendant 1 till their death.

This case has not been substantiated or found to be justified by the lower appellate court. Such being the case we have to take it that defendant 2 and his brothers were aware from the date of Ex. B. 2 that their claim to property has not been accepted by defendant 1. Though there has been no specific evidence of any denial after the death of defendant 2's father till the date of Ex. B. 2, it seems to me that at least from that date onwards the title of defendant 2 and his brothers has been disputed by defendant 1.

In that case the hostile assertion having taken place, under Art. 120, Limitation Act the cause of action commences from that date. Reliance is placed on the decision of Somayya J. in - *Oorpokkil alias Athikkot Parvathi Amma's daughter Visalakshi Amma and Others Vs. Oorpokkil alias Athikkot Kuppu Amma's son Madhava Menon and Others*, , where the learned Judge held that a co-sharer's suit for his share of the income of property is governed by Art. 120, Limitation Act and the starting point is when the right to sue accrues. It was further held that it may be that he may be entitled to an account of the share of the income

for more than six years prior to the date of suit as it cannot be said that in the absence of ouster or assertion of hostile title to the knowledge of the plaintiff his right to a share in the income should be confined only to a period of six years prior to the date of suit.

It is not necessary for me to express any opinion whether I agree with the reasoning of the learned Judge though the effect of that decision may be that if one co-sharer does not care to enjoy the income but allows the other to appropriate the whole of it to himself even for a period of more than 12 years, still the co-sharer who has not enjoyed his share of income will be entitled to an account for an indefinite period. I do not think that such a consequence had been envisaged.

It is certainly not the duty of a co-sharer to collect the income and pay their shares to the other co-sharers even if there is no demand. The mere fact that there is no ouster or assertion of hostile title would not entitle a co-sharer who has not received the income to claim it for any period more than six years. The cause of action in such a case must be deemed to arise when the income accrues and not when there is a denial of the co-sharer's right. The rights and obligations "inter se" between the co-sharers are subject to well defined principles.

The Privy Council in - "Corea v. Appuhamy", 1912 AC 230 (E) has laid down that possession of one co-sharer is never considered adverse until there is an ouster by the other. But that principle cannot be extended so far as to say that it is the duty of the co-sharer in possession to collect the income and pay their shares to the other co-sharers. No such sense of obligation is cast on a co-sharer. If the broad proposition of law enunciated by Somayya J. is pushed to its logical conclusion then it will be open to one co-sharer to lie low without taking any interest in the management of the property leaving the other co-sharer to be in possession sometimes against his desire, and thereafter claim a share of mesne profits for an indefinite period.

It seems to me, therefore, that apart from the question of ouster the cause of action for claiming share in the mesne profits arises as and when the profits are received. Viewed in this light the cause of action for the plaintiff for realising each year's mesne profits would arise on the date of such collection. Under these circumstances the plaintiff will not be entitled to mesne profits for more than six years prior to the date of the suit. The decree of the lower appellate court is modified to that extent. In other respects the second appeal is dismissed. In the circumstances of the case the parties will bear their own costs in this court. No leave.