
(1910) 01 MAD CK 0048
In the Madras High Court

Duvvada Hari Kristna Chowdhary and Davvada Parasu
Ramayya Chowdary alias Narayana Chowdary

APPELLANT

Vs

Sripada Venkata Lakshmi Narayana Pantulu and Others

RESPONDENT

Date of Decision : 12-01-1910

Acts Referred:

Citation : 5 Ind. Cas. 491

Hon'ble Judges : Arnold White, C.J; Munro, J

Bench : Division Bench

Judgement

1. The father of the plaintiffs obtained a decree against the 5th defendant and in execution thereof brought to sale and purchased the 5th defendant's one-fifth share in the two suit villages. The plaintiffs in the suit, out of which these appeals arise, sued for partition and for possession (sic) 5th defendant's one-fifth share in the (sic) villages.

2. Balakrishnama, adoptive father of the 2nd defendant, and defendants Nos. 1, 3 and 5 were members of an undivided family. In 1871 they effected a partition. The bulk of the family property was divided by metes and bounds, but the suit villages and some other immovable property were kept undivided for convenience of enjoyment and were held by the divided members as tenants in common, though the actual management was vested in Balakrishnama, who was to pay to each of the tenants in common his share of the income. In January 1893, Balakrishnama died and the management was thereafter with the 1st defendant.

3. Two of the issues framed in the suit were: whether the suit was barred by limitation and whether the suit was bad as being a suit for partial partition. The Court found both these issues in the negative and gave a decree for partition. The arguments on behalf of the appellants have been confined to an attempt to show that the findings upon the above issues are wrong. We shall first deal with Appeal No. 184 which is by the 1st defendant. This defendant in his written statement admitted that the 5th defendant used to receive payments towards his

share of the income of the suit lands as long as Balakrishnama was alive. He contended, however, that after Balakrishnama's death in 1893, the 5th defendant had no enjoyment and that, therefore, the suit brought in 1906, was time-barred. The article of Schedule II of the Limitation Act, applicable to a case like the present, is Article 144 and to succeed, it was incumbent upon the 1st defendant to prove that the 5th defendant was, in denial of his title, excluded from the enjoyment of his share of the suit lands. *Jogendra Nath Rai v. Baldeo Das Marwari* 35 C. 961 : 12 C.W.N. 127 : 6 Cri.L.J. 735, *Sellam v. Chinnammal* 24 M. 441, *Ittappan v. Manavikrama* 21 M. 153.

4. This was the view taken by the Court below, and it has not been seriously disputed before us. We think the Court below was tight in holding that the 1st defendant failed to discharge the burden which rested upon him. The 5th defendant stated as a witness for the defence that after the partition of 1871 he never received any share of the produce either from Balakrishnama or from any one else. In so stating he went further than the 1st defendant himself. There can be no doubt that his sympathies are now with the defendants rather than with the plaintiffs and no reliance can be placed upon his evidence. Exhibits II and VIII are relied upon. These are written statements filed by the 5th defendant in Original Suit No: 1 of 1894 and Original Suit No. 10 of 1895, respectively. In these statements the 5th defendant alleged that the partition of 1871 was never acted upon and that he and other members of the family were managing portions of the family lands. He never stated that he was excluded from enjoyment of the suit lands. His object in putting in these written statements was to claim a larger share than he was entitled to under the partition of 1871. This is all the evidence relied upon to prove adverse possession and it is manifestly insufficient.

5. The remaining question is whether the suit is bad as being a suit for partial partition. The 5th defendant was entitled as tenant in common to 1/5 share, not only in the suit villages but also in certain inam "lands. The suit is for partition of his 1/5th share in the suit villages only, that being all that plaintiff's father bought. In support of the contention that the suit is bad we have been referred to a passage in *Ramaswamy Chetty v. Alagiriswamji Chetty* 27 M. 361 and to an unreported decision of this Court in Second Appeal No. 175 of 1905. In *Ramaswamy Chetty v. Alagirisamy Chetty* 27 M. 361 it is said: "It is no doubt the law that the transferee only of the co-tenancy cannot maintain a suit for partition of the portion transferred to him." For this statement of the law *Parbati Churn Deb v. Ain-ud-deen* 7 C. 577 : 9 C.L.R. 170 is relied upon. As was, however, pointed out in the case of *Radha Kanta Shaha v. Bipro Das Roy* 1 Cri.L.J. 40 it was not laid down in that case as a matter of law, that a partition of a revenue paying estate, when that portion is capable of partition without much inconvenience, to other shares, is absolutely barred by law and *Syed Harihur Rasul Abdul Faiz v. Ashita Mohan Ghosh* 12 C.W.N. 640 and *Uma Sundari Debi v. Benode Lal Pakrashi* 34 C. 1026, are further authority that a suit like the present is not bad. Second Appeal No. 175 of 1905 is clearly distinguishable. There the

suit was to recover specific land left by the testator under his will to the plaintiff, and it was held that plaintiff could not succeed because the immovable property of the testator's family had not been divided and the testator himself could not have claimed any specific portion of the undivided property as his share. We, therefore, hold that the suit is not bad and dismiss Appeal No. 184 with costs.

6. Appeal No. 183 is by the 2nd defendant. The only difference between this appeal and appeal No. 184 is that there is no admission by the 2nd defendant that the 5th defendant at any time enjoyed his share of the suit property. This, however, is immaterial seeing that the burden of proof is upon the 2nd defendant.

7. We, therefore, dismiss the appeal with costs.