
(2011) 02 MAD CK 0431

In the Madras High Court

Case No : S.A. No. 1026 of 2000 and C.M.P. No. 118 of 2011

Gurusamy

APPELLANT

Vs

Manickaraj and Others

RESPONDENT

Date of Decision : 14-02-2011

Acts Referred:

Citation : (2011) 02 MAD CK 0431

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Advocate : V. Natarajan, for the Appellant; C. Sanjai Babu, for V. Nicholas, for the Respondent

Final Decision : Dismissed

Judgement

R.S. Ramanathan, J.—The Plaintiff is the Appellant herein. The suit was filed by the Plaintiff for partition.

2. The case of the Plaintiff was that the property originally belonged to one Annamalai Chetty, who had three sons and in the partition that took place amongst three sons, the suit property was allotted to the share of Veerana Chetty, the second son of Annamalai Chetty. The said Veerana Chetty, had two sons and the Plaintiff is the son born to the first wife and therefore, he is entitled to 4/9 share in the suit property.

3. The Respondents/Defendants filed a statement admitting that the properties were allotted to the share of Veerana Chetty, but denied the status of the Plaintiff, as a son of Veerana Chetty and disputed the marriage of Veerana Chetty with Lakshmi Ammal, the mother of the Plaintiff. It is further stated that in the year 1951, Veerana Chetty, sold a portion of the property in favour of his wife Ponnammal and thereafter, settled the remaining portion in favour of first Defendant represented by his wife³ Ponnammal, and therefore, the first Defendant and Ponnammal became the owner of the property. After the death of the said Ponnammal, the Defendants became absolute owner of the suit property.

4. The Trial Court held that the Appellant/Plaintiff is the son of Veerana Chetty, whose first wife was Lakshmi Ammal and that has been admitted by Veerana Chetty, himself in Ex.A5, viz., the settlement deed executed by him in favour of the first Defendant and as the property is the ancestral property in the hands of Veerana Chetty, he cannot sell the property or settle the property and those deeds are not binding on the Plaintiff, as the Plaintiff is one of the co-parceners entitled to 1/3 share in the properties.

5. The First Appellate Court reversed the findings of the Trial Court and allowed the appeal on the ground of limitation that admittedly the Plaintiff was excluded from enjoyment of the property from the year 1957 and therefore, he is not entitled to the partition. Hence, this Second Appeal.

6. At the time of admitting this Second Appeal, the following substantial question of law was framed by this Court:

Has not the Lower Appellate Court failed to see that the burden of proving exclusion of the Plaintiff from possession of the joint family property is only on this Defendant.

7. It submitted by the learned Counsel appearing for the Appellant that the Lower Appellate Court erred in allowing the appeal on the ground of limitation when no issue was framed by the Trial Court regarding limitation. It is further contended by the learned Counsel that it is admitted that the property was the ancestral property in the hands of Veerana Chetty and Ex.A5, would prove that the Plaintiff is the son of Veerana Chetty, whose first wife was Lakshmi Ammal and therefore, the Plaintiff became entitled to 1/3 share in the property.

8. The learned Counsel appearing for the Appellant further submitted that in the absence of any issue regarding limitation, the Lower Appellate Court ought not to have dismissed the suit on the ground of limitation and between the co-parceners, there is no question of limitation in the absence of ouster and in this case, it has not been pleaded or proved by the Respondents that the Plaintiff was ousted from enjoying the property exclusively and the Respondents/Defendants have not discharged the burden.

9. On the other hand, the learned Counsel appearing for the Respondent submitted that even though limitation was not pleaded in the written statement, being a question of law, it can be raised even in the second appeal stage and evidence was let in by the parties regarding that limitation and considering the evidence of parties, the Lower Appellate Court has rightly held that the suit claimed is barred by limitation.

10. It is further submitted by learned Counsel appearing for the Respondent that it is admitted by the Plaintiff in cross-examination that even in the year 1957, he issued notice claiming partition and that was replied by the Defendants denying the Plaintiff's right to the suit property and he has also issued Ex.B1, notice dated 22.0.1976 and that was replied by the Respondents under Ex.B2,

denying the right of the Plaintiff.

11. The learned Counsel appearing for the Respondent also submitted that even in the year 1957, the Plaintiff's right was denied by the Respondents/Defendants and the Respondents asserted that they are enjoying the property in their own right and also denied the right of the Plaintiff and as well as ousted him from the enjoyment of the property and therefore, the Plaintiff is not entitled to the relief prayed for. The learned Counsel also relied upon the judgment reported in AIR (1995) Mad 200 in the case of (Marudanayagam v. Sola Pillai) in support of his contention.

12. Heard the learned Counsel on either side.

13. It is admitted that the properties were allotted to one Veerana Chetty, under the partition deed and it is also admitted that the properties were ancestral properties in the hands of Veerana Chetty. It is also admitted by the Appellant that under Ex.A4, a portion of the suit property was sold by Veerana Chetty, in favour of his wife Ponnammal and another portion was settled in favour of the first Respondent/first Defendant herein. Ex.A5, supports the case of the Plaintiff that he is the son of Veerana Chetty, whose first wife was Laxmi Ammal and therefore, the contention of the Respondents that the Plaintiff is not the son of Veerana Chetty cannot be accepted. In Ex.A5, Veerana Chetty, categorically admitted that Laxmi Ammal, was his first wife and through her he had a son by name Gurusamy.

14. Therefore, both the Courts have rightly held that the Plaintiff was the son of Veerana Chetty. It is also seen from the judgment of the Trial Court that no issue regarding the limitation was framed. Nevertheless, having regard to the evidence and limitation being the question of law can be raised at any point of time, this was considered by the Lower Appellate Court and the Lower Appellate Court held that the suit is barred by limitation.

15. Well, when the Plaintiff admittedly a co-owner along with the Defendants in respect of the property, even though the settlement deed and the sale deed were executed by Veerana Chetty, that will not bind the share of the Plaintiff. Therefore, the Plaintiff continues to be the co-owner in respect of the 1/3 in the suit properties. Nevertheless, in the year 1957, he issued a notice to the Defendants claiming partition and that was denied. That was followed by another notice viz., Ex.B1, issued by the Plaintiff in the year 1966, claiming partition and the Defendants sent notice under Ex.B2, denying right of the Plaintiff to claim any share in the suit properties. These facts are admitted by the Plaintiff in the evidence.

16. Therefore, considering the above said facts, the Lower Appellate Court rightly held that from the year 1957 onwards, the Plaintiff was excluded from the enjoyment of the property by the Defendants and therefore, the suit filed in the year 1980, is clearly barred by limitation. In the judgment referred to supra, it has been held as follows:

It is settled law that lapse of time is never in itself a bar to partition and the statute of limitation will operate from the time the Plaintiff is excluded from his share and such exclusion became known to him. There can be no exclusion without a denial of the coparcener's right to a share and such denial may be express or implied. While partition is demanded and refused or if the coparcener is expelled from the joint family, that would be clear exclusion.

17. As stated supra, in this case also from the year 1957 onwards, the right of the Plaintiff was denied and hence the Lower Appellate Court rightly held that the Plaintiff was excluded from the possession of the property and hence, his claim is barred by limitation. Therefore, the substantial question of law is answered against the Appellant.

18. In the result the judgment and decree of the Lower Appellate Court is confirmed and this Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is also dismissed.