

(1912) 10 MAD CK 0075
In the Madras High Court

Kolandavelu Pillai

APPELLANT

Vs

Armugatha Pillai and Others

RESPONDENT

Date of Decision : 21-10-1912

Acts Referred:

Citation : 18 Ind. Cas. 493

Hon'ble Judges : Miller, J;Abdur Rahim, J

Bench : Division Bench

Judgement

Miller, J.—This is a suit for partition. The plaintiff's father, the 1st defendant and another (deceased) were three brothers. The 2nd defendant, son of the 1st defendant, is alleged to have been adopted by the deceased 3rd brother. The question in the suit is whether this adoption was made or not. If it was made, as the family now stands, the plaintiff would be entitled to one-third of the family property. If it was not, he would be entitled to one-half of the family property. The Subordinate Judge has held, by reason of the period of limitation prescribed by Article 113 of the Limitation Act, that the plaintiff is not now entitled to question the adoption and, consequently, he must be allowed only an one-third share. The decision of the Subordinate Judge was passed at a time when it had been held in this Court that the period of limitation provided by Article 118 was applicable to all suits whether for possession or not which involved the question of the existence of an adoption. That was before the decision of the Privy Council in *Tirbhuwan Bahadur Singh v. Ramashar Baksh Singh* (I) which was followed, of course, in this Court in *Velaga Mangamma v. Bandlamudi Veerayya* 2 M.L.J. 178 and *Karnan Rama Row v. Venkoba Row* 17 M.L.J. 282 and which was in those cases understood to decide that Article 118 of the Limitation Act is no bar to a suit for possession. That view of the Privy Council in *Tirbhuwan Bahadur Singh v. Rameshar Baksh Singh* 3 A.L.J. 695. has been confirmed by the observation at page 432 in *Muhammad Umar Khan v. Muhammad Niaz-ud-din Khan* 13 Ind. Cas. 344 where the Privy Council distinctly pointed out that *Tirbhuwan Bahadur Singh v. Rameshar Baksh Singh* 3 A.L.J. 695. meant to decide that question. It was contended that there was a distinction between this suit and the case in

Tirbhuwan Bahadur Singh v. Rameshar Baksh Singh 10 C.W.N. 1065 and the two cases of this Court, the distinction being that Article 141 of the 2nd Schedule to the Limitation Act was applicable to those cases, whereas another Article 144 would be applicable to the present suit. I entirely fail to follow this distinction. I can understand a distinction based on the contention that Article 118 might be invoked in case where it is necessary for the plaintiff to set aside an adoption before he asks for possession. A distinction based on that is intelligible. But here there is no more reason why the plaintiff should seek to displace this alleged adoption before proceeding with the suit for possession, so far as I can see than there was in all those other cases. No other distinction which is intelligible to me has been suggested. There appears to be no reason why the plaintiff should not apply to his suit for partition the words of their Lordships in Muhammad Umar Khan v. Muhammad, Niaz-ud-din Khan (1912) M.W.N. 77 where they say: "The omission to bring, within the period prescribed by Article 118 of the second Schedule of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit like this for possession of property." It seems to me that the words are as applicable to this suit for partition and possession of a share as to the other suit which was for possession of the whole estate. If I am right, of course, the Subordinate Judge's decision is wrong. The plaintiff's suit is in time. The Subordinate Judge then finds, as a matter of fact, that the adoption questioned never did take place and that finding has not been contested in the argument here. The decision of the Subordinate Judge that the plaintiff should get one-third of the property must, therefore, be modified by giving him one-half.

2. There are a few other points taken in the appeal relating to items of the property in respect of which orders have been made as to partition. First as to what are called E. Schedule lands, i.e., lands described in schedule E. attached to the plaint. Apparently they were not made the subject of a definite issue. The evidence is that they stand in the name of the 2nd defendant who was managing the property. The 2nd defendant alleged that they were his brother-in-law's and the plaintiff says that once the brother-in-law told him that he gave them to the 2nd defendant. The 2nd defendant appears to have been managing the property and the lands stand in his name. In the absence of any other evidence as to their ownership, it should be taken that the lands belong to the family and they must be, therefore, held to be family property divisible between the plaintiff of the one part, and the 2nd and 3rd defendants together of the other.

3. The third ground relates to the omission of certain outstandings which admittedly belong to the family, from the partition. There is no doubt that the omission of these items from the preliminary decree was merely accidental and they will now be added to the property to be divided.

4. There is a ground taken as to interest. Interest was given by the Commissioner on some amounts collected after the suit by the 2nd defendant who refused to produce the accounts and to show what he had done with the

money collected by him. He admitted as to some of it that he had lent it out on interest and as to some he said that he had spent it. The Subordinate Judge has disallowed interest simply on the ground that the preliminary decree has not provided for it. It seems to me that the Commissioner was right seeing that the 2nd defendant has not shown how he has disposed of the money collected by him, in giving interest as allowed by the Commissioner for those items.

5. The final question is as to the costs of the suit. There is no doubt that the fact that a new partition will have to be made in the place of the partition which has been effected is due to the plaintiff failing to appeal against the preliminary decree. He has allowed the partition to go on and now that will have to be modified and in fact re-made. I think the proper order as to costs of the suit will be that costs up till now will be provided out of the estate and costs of the fresh partition will be paid by the plaintiff.

Abdur Rahim, J.

6. I agree.