

(1982) 02 MAD CK 0027
In the Madras High Court

R. Purushothaman and Others		APPELLANT
	Vs	
K. Dhanapal and Others		RESPONDENT

Date of Decision : 23-02-1982

Acts Referred:

Citation : (1984) 97 LW 669 : (1982) 2 MLJ 287

Hon'ble Judges : V. Ramaswami, J

Bench : Division Bench

Judgement

V. Ramaswami, J.—The plaintiffs are the appellants. A suit was filed by them on 8th April, 1975, for reopening a partition already effected

on 11th September, 1953, and for partition and separate possession of their share in the properties. The prior partition dated 11th September,

1953, was executed by the three sons of one Krishnaswami Chetty who are defendants 1, 2 and 4 herein and the third defendant who is the wife

of the said Krishnaswami Chetty. The plaintiffs are the children of the fourth defendant. The said Krishnaswami Chetty died on 19th December,,

1951, leaving the fourth defendant, the father of the plaintiffs, who is the eldest son, and two other sons, defendants 1 and 2 of whom the second

defendant was then a minor represented by his mother and guardian. This suit has been filed more than, three years after the first plaintiff had

attained the age of majority. One of the main defences in the suit was that the suit is barred by limitation. The learned Judge has accepted this

contention. However, since some of the landed properties situated in some far off villages including a mango grove were not divided, the learned

Judge also went into the question whether the partition dated 11th September, 1953, was fair and equal and ultimately held that the partition was

fair and reasonable and does not call for any interference. After giving those findings, the learned Judge gave a decree for partition as prayed for in

respect of those items which were not included in the partition dated 11th September, 1953. It is against this decree and judgment the present appeal has been filed.

2. The learned Counsel for the appellants contended that the suit is not barred by limitation mainly relying on certain observations of the Supreme

Court in *Ratnam Chettiar and Others Vs. S.M. Kuppuswami Chettiar and Others*, , where it was observed by the learned Judges as follows:

Where, however, a partition effected between the members of a Hindu undivided family which consists: of minors is proved to be unjust and unfair

and is detrimental to the interests of the minors, the partition can certainly be reopened whatever the length of time when the partition took place. In

such a case it is the duty of the Court to protect and safeguard the interests of the minors and the onus of proof that the partition was just and fair is

on the party supporting the partition.

This passage was relied on by the learned Counsel as applicable to the facts of this case and he said that there can be no limitation in a case where

at the time partition the party challenging the partition was a minor and he wants to question the partition on the ground that it is unfair, unjust or

inequitable. We are unable to agree with this contention of the learned Counsel nor can the judgment of the Supreme Court be said to have laid

any such proposition. In the case before the Supreme Court, the suit was filed for partition after cancellation of a partition deed made between the

father of the plaintiffs and his elder brother on 10th May, 1940. At the time when the partition was made, the plaintiffs were minors. The suit itself

was filed when the plaintiffs were still minors and had not even attained the age of majority, that is to say, both at the time when the partition was

effected by the father as also at the time when they filed the suit for setting aside the partition, the plaintiffs, were minors. Therefore, no question of

limitation as such arose for consideration in that case. It may also be mentioned that the father of the plaintiffs was made the fifth defendant in the

suit and it appears that he not only did not contest the suit but accepted the partition even in the Supreme Court. But what was argued in that case

was that the partition was effected by the plaintiffs' father in 10th May, 1940,

and the case itself came up before the Supreme Court for hearing in 1975, more than 35 years after the partition and, in those circumstances, as seen from paragraph 7 of the judgment it was argued that the partition between the two brothers, namely the plain-tiffs' father and his brother, was voluntarily made about 35 years back and the father of the plaintiffs had most willingly and with good grace accepted the partition of the shares that were allotted to him. In answer to this contention, the Supreme Court observed that if once the partition is proved to be unjust and unfair and is detriment to the interests of the minors, the partition can certainly be reopened, whatever the length of time when the partition took place. When a sympathy was sought to be raised on the ground that the father had accepted the partition even before the Supreme, Court and that 35 years' time had elapsed,, the Supreme Court felt that they were not relevant considerations if once the Court came to the conclusion that the partition was unjust and unfair. The decision, therefore, in no way supports the contention of the learned Counsel for the appellants. In fact a similar argument based on the same observations appears to have been raised before Ramanujam, J., in the case in Meenambal and Others Vs. Chockalinga Chettiar and Others, , where the learned Judge did not accept it and said that the decision of the Supreme Court cannot be taken to be an authority for the proposition that whenever a partition is unfair and unequal, the same can be set aside without reference to the question of limitation.

3. The question for consideration then is as to what is the period of limitation for filing the suit and whether the suit is barred by limitation. Under Article 59 of the First Schedule to the Limitation Act of 1963, to cancel or set aside an instrument, a period of three years limitation is prescribed and the period is to begin when the facts entitling the plaintiff to have the instrument set aside became known to him. If this Article is taken as a proper Article, then a period of three years will have to be counted from the date when the first plaintiff attained the age of majority as he shall be deemed to have been aware of the fact at least from that date since the partition deed of 1953 was a registered document and the parties have been put in possession of their respective shares of the properties as and from that date. But in our view the suit as such may be taken as one for

which no specific period of limitation is provided elsewhere in the Schedule to the Act and therefore Article 113 is the one that is applicable to the instant case. Under that Article, any suit for which no period of limitation is provided elsewhere in the Schedule, will have to be filed within a period of three years when the right to sue accrues. The right to sue had accrued to the plaintiff when the original partition of 1953 which is assailed as unfair and unjust was executed. But since he was under a legal disability within the meaning of Section 6 of the Limitation Act, the period of three years will have to be counted from the date when he attains the age of majority and, therefore, the suit should have been filed within three years from the date when he attained the age of majority. The first plaintiff attained the age of majority on 1st October, 1969, and therefore the suit filed in 1975 is hopelessly barred by limitation.

4. It was then contended by the learned Counsel for the appellants that in respect of the mango garden shown as item 6 of the plaintiff's schedule and the six items of properties shown in the additional written statement, there was a partition arrangement under Exhibit P7 in 1970 and that under that partition all the six items mentioned in the additional written statement fell to the share of the plaintiff's father, the fourth defendant in the suit, and therefore, the decree restricting the plaintiff's right in respect of the properties to a 5/24th share is incorrect. The learned Judge did not accept the contention of the petitioner that there was any partition in the year 1970 and on a construction of Exhibit P-7, the learned Judge felt that it would not amount to a partition at all. We are in entire agreement with the learned Judge. Apart from the fact that the recitals in Exhibit P-7 do not show that it is a partition as such but is only an agreement to partition, if it is to be treated as a deed of partition, it is inadmissible in evidence. Exhibit P-7 is neither written in any stamp-paper nor registered and the value of the property is more than Rs. 100. Further even for evidencing possession, we cannot rely on the same because the mango grove of the total extent of 8 acres odd was shown as item 6 in the schedule A to the plaintiff and it had not been claimed in the plaintiff that the mango garden was ever divided in 1970 and only a little over 2 acres was allotted to the plaintiff's father. The plaintiffs, therefore, have not asserted that they had been in possession of the properties allotted to them under the partition

agreement of the year 1970 adversely to the defendants in order to claim any right even on the basis that it was a partition arrangement. We are

therefore, unable to agree with the learned Counsel for the appellants that either a portion of the mango garden was actually allotted to the plaintiff

or that the properties shown in the additional written statement were allotted to the plaintiffs in a partition of the year 1970.

5. In the result, the appeal fails and it is dismissed, but there will be no order as to costs.