

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.04.2015

CORAM

THE HONOURABLE MS. JUSTICE R. MALA

S.A.No.819 of 2008

Judgment reserved on 09.04.2015	Judgment pronounced on 13.04.2015
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Jayaraman ..Appellant/Defendant

Vs

Ramakrishnan ..Respondent/Plaintiff

Prayer: Second appeal filed under Section 100 of CPC against the Judgment and Decree dated 10.03.2008 in A.S.No.74 of 2007 on the file of the Principal Sub-Court, Mayiladuthurai, confirming the Judgment and Decree dated 13.07.2007 in O.S.No.307 of 2004 on the file of the District Munsif Court, Sirkazhi.

For Appellants : Mr.S.Sounthar
For Respondents : Mr.G.M.Shankar

JUDGMENT

This second appeal arises out of the Judgment and Decree dated 10.03.2008 in A.S.No.74 of 2007 on the file of the Principal Sub-Court, Mayiladuthurai, confirming the Judgment and Decree dated 13.07.2007 in O.S.No.307 of 2004 on the file of the District Munsif Court, Sirkali.

2.The averments made in the plaint are as follows:-

(i) The defendant is the second brother of plaintiff. The father of plaintiff and defendant is one Pakkirisamy, who is having four other sons by names Sivaraman, Gopalakrishnan, Balakrishnan and Radhakrishnan. There was a family arrangement on 21.08.1977 and the properties were separately allotted to each members of the family under separate schedule. The said document was styled as "Karaiolai" and its original is with the defendant. The allotment under the said Karaiolai was confirmed and affirmed under the decree and judgment made in O.S.No.47 of 1983 on the file of the Sub-Court, Mayiladuthurai, which was affirmed in A.S.No.59 of 1986 on the file of the District Court, Nagapattinam.

(ii) An ancestral family house in one of the items of the properties found in the said Karaiolai was built up prior to family arrangement on 21.08.1977, in which defendant was living with his family. Electricity service connection stands in the name of the father Pakkirisamy.

(iii) As per family arrangement dated 21.08.1977, the entire 14 cents with the entire house thereon were allotted to the share of the plaintiff and it was provided that the father Pakkirisamy should enjoy the same till his life without any power of alienation and thereafter, to be taken by the plaintiff with absolute rights.

(iv) The defendant had been allotted a house site by name Puliamarathu Kollai under the terms of the family arrangement and it was stipulated that the defendant should continue to occupy the suit property for a period of five years to enable him to build a new house in the site allotted to him. Further, as per the family arrangement, the defendant should hand over the suit property to the plaintiff at the expiry of five years from the date of family arrangement.

(v) Since the defendant was postponing to vacate the suit property and cut the power supply to the eastern portion of the house where the plaintiff residing, the plaintiff caused a registered notice to the defendant to surrender the possession and also for damages for use and occupation at Rs.200/- per month. The defendant admitted in his reply notice that he was bound to surrender the possession of suit property. Since the defendant has not handed over the possession, the plaintiff along with his father Pakkirisamy filed a suit against the defendant for recovery of possession of suit property and profits in O.S.No.161 of 1995 on the file of the Sub-Court, Mayiladuthurai and the said suit was transferred to the District Munsif Court, Sirkazhi and renumbered as O.S.No.489 of 1995. The said Court on 21.10.1998 directed the defendant to put the father of the plaintiff in possession of the suit property as he was life interest holder within 2 months and also to pay the past profits, against which, the defendant preferred an appeal in A.S.No.143 of 1998 on the file of the Sub-Court, Mayiladuthurai, which was dismissed.

(vi) Thereafter, the defendant took his father in his control till he died intestate on 18.02.2002. Hence, the suit property could not be taken possession by the plaintiff. Therefore, the plaintiff filed an application in I.A.No.387 of 2003 under Section 152 of C.P.C. for amendment of the decree in O.S.No.489 of 1995 enabling the plaintiff to execute the said decree and to take possession of the suit property. The defendant also concocted a Will as if it was executed by his father bequeathing the suit property to him on 12.02.2001. But the said I.A.No.387 of 2003 was dismissed on 22.01.2004 holding that the plaintiff should file a fresh suit for

recovery of possession. Therefore, the plaintiff constrained to file a suit in O.S.No.307 of 2004 for the following reliefs:

(a)directing the defendant to put the plaintiff in possession of the suit property;

(b)directing the defendant to pay a sum of Rs.5,940/- as past profits to the plaintiff;

(c)directing the defendant to pay future profits to the plaintiff from date of plaint till date of delivery of possession;

(d)directing the defendant to pay the costs of the suit;

3.The gist and essence of written statement filed by the defendant are as follows:

(a) The defendant admitted that "Karaiolai" came into existence on 21.08.1977 and he also admitted that after five years, the defendant has to vacate the possession of the suit property. The defendant has taken care of his father till his death. In the year 1982, the suit property was given to the defendant. Since 1982, the defendant paid the house tax and electricity bills. In the year 1990, the defendant has made some repair works of the house at his own costs, for which, the plaintiff has also not made any objection. So the plaintiff is not entitled any right to possess the suit property as promissory estoppel. The father Pakkirisamy is residing with the defendant till his death (i.e.) on 18.02.2002. He executed a Will dated 12.02.2001 in favour of the defendant during his life time. Therefore, the plaintiff has no right in the suit property. Without sought for declaration of title, the plaintiff cannot be sought for recovery of possession. Therefore, the defendant prayed for dismissal of the suit.

4.The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side counsel has framed necessary issues and on perusing the oral and documentary evidence viz., P.W.1, D.W.1 to D.W.4 and Exs.A1 to A4 and Exs.B1 to B9, decreed the suit as prayed for in the plaint. Aggrieved against the judgment and decree of the trial court, the defendant preferred an appeal in A.S.No.74 of 2007 on the file of the Principal Sub-Court, Mayiladuthurai.

5.The learned First Appellate Court has considered the argument advanced on either side and framed necessary point for consideration and confirmed the Judgment and Decree passed by the Trial Court and dismissed the appeal. Against the Decree and Judgment of the first Appellate Court, the present second appeal has been preferred by the defendant.

6.This second appeal is not admitted, only notice of motion has been ordered. Since this second appeal is of the year 2008, during arguments, the following substantial question of law is framed for consideration:

"Whether the suit is barred by limitation when the right to sue accrued in the year 1982 and the suit is filed in the year 2004 well beyond the period of limitation?

7.Challenging the judgment of concurrent findings rendered by both the Courts below, the learned counsel for the appellant/defendant submits as per Karaiolai, the suit property was allotted to the share of the respondent/plaintiff and five years time was granted to the appellant/defendant to hand over the possession after constructing a house in the site allotted to the defendant in Puliamarathu Kollai. The period of five years was expired on 20.08.1982. But the respondent/plaintiff filed a suit only in the year 2004, so the suit itself is barred by limitation. He further submits that in the written statement filed by the defendant, he stated that in the year 1982 itself, the suit property was given to the defendant and the defendant has done some repair works in the suit property in the year 1990, for which, the plaintiff did not make any objections. So the plaintiff has estopped from claiming possession of the suit property. The above aspects were not considered by both the Courts below. Therefore, he prayed for allowing the second appeal.

8.Resisting the same, learned counsel for the respondent/plaintiff submits that Karaiolai came into existence on 21.08.1977 and the allotment under the said Karaiolai has been confirmed and affirmed under the decree and judgment in O.S.No.47 of 1983 on the file of the Sub-Court, Mayiladuthurai and the same was confirmed by the District Court, Nagapattinam in A.S.No.59 of 1986. So the family partition between the father Pakkirisamy and his sons is accepted. In the said Karaiolai, the father Pakkirisamy is having life estate over the suit property and after his death only, the respondent/plaintiff is having absolute right over the suit property. The father died on 18.02.2002. Immediately, the plaintiff filed the present suit, so the suit is not barred by limitation. He further submits that the appellant herein has putforth his case on the basis of the Will under Ex.B9. To prove the Will, D.W.2 and D.W.3 were examined. But both the Courts below have rightly disbelieved their evidence and also held that the father Pakkirisamy has no right to execute the Will in respect of the suit property. So the judgment and decree passed by the trial Court, which were confirmed by the first Appellate Court does not warrant any interference. Therefore, he prayed for dismissal of the second appeal.

9.Considered the rival submissions made on both sides and perused the materials available on record.

10.The admitted facts of the case are as follows:

(i)Originally, the suit property and other properties belonging to Pakkirisamy, who is having six sons namely, plaintiff/respondent/Ramakrishnan, defendant/appellant/Jayaraman, Sivaraman, Gopalakrishnan, Balakrishnan and Radhakrishnan.

(ii)There was a family arrangement between Pakkirisamy and his sons, which was evidenced by Karaiolai dated 21.08.1977. In the said Karaiolai, it was stated that suit property was given to the share of respondent/plaintiff and his father Pakkirisamy is having life estate till his death. The allotment under the said Karaiolai was confirmed and affirmed under the decree and judgment passed by the Sub-Court, Mayiladuthurai in O.S.No.47 of 1983 wherein the parties herein are parties to that proceedings and the same was confirmed by the District Court, Nagapattinam in A.S.No.59 of 1986.

(iii)As per the terms of Karaiolai, the appellant/defendant has to hand over the possession of the suit property to the plaintiff within five years after constructing a building in the land viz., Puliyamarathu Kollai, which is allotted to him. Since the defendant did not hand over the possession, the plaintiff along with his father filed a suit in O.S.No.161 of 1995 on the file of the Sub-Court, Mayiladuthurai for recovery of possession and past and future profits. Subsequently, it was transferred to the District Munsif Court, Sirkazhi and renumbered as O.S.No.489 of 1995. On 21.10.1998, the said Court passed the decree directing the defendant/appellant herein to put the father of the plaintiff in possession of the suit property within two months as he was a life interest holder and to pay a sum of Rs.600/- as past profits and the plaintiffs are directed to work out the remedy of future profits under order 20 Rule 12 C.P.C. in a separate proceedings. Aggrieved over the same, the defendant has preferred an appeal in A.S.No.143 of 1998 on the file of the Sub-Court, Mayiladuthurai and the said appeal was also dismissed on 17.11.1999 confirming the decree passed by the trial Court.

(iv)Thereafter, the father Pakkirisamy had been in possession of the suit property and the father is under the care and control of defendant till his death. The father Pakkirisamy died on 18.02.2002.

(v)After the death of his father, the plaintiff/respondent herein has filed an application in I.A.No.387 of 2003 under Section 152 of C.P.C. for amendment of judgment and decree made in O.S.No.489 of 1995 and to take possession of the suit property. The said application was dismissed. Hence, the plaintiff has filed the present suit in O.S.No.307 of 2004 for recovery of possession of the suit property.

11.The only point to be decided is that whether the right of the appellant/defendant is extinguished? As per Karaiolai dated 21.08.1977, the suit property was allotted to the plaintiff and the life estate has been given to the father Pakkirisamy. That factum was not disputed. In the written statement itself, the defendant admitted the relationship between him and the plaintiff and terms of Karaiolai dated 21.08.1977.

12.In para-2 of the written statement, the defendant stated that as per Karaiolai, the defendant is permitted to reside in the suit property for five years and thereafter, he should vacate the suit property. So it clearly shows that the suit property was allotted to the plaintiff and the same was also admitted by the defendant.

13.It is also admitted that life estate was given to the father Pakkirisamy, which was evidenced by Exs.A1/decree in O.S.No.489 of 1995 and A2/decree in O.S.No.143 of 1998. The said Pakkirisamy died on 18.02.2002 and the present suit was filed in the year 2004, which is well within time. So the arguments advanced by the learned counsel for the appellant/defendant that the suit is barred by limitation, does not merit acceptance.

14.It is pertinent to note that the appellant herein has put forth his claim in para-3 of the written statement stating that in the year 1982 itself, the suit property was given to the defendant and he is the absolute owner of the property. But whereas in the subsequent para, the defendant stated that his father Pakkirisamy executed a Will in favour of the defendant on 12.02.2001 bequeathing the suit property in his favour. The trial Court has rightly rejected the Will under Ex.B9 stating that the father Pakkirisamy has no right to execute the Will, since he has only life estate in the suit property. So the evidence of D.W.2 and D.W.3, who were examined to prove the Will, is unnecessary and their evidence was rightly rejected by the Court below.

15.Furthermore, father Pakkirisamy was examined in O.S.No.489 of 1995 and his deposition was marked as Ex.A4, in which, he deposed that the suit property was allotted to his son Ramakrishnan, who is the plaintiff and as per Karaiolai, the father has no right to deal with the suit property. It clearly shows that the respondent/plaintiff is the absolute owner of the suit property only after the death of his father, who died on 18.02.2002 and the plaintiff's right to possession was accrued only on that day. The respondent/plaintiff filed the present suit in the year 2004 within two years from the date of death of his father, so the suit is not barred by limitation.

16.Even though the learned counsel for the appellant argued that the appellant is enjoying the suit property from 1982 onwards, he is not claiming any adverse possession. It is to be noted that once the

defendant is in permissive occupation of the suit property unless he handed over the possession, he is not entitled to claim adverse possession. Under such circumstances, I am of the view, the defence raised by the learned counsel for the appellant is frivolous and it is hereby rejected.

17.As stated supra, as per Karaiolai, the respondent/plaintiff is entitled to the absolute right over the suit property after the death of his father Pakkirisamy, who died on 18.02.2002. Thereafter, the plaintiff filed the present suit in O.S.No.307 of 2004 well within in time. So the suit is not barred by limitation. In such circumstances, the trial court and first appellate court, came to the correct conclusion that the respondent/plaintiff is entitled to the recovery of possession and also mesne profits, past and future profits. The substantial question of law is answered accordingly.

18.For the foregoing reasons, the decree and judgment passed by both courts below does not warrant any interference and the same are hereby confirmed. The second appeal is liable to be dismissed and it is hereby dismissed.

19. In fine,

- Second appeal is dismissed.
- The decree and judgment passed by both courts below are hereby confirmed.
- Two months time is granted to the appellant/defendant to deliver the possession of the suit property to the respondent/plaintiff.
- There is no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

- 1.The Principal Sub Judge, Mayiladuthurai.
- 2.The District Munsif Court, Sirkazhi.
- 3.The Section Officer, V.R.Section, High Court, Chennai.

+ 1 cc to Mr.S. Sounther, Advocate SR.20324

+ 1 cc to Mr.G.M.Shankar, Advocate SR.20081

MSM(CO)

EU 01.06.2015

S.A.No.819 of 2008