

N THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 03.09.2018

DELIVERED ON: 05.09.2018

CORAM:

THE HON'BLE MRS.JUSTICE R. HEMALATHA

S.A.No.1441 of 2002

1. Chinnathayee
2. Nagamalai
3. Periya Gounder
4. Perumal

... Appellants/Plaintiff

Vs.

1. Raman
2. Veerappan
3. Seerangammal
4. Nagammal
5. Chinnammal
6. R.Baskar

(6th respondent impleaded as party respondent
vide order dated 19.04.2007 made in
CMP No.885 of 2007)

... Respondent/Defendants 1 to 2/4 to 6

PRAYER : Second Appeal filed under Section 100 of C.P.C.,
against the decree and judgment dated 21.09.2001 passed in
A.S.No.98 of 2000 by the II Additional District Judge, Salem,
upholding the decree and judgment dated 29.12.1999 passed in
O.S.No.763 of 1991 by the Principal Subordinate Judge, Salem.

For Appellants : Mr.N.S.Sivakumar

For 6th Respondent : Mr.R.Nalliyappan

Respondents 1 to 5 : Set Exparte vide court
order dated 27.07.2018.

JUDGMENT

The unsuccessful plaintiffs in O.S.No.763 of 1991 on the
file of the Principal Sub Judge, Salem and appellants in
A.S.No.98 of 2000 on the file of the II Additional District
Judge, Salem are the appellants herein.

2. For sake of convenience, the parties are called as per their ranking in the trial.

3. The plaintiffs filed a suit for partition of the suit properties into 3 equal shares and to allot one such share to them. The case of the plaintiffs in brief is as follows. The plaintiffs 2 to 4 are sons of one Puthira Gounder and the first plaintiff is the wife of Puthira Gounder. Puthira Gounder died during the year 1997. The defendants 1 and 2 are brothers of Puthira Gounder and they were all born to one Ramaswami Gounder. Ramaswami Gounder was a lessee in respect of a land belonging to Sugavaneswarar Temple and as per the wishes of Ramasamy Gounder, Puthira Gounder cultivated the properties. According to the plaintiffs, the suit properties are joint family/ancestral properties of the plaintiffs and the defendants and that they are each entitled to 1/4th share in the properties. It is further contended by them that since Ramasami Gounder gave up his rights over the suit properties, even during his life time and he was being maintained by his sons. The third defendant, who is the wife of Ramasamy Gounder is not entitled to any share over the suit properties. It is also contended by the plaintiffs that a dispute arose between the plaintiffs and the defendants 1 and 2 in respect of the suit properties, after the demise of Puthira Gounder, and that the defendants 1 and 2 created a deed styled as release deed and falsely contended that Puthira Gounder received Rs.4,000/- in respect of his share in item No.2 of the suit properties. The plaintiffs after enquiry, came to know that no such release deed was executed by Puthira Gounder. In fact, Puthira Gounder was addicted to alcohol and the defendants 1 and 2 might have executed the deed in order to stall Puthira Gounder from making any alienation in favour of a stranger. It is further contended by the plaintiffs that the said release deed would not bind them (plaintiffs).

4. The first defendant filed a written statement and the same was adopted by the defendants 2 and 3. In the written statement it is alleged that the suit is barred by limitation and that the defendants 1 and 2 have perfected their title by adverse possession and prescription. According to them, since the plaintiffs left the village about 22 years back, they cannot contend that they are members of joint family. It is also their contention that the suit is not maintainable, since the plaintiffs have not claimed declaration of their title to the suit properties.

5. During the pendency of the suit, the third defendant died and the defendants 4 to 6 were impleaded as legal heirs of the the deceased 3rd defendant. The defendants 4 to 6 in their written statement denied all the allegations of the plaintiffs and also claimed adverse possession over the suit properties.

6. The trial court framed the following issues and additional issues.

1. Whether the relief of partition regarding the suit properties is maintainable?
2. Whether the plaintiffs have got 1/3rd share in the suit properties?
3. Whether the plaintiffs are entitled to get possession of 1/3rd share from the defendants?
4. Whether the suit is barred by limitation?
5. Whether the defendants 1 and 2 have acquired title by prescriptive by adverse possession against the plaintiffs?
6. Whether the suit properties are joint family ancestral properties?

Additional Issues

1. Whether Ramasamy and others have executed a release deed on 4.3.1970 in respect of their rights in the suit property?
 2. Whether the release deed dated 4.3.1970 is binding on the plaintiffs?
 3. Whether the suit is not maintainable without a prayer for setting aside the release deed dated 4.3.1990?
7. In the trial court, the fourth plaintiff examined himself and one another witness and marked Ex.A1 to Ex.A3. The first defendant examined himself and one another witness and marked Ex.B1 to Ex.B54.
8. The trial court after full contest, dismissed the suit vide its decree and judgment dated 29.12.1999 in O.S.No.763 of 1991. The appeal in A.S.No.398 of 2000 was also dismissed by the learned II Additional District Judge, Salem on 21.09.2001.
9. Now the following substantial questions of law are raised in the present second appeal.
1. Whether the courts below are correct in law in casting burden of proof upon the appellants/plaintiffs regarding truth, validity and genuineness of Ex.B2, release deed dated 4.3.1970?
 2. Whether the findings of the courts below that the suit is barred by limitation are correct in law?
 3. Whether the courts below are correct in law in holding that the respondents/defendants 1 and 2 prescribed title by adverse possession?
10. The suit properties are described under two heads. Item No.1 is situate in survey Nos.120/3E, 120/3G, 120/3D, 120/3F of Alagapuram Pudur Village, Salem measuring 0.70.5 hectares and the item No.2 is described as a tiled house and two thatched sheds in survey No.156/2A of Alagapuram Pudur village measuring

0.32.5 Hectares.

11. Both the courts below had concurrently held that the plaintiffs have not established that the suit properties are ancestral / joint family properties of late Puthira Gounder, father of the plaintiffs 2 to 4 and husband of the first plaintiff and that though the nomenclature of the deed dated 4.3.1970 (Ex.B2) is shown as release deed, it is only a partition deed, the execution of which is proved by the defendants. It is further observed that the defendants 1 and 2 have perfected their title by adverse possession and prescription.

12. At the out set, it may be observed that the plaintiffs themselves have categorically contended that the suit properties belonged to Arulmigu Sugavaneswarar temple and they were leased out to Ramasamy Gounder. Curiously enough, the plaintiffs 2 to 4, who are the grandsons of Ramasamy Gounder contend that the suit properties are their ancestral/joint family properties. No lease deed in favour of Ramasamy Gounder is filed. In any event, Ramasamy Gounder along with his sons Puthira Gounder and the defendants 1 and 2, as co-nominee parties, executed a release deed dated 4.3.1970. Though the plaintiffs initially contended that this document is fabricated, the learned counsel appearing for the appellants/plaintiffs during the course of arguments, gave up this contention of the plaintiffs. His specific contention is that since the plaintiffs 2 to 4 were born at the time of execution of the release deed dated 4.3.1970 (Ex.B2), the same would not bind them, as they were also members of joint family. His further contention is that when the plaintiffs have specifically pleaded that their father Puthira Gounder was addicted to alcohol, it is for the defendants 1 and 2 to establish that the release deed was executed only for the welfare of the minors.

13. It is seen that the first plaintiff, who is the wife of Puthira Gounder signed the release deed (Ex.B2) as one of the attestors. Therefore, the plaintiffs cannot contend that the Ex.B2 is fabricated, especially when the release deed Ex.B2 is executed 17 years prior to the date of death of Puthira Gounder. The first plaintiff also did not choose to examine herself. Nearly after 30 years of the execution of the deed (Ex.B2), the plaintiffs have filed the suit in O.S.No.763 of 1991 before the Principal Subordinate Judge, Salem. The plaintiffs have not also adduced any evidence to show that he was in possession and enjoyment of the suit properties, even after the execution of Ex.B2. A reading of Ex.B2 shows that late Puthira Gounder had relinquished his rights over the suit properties even during the year 1970. However, the learned counsel appearing for the appellants relied on the decision in

Sunilkumar and another Vs. Ram Paskash Sothen reported in 1998 (2) SCC 77 and contended that a son acquired by birth an interest equal to that of the father in ancestral property. He would also contend that if any alienation is made by the Manager/ Kartha of the joint family, it should be for legal necessity for the minors or for the benefit of the estate and since the defendants did not prove that the release deed was for any of the above, the alienation whatsoever made by late Puthira Gounder would not bind them. At this juncture, it is relevant to point out that Ramasamy Gounder alone was the head of the family and in his name alone even as per the case of the plaintiffs, the suit items were leased out by the temple. Puthira Gounder is not the kartha/manager of the properties. During the life time of Puthira gounder, he did not raise any objection for the alienation made by his father and the plaintiffs after a lapse of 30 years, cannot claim any right over the suit properties. The defendants 1 & 2 claim to be in possession and in support of their contention, adduced acceptable evidence, which are properly scrutinised and analysed by both the courts below. Hence, I do not see any reason to interfere with the findings of both the courts below. As far as the Item No.2 is concerned, the plaintiffs have not adduced any acceptable evidence to show that the said property measures as described in the plaint and the same belonged to the joint family. On the other hand, the defendants have filed the sale deed Ex.B37 to show that they have purchased 10028 sq.ft. in S.No.156/2 in patta No.68. It is also seen from the records that after alienation, S.No.156/2 has been sub divided and therefore, merely because S.No.156/2A is not found in Ex.B37, will not render the said document as alien to the second item of the suit property. In fact, the first appellate court has observed that "That apart, no material has been placed by the plaintiffs to show that the second item of the suit properties has been in possession and enjoyment of either Puthira Gounder or the plaintiffs as claimed in the plaint". Therefore, it can be seen that the plaintiffs have failed to establish that the second item of the suit properties belonged to the joint family as claimed in the plaint." These observations are based on facts and are well founded.

14. Both the courts below have also observed that the suit is barred by limitation. The learned counsel for the appellants would contend that since the third defendant attained majority only in the year 1986 (for which no documentary evidence is filed), the suit filed in the year 1992 is well within the time under Article 109 of the Limitation Act. Reliance was also placed on the decision in Baljinder Sing V. Rattan singh passed by the Honourable Supreme Court of India in Civil Appeal No.598 of 2005 on 5.8.2008, in which it has been held thus.

Articles 65 and 109 operate in different fields.

The trial court categorically found that Article 65 was not applicable and Article 109 was applicable to the facts of the case. The first Appellate Court in essence accepted that Article 109 was applicable, which provided for a period of 12 years to set aside the alienation effected by a father from the date when the alienee was in possession of the property. Though the first Appellate court accepted that Article 109 was applicable, yet it was held that the spirit of Article 109 is that by taking over the possession of the land which is subject matter of the suit the alienee inter alia gives a notice to the persons governed by Mitakshara School of Law to agitate their rights, if any. Otherwise, their remedy would become barred by limitation. It was held that the starting point of limitation would be somewhere in the year 1992 when he came to know of the alienation made by the father. Consequently, the cause of action accrued in the year 1992 when he gained knowledge about the existence and execution of the sale deeds. Therefore, the period of 12 years as laid down in Article 109 was to be reckoned from the year 1992 and since the suit had been filed in 1994, it is within the period of limitation.

15. In any event, since the plaintiffs have not established that the suit properties are their ancestral/joint family properties, they cannot maintain a suit for partition. Moreover, the defendants 1 and 2 were allowed to be in possession of the suit property since the year 1970 and as already observed, late Puthira Gounder, father of the plaintiffs did not raise any objection over the same during his life time. Therefore, the plaintiffs, sons of Puthira Gounder, now cannot claim partition of the suit properties. The findings of both the courts below are based on sound principles of law and I do not see any reason to interfere with the findings recorded by them. Therefore, second appeal is liable to be dismissed.

16. In the result, the second appeal is dismissed. No costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

mst

To

1. The II Additional District Judge, Salem.

2. The Principal Subordinate Judge, Salem.

+1cc to Mr.N.S.Sivakumar, Advocate, S.R.No.61539

+1cc to Mr.R.Nalliyappan, Advocate, S.R.No.61304

S.A.No.1441 of 2002

RSI (CO)
CS/14/11/2018



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