(2008) 06 MAD CK 0133

Madras High Court (Madurai Bench)

Case No: Second Appeal No''s. 1206, 1653 and 1715 of 1991

M. Kandasamy and 12 others		APPELLANT
	Vs	
A. Rajendran and 23 others T.G. Varadaraju Vs M. Kandasamy and 36 others Ranganath Konar and 3 others Vs A. Rajendran and 30 others		RESPONDENT

Date of Decision: June 23, 2008

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 4
- Hindu Minority and Guardianship Act, 1956 - Section 8
- Limitation Act, 1963 - Section 10, 11, 12, 13, 14

Hon'ble Judges: Prabha Sridevan, J

Bench: Single Bench

Advocate: S. Meenakshisundaram in S.A. Nos. 1206 and 1653/1991 and Mr. S.S. Sundar in 1715/1991, for the Appellant; S.S. Sundar for 20th Respondents in S.A. No. 1653/1991 and 16th Respondents in S.A. No. 1206/1991 and Mr. R. Devaraj (R. 1, 2 and 5), for the Respondent

Final Decision: Dismissed

Judgement

Prabha Sridevan, J.
The following substantial questions of law were raised in S.A.Nos.1206 and 1653 of 1993:-

S.A.No.1206 of 1991

1. Whether both the Courts below failed to note that the suit as far as the alienees are concerned is barred by limitation?

2. Whether both the Courts below erred in granting the relief contemplated under Sec. 21(1) proviso of Limitation Act and it is against law as the plaintiffs themselves did not pray for such relief?

3. Whether both the Courts below committed an error in granting the relief contemplated under Sec. 21(1) proviso of the Limitation Act without giving opportunity to the appellants to oppose the same which amounts to gross violation of natural justice?

S.A.No.1653 of 1991

1. Whether both the Courts below failed to note that the suit as far as the alienees are concerned, is barred by limitation?

2. Whether both the Courts below erred in granting the relief contemplated under Sec. 21(1) Proviso of Limitation Act is against law as the plaintiffs themselves did not pray for such relief?

As far as Second Appeal No.1715 of 1991 is concerned, when it was listed for hearing, the learned counsel sought permission of this Court to raise substantial questions of law and till date, it has not been admitted. The learned counsel would submit that the other two appellants raised the same substantial questions of law, which the appellant in Second Appeal No.1715 of 1991 desires to raise and they are all co-defendants in the same partition suit and by raising the substantial questions of law at the time of hearing, the respondent is not going to be put any prejudice, since the respondent would in any way have to meet the same point in the other two appeals. Accepting this, I have permitted the appellant in S.A.No.1715 of 1991 to raise the additional substantial questions of law and they are as under:

1) Is not the suit barred by limitation by virtue of Section 21 of Limitation Act especially when defendants 6 to 33 are deemed to have been made us parties only on their date of impleadment i.e. on 8.7.1986.

2) When it is an admitted fact that the plaintiffs are eo-nominee parties in the sale deeds, is not the suit unsustainable without prayer to set aside alienation paying court fee separately.

3) Whether Sec. 8 of Hindu Minority and Guardianship Act is applicable in case of alienation of joint family properties by father as Kartha and manager of the family.

2. The suit in O.S.No.76 of 1982 was filed for partition by the sons of the 4th defendant, who is the 4th respondent in S.A.No.1206 of 1991. The plaintiffs claim that the third plaintiff and the 4th defendant were members of an undivided Hindu Joint Family and that the 4th defendant was living a profligate, immoral and wayward life and spent the income of the family properties not for the purpose of legal or necessary expenditure. According to them, the plaintiffs came to know that the sale deeds have been brought about in the name of the first respondent, his

father one Karuppana Gounder and the third defendant. The plaintiff pleaded that all the sale deeds in favour of defendants 1 and 2 and in favour of the first defendant and the subsequent sale in favour of the second defendant are void ab initio. On 12.11.1965, the other suit schedule properties have been purchased by the first respondent from the 4th defendant. This sale deed was also attacked by the plaintiff. It was claimed that the suit properties were very valuable and therefore, the suit was filed for declaration that the alienation made by the 4th defendant are not binding on the plaintiff. Thereafter, some time in 1985, the plaintiffs upon contest by the defendants that the suit was bad for non-joinder for necessary parties, impleaded defendants 5 to 33 and included items 5 to 27 of the properties. It is relevant to note that in the affidavit filed for impleadment, it is merely pleaded that due to oversight and inexperience, the plaintiff was not able to include all the parties in the plaint. This was resisted by the defendants. The learned Sub-Judge, Karur allowed the application in I.A.No.807 of 1985, which is as follows:-

Arguments heard. The suit is listed in the year 1982. Even in the written statement the defendants 1 to 5 have stated that the suit is bad for non joinder of necessary parties. The suit was posted in the special list on 09.10.1985. The present petition is filed to implead the defendants 6 to 33. Petition is highly belated. Hence, the petition is allowed on payment of Rs. 25/- to Dl and Rs. 25/- to D2 and D3 on or before 17.7.86

3. The trial Court, on consideration of the materials on record, granted the alternative relief of partition. The appellate Court confirmed the same. In the present Second Appeal, the learned counsel appearing for the appellants submitted that Section 21 of the Limitation Act was wrongly invoked by the Courts below and when it clearly provides that whereafter the institution of a suit, if a new plaintiff or defendant is substituted, the suit as regards him is deemed to have been instituted, when he was so made a party. It was submitted that if a suit is deemed to have been filed on the date, when the defendants had been made parties, i.e. 1986, then, the suit is barred by time insofar as these impleaded parties are concerned.

4. The learned counsel also submitted that these sale deeds which are attacked are documents where minor is an eo-nominee party. So, it is essential that he should seek for cancellation of the document and pay appropriate Court fees and for this purpose, he relied on Balu alias Balakrishnan Vs. B. Sasikumar and Others, . The learned counsel submitted that in the present case, the plaintiff had become a major on 04.05.1976, just four days prior to the filing of the suit and therefore, the suit which is deemed to have been filed against the present appellants in 1986 is hopelessly barred by time. The learned counsel further submitted that when the father as a Kartha has executed the documents, it is not open to the sons to attack it.

5. The learned counsel for the respondent submitted that the appellant in S.A.No.1715 of 1991 not having filed an appeal before the first appellate Court,

cannot now maintain the second appeal.

6. I am not inclined to accept this objection for the following reasons. This is a partition suit and until final decree is passed, the suit is pending and this issue of limitation has been raised by the appellants in the other two Second Appeals and will have to be decided. That apart, there is Section 3 of the Limitation Act which reads thus:-

3. Bar of limitation:-(1)Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.

(2) For the purposes of this Act-

(a) A suit is instituted,-

(i)in an ordinary case, when the plaint is presented to the proper officer;

(ii)in the case of a pauper, when his application for leave to sue as a pauper is made; and

(iii)in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator;

(b) any claim by way of a set off, or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted.

(i) in the case of a set off, on the same date as the suit in which the set off is pleaded;

(ii)in the case of a counter claim, on the date on which the counter claim is made in Court;

(c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that Court.

So, if the Court is of the opinion that the remedy is barred even if the point is not raised, the Court shall dismiss such suits, appeals and applications. In fact, it is held that this duty cast upon the Court is imperative. In these circumstances, I reject the objection regarding maintainability of S.A.No.1715 of 1991.

6. The learned counsel for the respondents referred to Nathuni Ram Vs. Raghupat Ram and Others, wherein the Supreme Court held that when no appeal was filed by the defendants against the grant of partial relief, the reversal by the second appellate Court was improper. But, there, the position was different as seen in paragraph 10 of the judgment, which reads as follows:-

10. As noted above there are confusions galore in the High Court''s order; firstly the appeal was dismissed but the first appellate court''s order which was in favour of the appellant was set aside without any challenge from the defendants; secondly in the

appellant''s appeal the relief which was not questioned by anybody could not have been nullified; thirdly, the High Court''s ultimate conclusion was that the appeal was allowed while it was otherwise.

7. In the present case, the preliminary decree for partition has been questioned and the matter has been kept alive by the other defendants and therefore, by permitting the 24th defendant to join the other defendants in attacking the decree granted in respect of his property in a suit which was barred by time as against him, his right will not in any way be affected by the judgments cited by the learned counsel for the respondent. The learned counsel for the respondents also referred to Karuppaswamy and Others Vs. C. Ramamurthy, wherein the Supreme Court held that the plaintiff was entitled to invoke the proviso to Section 21 of the Limitation Act. That was a case, where the suit was filed against a person not knowing that he had died 6 weeks prior to the filing of the suit. Only from the endorsement on the summons/ he came to know about the defendant''s death. Immediately thereafter, he filed an application under Order 22, Rule 4 of the CPC for impleading legal representatives of the dead defendant. The trial Court did not attribute any neglect or contumacy to the conduct of the plaintiff. It was rather observed that the plaintiff could have known about the date of death of the defendant only by the counter filed to plaintiff''s application under Order 22 Rule 4, C.P.C. It is in these circumstances, the Supreme Court held that when errors are committed, due to a mistake in good faith, the Court permits correction of such mistake. The Supreme Court dealt with the change in the provisions in 1908 Limitation Act and 1963 Limitation Act and held that the rigour of the law is mitigated by the provisions of Section 21(1), which enables the Court to include a new plaintiff or a defendant or to direct that the suits as regards the newly added parties shall be deemed to have been instituted earlier on the date of plaint, if the Court is satisfied that the omission was in good faith.

8. The learned counsel also referred to the judgment of the Supreme Court in 1983 TLNJ 2 = (1983) 96 L.W. 15 S.N., Munshi Ram Vs. Narsi Ram and another, where the Supreme Court considered as to how to deal with the application to implead an additional defendant and there also, the Supreme Court was of the view that the appellant realized his mistake and filed an application with all due diligence on the very next day. These two judgments will not come to the aid of the respondents.

9. As seen from the extract in para 3 above, the application to implead was highly belated. Section 21 of the Limitation Act reads thus:-

21. Effect of substituting or adding new plaintiff or defendant:-

(1) Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party:

Provided that where the Court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as

regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owning to assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff.

There was no order by the Court to the effect that the impleadment shall take effect from the date of suit. Therefore, the respondent is not entitled to invoke proviso to Section 21 of the Limitation Act. If so, the suit with regard to these appellants who are subsequently impleaded defendants, the suit is barred by time.

10. It is also relevant to note that apart from merely including the properties and impleading the defendants by way of amendment, there are absolutely no pleadings with reference to the sale deeds dated 20.06.1960 in favour of Senniappa Mudaliar & Co. and then, in favour of Padmanaba Chettiyar and others. There are no averments with reference to dates of sale and the circumstances under which the sales were effected. As regards the sales in favour of D.1 to D.4, the original defendant there are specific pleadings that the sales were to discharge expenses incurred for immoral purposes. But, the pleadings have not been amended when the appellants were included and impleaded. There are no pleadings with regard to the vitiating factors as regards the sale deed in favour of the transferees who are the predecessors-in-interest of these appellants. If so, even the plea that the sales are not binding on the respondents cannot be taken. It appears that pending the Second Appeal, the respondents/plaintiffs have settled the matter with several of the contesting defendants. My finding with regard to limitation is in respect of only the sales in favour of the appellants. The substantial questions of law are answered in favour of the appellants. The suits are dismissed only in regard to the appellants and it will not, in any way, affect any settlements arrived at by the respondent with other defendants. The preliminary decree passed is set aside only with regard to the appellants and the shares declared by the Courts below with regard to the other properties are not disturbed. No costs.