

CASE NO.:
Appeal (civil) 3399 of 2000

PETITIONER:
Rajavel

RESPONDENT:
Thirunavukkarasu & others

DATE OF JUDGMENT: 07/02/2007

BENCH:
Dr. AR. Lakshmanan & Tarun Chatterjee

JUDGMENT:
J U D G M E N T

TARUN CHATTERJEE, J.

This is an appeal at the instance of the defendant/appellant from the judgment of the High Court of Judicature at Madras passed in a second appeal whereby the concurrent judgments of the courts below were set aside and the suit for injunction filed by the plaintiff/respondent in respect of the 'C' schedule property of a partition deed dated 9th December, 1949 (hereinafter referred to as the "suit property") executed by one Manickam Ammal, widow of Narayanswami Mudaliar, who was the original owner of the suit property, and Thailammal, his widowed daughter-in-law, was decreed.

The case made out by the plaintiff/respondent in the courts below may briefly be stated as follows:-

By the partition deed, as noted hereinabove, the suit property was set apart for performing charities relating to performance of guru puja every year at Sri Kumbeswara Swamy Temple at Kurinjipadi Kuppan village in the State of Tamil Nadu. The partition deed also contained a clause that income from the suit property shall be spent for the aforesaid charity. One Adhanamozhi Mudliar, son of Verappa Mudliar, was appointed the trustee of the suit property. The said deed also contained that after the death of Adhanamozhi Mudliar, his descendants would continue to be in possession of the suit property and perform the charities. As per the pedigree filed by the counsel for the appellant the plaintiff/respondent is the grandson of the original owner and the defendant/appellant is the great-grandson of the brother of the deceased trustee's grandfather. The trustee, Adhamanozhi Mudliar, put Manickasami, father of the defendant/appellant into possession of the suit property, as he was unable to perform his duties as trustee. The said Manickasami entrusted the defendant/appellant with the trust and on his death, the defendant/appellant continued to perform the charities. Even after the death of Adhamanozhi Mudaliar, the defendant/appellant continued to be in possession of the suit property and also continued to perform the charities.

In the plaint, the plaintiff/respondent as a grandson of the original owner claimed to be entitled to enjoy the suit property and perform the charities. It was also pleaded that the defendant/appellant had no right to be

in possession of the suit property or to perform charities out of the income of the suit property. When the defendant/appellant failed to deliver possession of the suit property in spite of repeated requests, the plaintiff/respondent was constrained to file the suit for injunction.

The defendant/appellant filed his written statement denying the material allegations made in the plaint. It was stated specifically in the written statement that Adhamanozhi Mudaliar, the original trustee was not taking care of the suit property and was not performing the charities, and on the other hand, the defendant/appellant was performing the charities out of the income of the suit property and, therefore, the suit for injunction filed against the defendant/appellant must be dismissed. It was also stated in the written statement that the suit was not maintainable as the plaintiff/respondent only prayed for possession instead of asking for declaration of the trusteeship in his favour. It was also pleaded that the suit was barred by limitation in view of the fact that the suit property was in possession of the defendant/appellant for more than twelve years and also that the defendant/appellant had been regularly performing the charities, and therefore, he had acquired the title to the suit property by way of adverse possession. Thus, the question of granting a decree in favour of plaintiff/respondent could not arise at all. It was also denied in the written statement that the plaintiff/respondent was a descendent of the original trustee, Adhamanozhi Mudaliar and, therefore, was entitled to perform the charities after the Trust was created. According to the appellant, after the death of Manickaswami in the year 1969, he was performing the charities and, therefore, it was denied that the charities were not performed by him nor was it correct to say that the defendant/appellant had misappropriated the income arising out of the suit property. Accordingly, it was prayed that the suit ought to have been dismissed with costs.

After framing issues including the issue relating to the maintainability of the suit, the Trial Court dismissed the suit, inter alia, on the ground that the suit had been filed to harass the defendant/appellant due to past enmity and that the plaintiff/respondent could not ask him to render accounts of the suit property. In appeal, the judgment of the trial court was affirmed, inter alia, on the finding that the defendant/appellant was entitled to continue as trustee of the suit property as the plaintiff/respondent could not prove that he was a near relative of the deceased trustee. The appellate court also dismissed the appeal on a finding that defendant/appellant had acquired title over the suit property by way of adverse possession. The appeal was also dismissed on a finding that the suit was barred by limitation. Feeling aggrieved, the plaintiff/respondent filed a second appeal in the High Court of Judicature at Madras challenging the judgments of the courts below by which the suit was dismissed. At the time of admission, the High Court framed the following substantial question of law:

"Whether the lower appellate court was right in holding that the suit was barred

by limitation contrary to provisions of Section 10 of the Limitation Act ?"

The second appeal came up for hearing initially on 9th December 1996 and the same was allowed in the absence of the defendant/appellant. However, on an application made for recall of the said judgment, the High Court again heard the learned counsel for the parties and thereafter allowed the appeal of the plaintiff/respondent again, whereby, the concurrent judgments of the courts below were set aside and the suit was decreed in favour of the plaintiff/respondent.

Feeling aggrieved by the judgment and decree of the High Court passed in the second appeal, the special leave petition was filed in respect of which leave has already been granted.

We have heard the learned counsel for the parties and examined the judgments of the High Court, appellate court and the trial court in depth and detail. The High Court, while deciding the appeal, had framed only the substantial question of law as noted hereinabove. Although the High Court had framed the aforesaid substantial question of law, even then it went on to hold on merits and set aside the concurrent findings of the courts below. The High Court also rendered a finding that the dedication of the suit property to charity was not absolute and that the ownership of the same was retained by the original owner. The High Court also held that the plaintiff/respondent was entitled to succeed in the suit as an heir of the original owner of the suit property on a finding, as stated above, that the dedication of the suit property was not absolute.

The High Court also held that it was not open to the deceased-trustee to delegate his rights in respect of the suit property to the father of the defendant/appellant. In our view, the High Court had not framed the proper substantial questions of law while deciding the appeal. It is true that the issue relating to limitation was involved but the other substantial questions of law, which were required to be framed by the High Court, were not framed. We are, therefore, of the opinion that, as noted hereinabove, the second appeal should be sent back to the High Court for a fresh decision after framing the substantial questions of law and thereafter it should decide the appeal afresh on the questions framed thereof. Accordingly, the following substantial questions of law are hereby formulated by us:

1. Whether the suit filed by the Plaintiff merely seeking relief of possession of trust property without claiming the relief of declaration of trusteeship was maintainable?

2. Whether the claim of the Plaintiff to trusteeship on the ground of propinquity with the deceased trustee is contrary to the rules of succession under law, accordingly priority to an agnate as against a cognate and the defendant as agnate is a nearer relative of the deceased trustee?

3. Whether the defendant would be an "heir" of the deceased trustee, for the purposes of the partition deed making the dedication and hence entitled to continue as a trustee to the exclusion of all others?

4. Whether at any rate, the right of hereditary trusteeship devolves upon the defendant by reason of his recognition as such by the deceased trustee and/or on account of de facto/constructive trusteeship exercised for a long period?

It was brought to our notice by the learned counsel for the defendant/appellant that plaintiff/respondent in the meantime had alienated a part of the suit property pending disposal of appeal, contrary to the order of status quo passed by this Court on 15th December 1999 and subsequent order dated 8th May 2000, restraining sale of the suit property. Since we are remanding the appeal back to the High Court for a decision afresh, it would not be necessary for us to go into the question whether such sale could be held to be invalid in view of the grant of interim order by this Court which can be taken up by the High Court. The High Court would be at liberty to grant appropriate relief to the parties in respect of such sale.

For the reasons aforesaid, we set aside the judgment of the High Court and send the appeal back to it for disposal afresh. It is made clear that the High Court shall decide the appeal on the basis of the substantial questions of law framed by us along with the substantial question of law already framed by it in accordance with law and on merits after giving opportunity of hearing to the parties. We also make it clear that it would be open to the parties to bring on record additional evidence, if any, under Order 41 Rule 27 of CPC and for this purpose it would be open to either of the parties to file an application. If such an application is filed, the High Court shall decide the same in accordance with law.

Accordingly, the appeal is allowed to the extent indicated above. There will be no orders as to costs.