

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : **23.11.2016**

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

O.S.A.No.345 of 2009

T.Viswanatha Mehta (Deceased)

T.Sundaresa Mehta (Deceased)

1. T.Ramachandra Mehta
2. T.Chandra Mohan Mehta
3. T.Ratnakumar Mehta
4. T.Jayakumar Mehta
5. T.Roopkumar Mehta
6. C.S.Mehta
7. T.Nataja Mehta
8. T.Balakrishna Mehta
- 9.T.Subburaja Mehta
10. T.Gopalakrishna Mehta
11. Tara Bai
12. Nirmala Bai
13. Kamala Bai
14. Vimala Bai
15. Uma Bai
16. Anuradha

.. Appellants

VS.

1. Krishna Bai
2. Kamatshi Bai
3. Saradha Bai
4. Sampoorani Bai
5. Kalyani Bai

..Respondents

Original Side Appeal under Order XXXVI Rule 9 of Original Side Rules read with Clause 15 of the Letters Patent Act against the Judgment and Decree, dated 22.06.2006 made in C.S.No.902 of 1990.

For appellants : Mr.R.Parthasarathy

For respondents : Mr.V.Raghavachari for
for Mr.C.Hanumantha Rao for R5

R1 to R4 given up

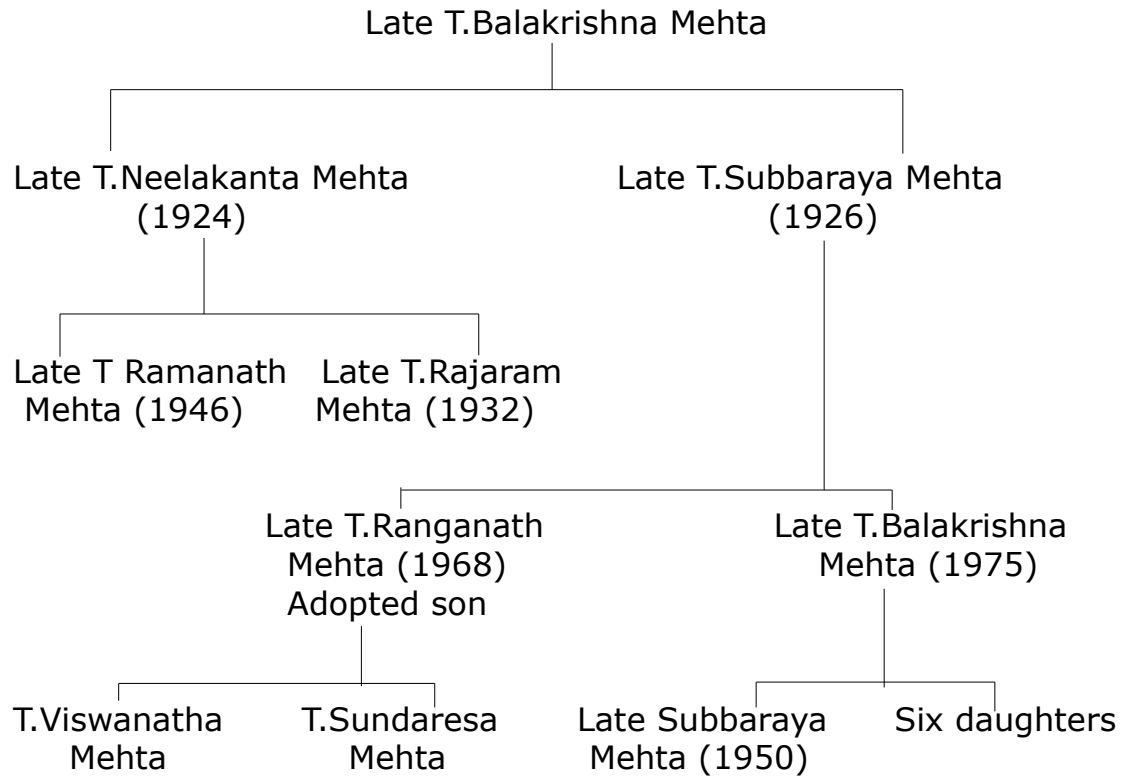
J U D G M E N T

(Judgment of the Court was delivered by
P.KALAIYARASAN, J)

This Original Side Appeal is directed as against the Judgment and Decree of the learned single Judge, dated 22.06.2006 made in C.S.No.902 of 1990 dismissing the suit for partition.

2. The brief averments in the plaint are as follows :

(i) The plaintiffs are legal heirs of T.Ranganatha Mehta and defendants are legal heirs of late T.Balakrishna Mehta. The Genealogy tree is as follows :



(ii) The above said Ranganath Mehta and Balakrishna Mehta are adopted son and son of Subbaraya Mehta respectively. Various properties belonging to the family were partitioned among the family members by appointing a leading member of the Madras Bar, Mr.M.O.Parthasarathy Iyengar as an Arbitrator. As per the Award, dated 14.02.1924, various movable and immovable properties owned by the common ancestors were divided among the family members. Subbaraya Mehta was allotted 'M' schedule properties and Ranganatha Mehta and Balakrishna Mehta were allotted 'N' and 'O' schedule properties in the Award. 'M' schedule

properties allotted to Subbaraya Mehta consists 2,8,10 and 13 of Schedule 'A' in the Award. The dispute in this suit relates to the property allotted to Subbaraya Mehta.

(iii) The grand father of the plaintiffs and defendants Subbaraya Mehta died in 1926. On his death, both the sons, viz., T.Ranganatha Mehta and T.Balakrishna Mehta became entitled to equal share in the property left behind by T.Subbaraya Mehta who died intestate. Subsequent to the demise of Subbaraya Mehta also, the father of the plaintiffs and the father of the defendants continued to live together at No.29, Ekambara Eswarar Ahraharam Stree, Madras till the year 1939. The plaintiffs father and the defendants father continued to treat the properties as joint and enjoyed the same jointly as co-owners. Out of the four properties left behind by T.Subbaraya Mehta, one of the items namely, No.2/1, Edapalayam Lane was taken by mutual consent by T.Balakrishna Mehta, the father of the defendants while the father of the plaintiffs took to his share the premises at No.11, Greams Road, Madras. However the two other properties, namely, No.29, Ekambara Eswarar Agharam Street and No.36, Wallers Road, Madras were continued to be enjoyed jointly by the fathers of the plaintiffs and the defendants. These two properties are the subject matter of the present suit.

(iv) The father of the plaintiffs namely, T.Ranganatha Mehta died in the year 1968 and the father of the defendants T.Balakrishna Mehta died in the year 1975. When the plaintiffs came to understand that the defendants were negotiating for the sale of Item No.1, namely, No.29, Ekambara Eswarar Agraharam Street, Madras, they issued public notice, dated 23.08.1987 saying that the plaintiffs have a claim in respect of the said property. The defendants sent a reply notice claiming as if both the properties had been allotted to the defendants' father, as per partition effected by the Arbitrator. The plaintiffs did not take any steps to have these properties in view of the fact that the defendants continued to reside in the family house at No.29, Ekambara Eswarar Agraharam Street and there was cordial relationship between the plaintiffs and the defendants even after the death of the father of the defendants. In fact, the defendants approached the plaintiffs in 1979 and represented that they would take their half share exclusively by taking the property at No.36, Wallers Road and by reason of this, the other property at Ekambara Eswarar Agraharam Street could be taken by the plaintiffs as their half share. In spite of that the plaintiffs having allowed the defendants to put up construction and after the construction of the multi-storeyed complex at Wallers Road property, the defendants did not fulfil their promise and did not

hand over vacant possession or allot the property at No.29, Ekambara Eswarar Agraharam Street, Madras to the share of the plaintiffs exclusively. Subsequent to the issue of notices, realising the rights of the plaintiffs, the defendants came forward with a negotiation under which they had agreed that they would not sell the scheduled property 29, Ekambara Eswarar Agraharam Street, Madras. In spite of such undertaking, the defendants proceeded with the demolition of the said building and to reconstruct the same.

(v) The reasonable request of the plaintiffs to divide the property set out in the schedule by metes and bounds and allot their half share was not considered by the defendants and the defendants claim the said properties as their exclusive properties. Therefore, the present suit has been filed.

3. The averments in the written statement of the defendants are as follows :

(i) After the death of Subbaraya Mehta, the properties allotted to Subbaraya Mehta were divided between Ranganatha Mehta and Balakrishna Mehta and the plaint schedule item 1 and 2 were allotted to the defendants father Balakrishna Mehta. He was in complete possession and enjoyment of the property receiving rents,

paying property tax and other taxes including wealth and income tax in respect of those properties without any demur by the said Ranganatha Mehta during his life time till he died on 1968 and thereafter by the plaintiffs. At the time of death of Subbaraya Mehta in 1926, defendants father Balakrishna Mehta was a minor aged about 12 years. The adopted son of Subbaraya Mehta, i.e., Ranganatha Mehta was incharge of the entire affairs of the family, was acting unilaterally and even suppressed the Award dated 14.02.1924, resulting Balakrishna Mehta to file a suit against the said Ranganatha Mehta in O.S.No.2270 of 1957 on the file of the City Civil Court, Madras for a direction to furnish a copy of the Award, dated 14.02.1924. But the suit could not be pursued by Balakrishna Mehta due to the death of his only minor son. The relationship between the brothers were never cordial. The pattas in the suit property partitioned between the said two brothers have been transferred in their respective names by mutual consent.

(ii) The property tax, Urban land tax, kist and other Government levies have also been paid by the defendants father and then by the defendants in respect of the properties allotted to him. The defendants father was receiving the rental income from the properties to the exclusion of any claim by anybody much less said Ranganatha Mehta, father of the plaintiffs.

(iii) Balakrishna Mehta at his cost reconstructed the property at No.29, Ekambara Eswarar Agraharam street some time after 1939, paying all taxes. Similarly, Wallers Road property also had been leased out to various tenants from 1939 onwards and the rental income was received exclusively by Balakrishna Mehta. Further, in or about 1980, the old building at Wallers Road was demolished after evicting of tenants and new building was constructed by the fifth defendant as per the planning permit at her own cost, as the said property was allotted to her under a partition deed, dated 26.03.1980 between the fifth defendant and her sisters. In the said partition, the other defendants in this suit took Ekambara Eswarar Agraharam street property. The father of the plaintiffs, Ranganatha Mehta in his Will, dated 01.12.1965 mentioned only the Greams Road property as his only joint family property and the said Will has been probated and he has not mentioned the plaint schedule properties in his Will.

(iv) The plaintiffs sold the Greams Road property in favour of one Shanthilal Jain under a sale deed, dated 28.08.1989. The other property at Edapalayam road was also sold by the plaintiffs to a Trust by name Ramdev Bhavan. Therefore, the suit is liable to be dismissed.

4. The learned single Judge, by framing necessary issues, analysed both the oral and documentary evidence of both sides and dismissed the suit. Aggrieved by the Judgment, the plaintiffs have preferred this appeal.

5. The learned counsel appearing for the appellants contends that four properties allotted to T.Subbaraya Mehta under the Award came after his demise as properties of joint family consisting of Ranganatha Mehta and Balakrishna Mehta and when the said joint Hindu family undivided properties were subjected to oral partition, it is for the person who claim so to establish the same. It is contended that the defendants have miserably failed to prove such oral partition. It is further contended that since the plaintiffs father Ranganatha Mehta took Item 13 of 'A' schedule of the Award, i.e., Greams Road property leaving Item 8, i.e., Edapalayam lane property to the defendants father in an internal arrangement between them, he dealt with only Greams Road property in his Will and the learned single Judge is not correct in taking the same as against appellants.

6. The learned counsel appearing for the fifth respondent per contra contends that out of four properties, Ranganatha Mehta

was allotted two properties namely Edapalayam lane property and Greams Road property, whereas other two items, i.e., plaint schedule properties were allotted to the defendants father Balakrishna Mehta under oral partition. The learned single Judge after analysing the documents and oral evidence as to the uninterrupted enjoyment of the plaint schedule properties for nearly about five decades from 1939 by Balakrishna Mehta and after his demise by the defendants, has rightly dismissed the suit and the Judgment does not warrant any interference.

7. There is no dispute that Ranganatha Mehta is the adopted son and Balakrishna Mehta is the son born to T.Subbaraya Mehta. There was Arbitral Award as to the partition among the family members and the properties allotted to T.Subbaraya Mehta consisting of 4 items devolved upon T.Ranganatha Mehta and Balakrishna Mehta after the death of T.Subbaraya Mehta in 1926. Those four items of properties are Item No.8,13,2 and 10 in 'A' schedule of the Award, dated 14.12.1924. These properties are

1. Item 8 - 2/1, Edapalayam Lane property
2. Item 13 - 11, Greams Road property
3. Item 2 - 29, Ekambara Eswara Agraharam Street property.

4. Item 10 - 36, Wallers Road property.

Out of the above four properties, the last mentioned two properties, i.e., Item 2 and 10 in Schedule 'A' of the Award are the suit properties.

8. The specific case of the appellants / plaintiffs is that after the demise of T.Subbaraya Mehta, in an understanding between Ranganatha Mehta and Balakrishna Mehta. Item 8, i.e., Edapalayam lane property was taken by Balakrishna Mehta and Item 13, i.e Greams Road property was taken by Ranganatha Mehta and the remaining two properties, i.e., the suit properties have been in joint possession of Ranganatha Mehta and Balakrishna Mehta and continued to be in joint possession of the two families, even after the demise of the above said persons in 1968 and 1975 respectively.

9. The specific case of the respondents / defendants is that after the demise of T.Subbaraya Mehta, there was oral partition between brothers, i.e., Ranganatha Mehta and Balakrishna Mehta and out of the above said four items, first two items, i.e., Item 8 and 13 of 'A' schedule in the Award (Edapalayam lane property and Greams Road property) were allotted to Ranganatha Mehta and the

remaining two items, i.e., suit properties, Item 10 and 36 of 'A' schedule of the Award (Ekambara Eswarar Agraharam street property and Wallers Road property) were allotted to Balakrishna Mehta and pattas were also transferred in the name of respective sharers and the above said plaint schedule properties have been in possession and enjoyment of Balakrishna Mehta till his death and thereafter, the defendants have been collecting the rents, paying all taxes and even effected partition among family members.

10. No doubt a partition between coparceners may be partial either in respect of the property or in respect of the persons making it. In this case on hand, Balakrishna Mehta was only 12 years at the time of death of his father, T.Subbaraya Mehta in 1926. It is to be seen whether the alleged partial partition is either established or probable and acceptable.

11. In 1957, Balakrishna Mehta filed the suit in O.S.No.2270 / 1957 before the City Civil Court, Madras, seeking direction against his brother, Ranganatha Mehta to furnish a copy of the Award, dated 14.02.1924. Therefore, the relationship became strained leading to file a suit between brothers. Even after Ranganatha Mehta died in 1965 and Balakrishna Mehta passed away in 1975, the suit

properties are found dealt with by the legal heirs of Balakrishna Mehta, namely the defendants by leasing out the properties to various persons by executing lease deed and having correspondence as to lease and by paying taxes including excise duty, wealth tax etc. Ex.D.19 and Exs.D.22 to 26 are about the lease. Ex.D.17 and Ex.D.34 are pattas, Ex.D.14 series is the IT Assessment Order and Ex.D.13 is Quit Rent Demand. All these exhibits depict that Balakrishna Mehta and his legal heirs / defendants have dealt with the suit properties. On 26.03.1980, the partition deed was also executed among the family members of the defendants and the deed is exhibited as Ex.D.35. After the demise of T.Subbraya Mehta in 1926, the claim has been made by the plaintiffs in the suit properties only in 1987. Considering the above available evidence as to the exclusive enjoyment of the defendants family of the plaint schedule property with the knowledge of the plaintiffs, it is highly improbable and unbelievable that out of the four items of properties, two alone were divided among the brothers and the remaining items were treated as common properties.

12. The appellants / plaintiffs contends that Item 8 of 'A' schedule in the Award, i.e., Door No.2/1 Edapalayam lane property was taken by Balakrishna Mehta in an understanding between the

brothers. The fifth defendant contends that the suit property was allotted along with Greams Road property to Ranganatha Mehta and the above said Edapalayam lane property was acquired for the purpose of a School. When the appellants / plaintiffs pleads that in an understanding, Edapalayam lane property was given to Balakrishna Mehta, the burden is on them to establish the same. But the appellants / plaintiffs have not established the allotment of the said property in favour of Balakrishna Mehta. Therefore, the argument of the appellants as to the partial partition is not sustainable.

13. As already pointed out, the argument of the fifth respondent / fifth defendant is that there was oral partition between two brothers, T.Ranganatha Mehta and Balakrishna Mehta as to the properties devolved on the demise of their father, T.Subbaraya Mehta. According to the respondents all the four properties were divided among brothers orally, whereas the appellants / plaintiffs contend that there was only partial partition and the two items, i.e., plaint schedule properties were kept in joint possession.

14. It is pertinent to note that an agreement to separate is not required by law to be in writing. However, where the partition is

oral, evidence of subsequent conduct of the parties becomes material in law in order to determine whether there was a partition or not. It is to be noted that though the appellants / plaintiffs admit that there was partition but claims partial partition with respect to 4 items of properties devolved through T.Subbaraya Mehta. However, the plea of partial partition has already been negated.

15. The argument of oral partition of the fifth respondent / fifth defendant are probable and acceptable for the following subsequent conduct of the parties :

(i) As already pointed out, Ex.D.19, Ex.D.20 - lease Deed, Ex.D.22 - letter addressed to the Commissioner of Police regarding the lease, Ex.D.23 to Ex.D.26 - correspondence as to the lease, Ex.D.17 and Ex.D.34 - pattas, Ex.D.14 series - Income Tax Assessment Orders up to 1969-70 and Ex.D.13 - Quit Rent Demand have been in the name of Balakrishna Mehta and thereafter, defendants with respect to the suit properties.

(ii) Admittedly in both the suit properties, new constructions were made.

(iii) Partition deed was executed under Ex.D.35, dated 26.03.1980 among the

family members of the defendants in which both the suit properties were partitioned among themselves.

(iv) The Will executed by T.Ranganatha Mehta has been probated in O.P.No.132 of 1969 of this Court on the petition filed by his sons, the plaintiffs 1 and 2 herein and the same has been marked as Ex.D.2. In this Will, though he bequeathed his undivided share in Greams Road property, he has not mentioned the suit properties. Had these two suit properties been left as joint family properties, as alleged by the appellants / plaintiffs, the same would have been found a place in the Will.

(v) Under Ex.D.9, dated 29.05.1991 sale deed executed by the defendants in favour of third parties with respect to Ekambara Eswara Agraharam Street property (Suit Item No.2), plaintiffs have signed as concurring party. This document is subsequent to the suit. Thus the appellants relinquished their claim with respect to Item No.2 of the suit property.

Thus the above conducts of the parties clearly establish the oral partition and enjoyment of two properties without any demur by the defendants for several decades.

16. Another contention of the appellants / plaintiffs that there was understanding between the parties to give one of the suit properties to the appellants / plaintiffs, when the respondents / defendants started construction in the other property is not acceptable in the absence of acceptable evidence.

17. For the aforesaid reasons, the suit is liable to be dismissed and the learned single Judge has rightly dismissed the suit and this Court does not find any reason to interfere with the well reasoned Judgment.

In fine, this Original Side Appeal is dismissed with costs, confirming the Judgment and Decree of the learned single Judge, dated 22.06.2006 made in C.S.No.902 of 1990.

(A.S.,J.) (P.K.,J)
23-11-2016

Index : Yes

tsvn

**A.SELVAM,J.
AND
P.KALAIYARASAN,J.**

tsvn

**Pre-Delivery Judgment in
O.S.A.No.345 of 2009**

23-11-2016

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