



S.A.No.152 of 2004

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.08.2022

PRONOUNCED ON : 01.09.2022

CORAM

THE HON'BLE Mr. JUSTICE C.V.KARTHIKEYAN

S.A.No.152 of 2004

House Bi (Died)

1.Sayeetha Bi

2.Arifa Bi

...

Appellants

Vs.

1.Abdul Raheem (deceased)

2.Mohammed Sali (died)

3.Halima Bi (died)

4.Abdul Rahman

5.Abdul Kareem

6.Sheik Alauddin

(Respondent No.6 brought on record
as legal representatives of the deceased
first respondent vide Court order
dated 15.04.2010 made in CMP.
No.565 of 2010).

7.Halil Rahman

8.Bashir Ahamad

9.Kurshid Begum

10.Fazzil Rahman

11.Hajeera Begum

12.Shiek Alauddin

...

Respondents



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(RR7 to 12 brought on record as the legal representatives of the deceased R2 & R3 vide Court order dated 29/08/2019 made in CMP.No.6283, 6293, 6289, 6599 6601 & 6603/2019 in S.A. No.152/2004)

Prayer: The Second Appeal is filed under Section 100 of CPC, against the judgment and decree dated 27.04.2001 passed in A.S.No.188 of 1990, on the file of the Additional District Court, Cuddalore confirming the judgment and decree dated 30.03.1990 passed in O.S.No.22 of 1989 on the file of the Additional Sub-Court, Cuddalore.

For Appellants : Mr.M.Arunkumar
for M/s.Sampath Kumar Associates.

Respondents 1 to 3 : died

For Respondent : Ms.Nilaphar
Nos.6 to 9 & 11 for Ms.R.Meenal

JUDGMENT

The 4th and 5th defendants in O.S.No.22 of 1989 on the file of the Sub-Court at Cuddalore, are the appellants herein. The suit in O.S.No.22 of 1989 has been filed seeking a preliminary decree for partition and separate possession of the plaintiffs' 17/24th share in the suit property and for division of the property accordingly and also for costs of the suit.



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2.The suit property is situated at Grama Natham, survey No.1/25 measuring 10 cents in Thaikkaal Street, Madura Thulukkam Palayam Village, Cuddalore District.

3.By judgment dated 30.03.1990, the learned Sub Judge, Cuddalore, had decreed the suit. Aggrieved by such judgment, the first, fourth and fifth defendants filed A.S.No.188/1990 before the Additional District Court/Chief Judicial Magistrate, Cuddalore. By judgment dated 27.04.2001, the appeal suit was dismissed and the judgment and decree of the trial Court in O.S.No.22 of 1989 was confirmed. Since the first defendant died, the fourth and fifth defendants had filed the present second appeal.

4.The second appeal had been admitted on the following substantial question of law:

“ Whether the purchase in the name of one member of the family can be construed as joint family property as joint family is unknown to Mohamedan Law?”



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During the course of arguments, that substantial question of law was deleted and the following substantial question of law had been framed.

“Whether a property allotted to a Musilm male in a partition deed is taken by him absolutely or whether as a tenant in common along with his minor brothers?”

5.Pending the appeal, the first, second and third respondents died and their legal representatives were brought on record as 6th to 12th respondents.

6.It had been stated in the plaint in O.S.No.22 of 1989 that the suit property consisting of a house and a vacant site adjoining each other originally belonged to one Sayabu Kandu Rawuthar. He had two sons Sheikh Mohideen and Abdul Rahman and one daughter Sarambi. They inherited his property. The sons took two shares and the daughter took one share. Sheikh Mohideen died leaving his widow Ameerbi and one son and two daughters. The son predeceased his mother Sarambi died in



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1925. Her husband and her son predeceased her. Her share was inherited by her brother Abdul Rahman. The two daughters of Ameerbi predeceased their mother. Ameerbi sold her share in the property with specific boundaries to the third plaintiff who was the wife of the first plaintiff on 16.05.1962. Later, Ameerbi's granddaughter made some claim to the property and therefore, a release deed was obtained on 11.12.1970. This deed was registered. The plaintiff put up a building in the property purchased. After the death of Abdul Rahman, there was a dispute between his legal heirs on one hand and Ameerbi, the wife of his brother Sheikh Mohideen Rawvuthar. This dispute was resolved and a partition deed dated 24.10.1936 was entered into by Mohammed Ismail the eldest member of the family representing Abdul Rahman's branch who also represented his younger minor brothers.

7.The A schedule property was given to Mohamed Ismail. The B schedule property was given to Ameerbi. The A schedule property was enjoyed by Mohamed Ismail and the plaintiffs and was enjoyed in common. In 1947, the first and second plaintiffs constructed the building. Mohamed Ismail died leaving behind the first defendant, his widow and



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the second and third defendants, his sons and the fourth and fifth defendants, his daughters as his legal heirs. On the death of Abdul Rahman, his widow Ayshamma and his three sons, Mohamed Ismail and the plaintiffs and Rohiabi inherited the property. On the death of Rohiabi, her share was inherited by three brothers.

8.It was stated in the plaint that according to Muslim Law, in the property of Abdul Rahman, the plaintiff and Mohammed Ismail were each entitled to $1/3^{\text{rd}}$ share after leaving $1/8^{\text{th}}$ share to their mother Ayshamma. She sold her share to the third plaintiff on 02.03.1964. It was therefore claimed that the first plaintiff, the second plaintiff and the first to fifth defendants each entitled to $1/3^{\text{rd}}$ share in the remaining $7/8^{\text{th}}$ shares. Out of this, the first plaintiff was entitled to $7/24$ share the second plaintiff was entitled to $7/24$ share and the third plaintiff was entitled to $3/24$ share. Therefore, claiming that the plaintiffs were entitled to $17/24$ undivided share and the defendants were entitled to $7/24$ undivided shares, the suit was filed.



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9.In the written statement, the first defendant claimed that the sale deed dated 16.03.1962 would not affect the right, title and interest of the defendant. The release deed dated 11.12.1970 was claimed to have no effect on the litigation and it was stated that the sale in favour of the third plaintiff is not acceptable. It was stated that there was a registered partition deed dated 24.10.1936. It was stated that from the date of the partition, the husband of the first defendant and later, the first defendant alone was in possession. At no point of time, the other sharers laid any claim in the property. It was claimed that the husband of the defendant was entitled to the entire property. It was therefore stated that the relief of partition should not be granted. It was stated that the suit should be dismissed.

10.The learned Additional Sub Judge, Cuddalore, framed necessary issues for trial. During the trial, the first and second plaintiffs were examined as PW1 and PW2 and the fifth defendant was examined as DW1. The plaintiffs marked Exs.A1 to A48. Ex.A1 was the sale deed dated 16.03.1962 and Ex.A2 was the sale deed dated 02.03.1964 and Ex.A3 was the release deed dated 11.12.1970. The crucial document was



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Ex.A4 which was the partition deed dated 24.10.1936. Exs.A5 to A31 were house tax receipts. Exs.A32 to A34 were notices exchanged between the parties. On the side of the defendant, Exs.B1 to B53 were marked. Exs.B1 to 24 were extracts of voters list and Exs.B25 to 51 were the house tax receipts.

11.On the basis of the evidence adduced, it was found that the property originally belonged to Sayabu Kandu Rawathar, who left behind two sons and one daughter, who inherited the property in accordance with their entitlement for the shares. It was also noticed that the suit was between the two branches and therefore, the Sub Judge proceeded to work out the ratio of the shares among inheritors to the property. It was found that Ameerbi who was the wife of the first son Sheikh Mohideen would be entitled to undivided $2/40^{\text{th}}$ shares and her daughter and sons would be each entitled to undivided $7/40$ shares. But they predeceased her. Therefore, she obtained a residuary share also. It was found that as on 1925, owing to the birth and death occurring in the family, Ameerbi's share was determined as $6/40$ and the brother of her late husband was entitled to $16/40$, $8/40$ and $24/40$ share. Thereafter, it was found that



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under Mohammadian Law, the co-owner lived as a tenant in common. It was also observed that the doctrine of survivorship was not known in Mohammedan Law and that there are no co-sharers who live as tenants in common. It was also held that if one of the sharers is in possession of the whole estate, he would be deemed to be in possession on behalf of other co-sharers. It was stated that his possession would not be adverse to that of the other co-sharers. After a detailed discussion with respect to the shares, the learned sub-Judge decreed the suit as prayed for.

12. Aggrieved by such judgment, the first and fourth and fifth defendants had filed A.S.No.188 of 1990. The learned Additional District Judge framed the following points for consideration.

“1. Whether the defendants have perfected title by adverse possession ousting the other co-sharer.

2. Whether the deceased Mohamad Ismail represented the branch of Abdul Rahman while



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partition the property with Ameerbi by document dated 24.10.1936?

3.Whether the plaintiffs are entitled to claim partition of 17/24 share.

4.What is the share of respective parties?

5.Whether the judgment and decree of the trial Court is liable to be set a side?”

13.It was found that the first and second plaintiffs were minors at that time of the partition in the year 1936. It was for that reason their names were not found in the partition deed. It was also found that the inference of co-ownership holding as the property for the benefit of the minor arises not only when the other co-owner was a minor but also when the other co-owner was a female.

14.The report of the advocate commissioner was also noted wherein he had stated that the parties were living in three separate portions.

15.The learned Additional District Judge also examined the ratio or



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shares to be given to each one of the parties and confirmed the judgment and decree of the trial Court.

16.Questioning that judgment, the first, fourth and fifth defendants filed the present second appeal. The first defendant had died even before filing of the appeal. The following substantial question of law had been framed for consideration :

“Whether a property allotted to Musilm male in a partition deed is taken by him absolutely or whether as a tenant in common along with his minor brothers?”

17.The central document to be considered is the partition deed dated 24.10.1936. Mohammed Ismail had represented his younger brothers who were minors. Since they were minors, their names were not reflected in the partition deed.

18.It is to be noted that under Mohammadian law, the co-owners are only tenants in common. There is no actual division. The heirs succeed as tenants in common. The estate of a deceased person devolves



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on his heirs and each of them become entitled to a definite fraction of every part of the estate.

19.The heirs of a deceased Mohammedan being in possession of the whole estate will be deemed to be in possession on behalf of the other co-heirs also.

20.In **95 L.W 609 (Mohammed Ismail and another Vs. Khadirs Rowther and others)**, a Division Bench of this Court had held as follows.

“ 5.. . . .(2) the court below had gone wrong in applying the principle which govern the case of coparcenary joint Hindu family. In the case of Muslims, no such principles can ever be invoked. It is entirely for the plaintiffs to prove that the properties owned jointly yielded such surplus income so as to enable the appellants to purchase the suit properties.
.(emphasis applied)

21.The Division Bench further held as follows:

11.Point (2)- This is a case in which



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*admittedly the appellants along with the defendant 6 were in possession of all the properties jointly belonging to the family. They are admittedly of an extent of 40 acres and odd. There is absolutely no evidence whatever to show that out of the independent earnings either the first defendant, second defendant or even the 6th defendant ever acquired these properties. Only if that is proved the presumption that the independent acquisition of a member in a Muslim cannot be considered to belong to all the other members, will fail to arise. In fact, the law in this regard as laid down in **Mohammed Ibrahim v. Syed Muhammad Abbubakker, and others** is as follows:-*

“The personal law of Muslims does not recognise a system of joint holding as is common amongs Hindus. There may be cases, however where a custom may be set up in the matter of the holding of such properties by some of the members of the Muslim family whereby it could be established that such possession and title in some of the members is customarily to be



interpreted and understood as possession on behalf of all the members.. . . .”

22.It is thus seen that the possession of each one of the parties was not in their individual right but as tenants in common.

23.In the instant case, when Mohammed Ismail entered into the partition deed it was on behalf of his two minor brothers also. He acted on behalf of his minors brothers. He was involved as a co-owner along with his minor brothers. As the brothers of the plaintiff were minors, their names were not reflected in the partition deed. He acted also on their behalf and as stated above, all co-owners are tenants in common. They have a share in every fraction of the house.

24.I hold that both the Courts below, in the instant case, have correctly determined the ratio. The parties have common interest and common possession of the suit property. The property had not been purchased by Mohammed Ismail. It was obtained by him under Ex.A4 partition deed and therefore, under Mohammedan Law, all the legal heirs



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of Abdul Rahman would get a share in the property.

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25.The first plaintiff and the second plaintiff were each entitled to 7/24 share. The third plaintiff was entitled to 3/24 share. The plaintiffs were therefore entitled to 17/24 share.

26.The reasoning of both the Courts below is correct. The shares worked out is correct. The substantial question of law framed is therefore answered that under Mohammedan Law in a partition deed, property is taken as a tenant in common along with minor brothers. Mohammed Ismail entered into the partition deed not only on his behalf but also on behalf of his minor brothers, the first and second plaintiffs. All of them were tenants in common. The substantial question of law is answered accordingly.

27.I find no reason to differ with the judgments of both the Courts below.

28.In view of the such circumstances, the second appeal stands



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dismissed. In view of the relationship of the parties, no order as to costs.

Consequently, connected miscellaneous petition, if any, is closed.

Index:Yes/No
Internet:Yes/No
sms

01.09.2022

To

- 1.The Additional District Court, Cuddalore.
- 2.The Additional Sub-Court, Cuddalore.
- 3.The Section Officer, V.R.Section, High Court of Madras.

C.V.KARTHIKEYAN,J

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Pre-delivery judgment made in
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