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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 15.02.2022

Pronounced on : 21.02.2022

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

A.S.No. 535 of 2018

Paul Radje ... Defendant/Appellant

Vs

1. Andoni Irudayaraj @ George

2. Andonissamy Francois

(Both rep. By their Power of Attorney
Xavier Robert S/o Xavier Adolph)

... Plaintiffs/Respondents

PRAYER: Appeal filed under Order XLI Rule 1 CPC read with Section 96 of CPC, against the Judgment and Decree dated 16.04.2018 in O.S.No. 33 of 2012 on the file of II Additional District Judge, Puducherry.

For Appellant : Mr. S.Kalyana Raman

For Respondents: Mr. V.Venkatasamy

O R D E R

The defendant in O.S.No. 33 of 2012 is pending on the file of II Additional District Court, Pondicherry is the appellant herein, aggrieved by the Judgment and Preliminary Decree dated 16.04.2018.

2. The suit in O.S.No. 33 of 2012 had been filed by the respondents seeking partition and separate possession of undivided 1/3rd share in undivided 7/8th share in the ground floor in the entire portion in the first and second floors of the property, namely, land and building at Old No. 100, New No. 164 at Yanam Venkatachalampillai Street, Puducherry. It must be mentioned that the plaintiffs and the defendant are brothers and



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sons of late Andonissamy. They also had four other sisters and claiming privilege of being governed under the Customary Hindu Law as applicable to Pondicherry Christians, both the plaintiffs and the defendant claimed that their sisters are not entitled to any share in the aforementioned property.

3. The father Andonissamy was born on 15.01.1915 as Indian Christian. He married Kulanthai Ammal @ Kulanthai Theresa Mary on 23.05.1947. The first plaintiff Andoni Irudayaraj @ George was born on 09.04.1953, the second plaintiff Andonissamy Francois was born on 23.03.1959 and the defendant Paulradje was born on 29.05.1970. Their sisters, whom the brothers have ousted from claim of partition, had been given in marriage during the life time of Late Andonissamy.

4. The one aspect which is stressed is that the plaintiffs and the defendant are now domiciled in France and it is claimed that they are French citizens and that one aspect has been taken up as an additional ground by the defendant/appellant in the present appeal seeking to interfere with the Judgment and preliminary decree granted by the II Additional Sub Judge, Puducherry.

5. To relate the facts a little further, Andonissamy appears to have had an inclination to execute Wills and in this manner had executed three separate Wills but none of them today are under consideration by this Court or by the trial Court or even by the parties. He finally executed a settlement /donation deed on 18.11.2002 and interpretation of the covenants therein has given rise to the filing of the suit and subsequent adversarial litigation among his three sons.

6. By the said settlement / donation deed, he had settled or rather donated the entire ground floor of the aforementioned property to the defendant/appellant Paulradje. The plaintiffs however claim that being governed by the Hindu Customary Law as applicable to Christians in Pondicherry, Andonissamy can donate or settle the property only to the extent of only 1/8th undivided share to the appellant/defendant and it is on that basis, they have instituted the suit seeking partition and separate possession of the remaining 7/8th share in the ground floor and of the entire first and second floors of the property aforementioned into three equal parts.

7. In the written statement, it had been the contention of the appellant/defendant that since both the plaintiffs and also the defendant had renounced their claim to Indian Nationality



and have taken up French Citizenship to heart, they should be governed only by French law and if that law is applied, the defendant would get the entire ground floor and not just 1/8th undivided share. The first and second floor would be subject to partition as claimed by the plaintiffs.

8. During the course of trial, the learned II Additional District Judge had framed the following issues:-

"1. Whether the suit is maintainable under Pondicherry customary Law?;

2. Whether the donation deed dated 18.11.2002 is valid upto 1/8th of the ground floor of the suit property?;

3. Whether sons alone are entitled for succession and daughters are to be excluded?;

4. Whether the plaintiffs can demand their share in the suit property?

5. Whether the plaint is incorrect on facts and law and so deserves to be dismissed?

6. To what relief the plaintiffs are entitled?"

9. None of the parties came forward to graze the witness box but on the other hand deputed their power of attorney agents to adduce evidence on their behalf. The power of Attorney Agent of the plaintiffs was examined as PW-1 and he marked Ex.A-1 to A-14 and among those documents, the only significant documents are the birth certificate of Andonissamy Ex.A-1 dated 15.01.1915 and the death certificate of Andonissamy Ex.A-10 dated 03.10.2004. The Power of Attorney Agent of the defendant, who also happened to be his wife was examined as DW-1 and she marked Exs. B-1 to B-7 and this Court shall take into consideration mainly Ex.B-3 dated 18.11.2002 which is a certified copy of the donation/settlement deed executed by Andonissamy.

10. The learned II Additional Judge on consideration of the pleadings and the evidence adduced came to the conclusion that the property being in Pondicherry and the parties being Indian Christians, who had only domiciled in France, retain only the rights accrued to Christians in Pondicherry and would be governed by the Customary Law. He had also relied on the



Judgment of the Division Bench reported in AIR 1977 Madras 270 [Pauline Lucas Vs. Jerome], and held that the Hindu Customary Law prevailing in Pondicherry prior to the introduction of the Hindu Succession Act alone will apply and thereby concurred with the stand of the plaintiffs and granted partition and separate possession of three equal shares of undivided 7/8th share in the ground floor and in the first and second floor of the aforementioned property.

11. Aggrieved by such finding, and claiming that the donation/ settlement deed should have been examined in its proper perspective and should be upheld in letter and spirit and affirm settlement of the entire ground floor in favour of the appellant, the present Appeal has been filed.

12. Heard Mr.S.Kalyana Raman, learned counsel for the appellant and Mr.V.Venkatasamy, learned counsel for the respondents.

13. To enable better understanding, the parties shall be referred as plaintiffs and defendant.

14. The appellant was the defendant and the respondents were the plaintiffs in the suit.

15. The point which arise for consideration under Order 41 Rule 31 of the Code of Civil Procedure are:

(i) Whether the plaintiffs and the defendant are governed by the French Law or by the Hindu Customary law?;

(ii) Whether the settlement deed is valid only upto 1/8th undivided share in the ground floor in the suit property or for the entire ground floor?.

(iii) Whether the plaintiffs should have sought the relief to set aside the settlement deed executed by Andonissamy?;

16. The one central point which was not directly addressed by the learned counsels is that the property originally belonged to Andonissamy, the father of the plaintiffs and the defendant. He was an Indian Christian settled in Pondicherry. His birth certificate and his death certificate have been marked as documents and they reflect that particular fact. He was not a French National. As a Christian in Pondicherry, he was governed by Hindu Customary Law of Pondicherry as applicable to natives of Pondicherry.



17. The repeated contentions of the learned counsel for the appellant/defendant Mr.S.Kalyana Raman was that the plaintiffs and the defendant had settled and domiciled themselves in France and therefore, the plaintiffs and the defendant would be governed only by the French Law. But the point which should be addressed is whether, when the settlement deed was executed, the right of the settlor Andonissamy to deal with the property would be governed by Hindu Customary Law as applicable to Indian Christians settled in Pondicherry or under the French Law. The plaintiffs and the defendant are only beneficiaries of the settlement deed. They have no right to dictate as to how and in what manner the settlement deed should be executed or what was in the minds of the settlor. It was the wish and the capacity of the Settlor which will have to be examined and when there is a limitation on the Settlor that he can settle only $1/8^{\text{th}}$ share to his son then, the settlees are bound to accept to such limitation.

18. The fact that the parties are Indian Christians settled in Pondicherry are not disputed by any one of them. In fact, they interpret that particular fact to their advantage, to oust the daughters from partition. When they take that particular advantage, they should also taken upon themselves the disadvantage of the settlement deed being declared as null and void with respect to $7/8^{\text{th}}$ undivided share in the ground floor of the suit property. Otherwise the daughters can also step in and claim equal shares in the first and second floor of the property. Therefore, the argument advanced by the learned counsel for the appellant/defendant that the French law alone should be applicable is not correct and further, if the settlement deed is upheld in its entirety then the first and second floor to which no document had been executed by the father would be equally divisible among all the sons and daughters. The plaintiffs or the defendant do not want such a situation to happen. The only determining factor is law applicable to Andonissamy and without doubt he was governed under the Hindu Customary law as applicable to the Indian Christians in Pondicherry before the introduction of the Hindu Succession Act. Andonissamy had a right only to execute the settlement deed restricted to $1/8^{\text{th}}$ share undivided share.

19. The question which begs an answer is as to how this $1/8^{\text{th}}$ share came to be recognised as a fraction of a whole and how and why the owner of a property in Pondicherry being an Indian Christian can deal with only $1/8^{\text{th}}$ share and not with the entire property. That comes about under the doctrine of legitim.



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20. Let me take advantage of the Division Bench Judgment of this Court in 2002-3-L.W-669 [Krishnamoorthy Gounder Vs. Sitarama Gounder and others], wherein the Division Bench had examined this particular aspect:-

"18. The next point is as to what the son can do after the life time of the father in respect of gratuitous transfers. That is where the principle of legitim steps in. What is legitim?

19. To quote Justice David Annoussamy

"French jurists however have found that the father could give away only a portion of his properties called his disposable quota and the balance, constituted the legitim of the heirs. The principle of legitim for direct heirs as has been a consistent principle in the legal history in France and the same was affirmed with force and precision in the Code Civil. It is how the principle of legitim is a familiar one for Hindus in Pondicherry, whereas it is unknown in the rest of India. Till his death the father is the sole owner of all the properties with full right of disposal for consideration. The legitim is the portion of the estate which a person cannot dispose of by an act of liberality, if he has heirs in direct line, who are called accordingly forced heirs. When a person indirectly deprives his forced heirs of the amount of property which was in their legitimate expectation, by disposing away without consideration the totality or a substantial part of his estate, those heirs are entitled to show that their legitim had been encroached upon and to have it restored by way of reduction of excessive liberalities."



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20. The learned Judge has referred to the opinion of Sanner in his *Droit Civil Applicable aux Hindous*, 1916 in the following terms:

"preservation of the properties in the family was at the root of the real estate regime and successoral law in India and that, therefore, legitim was a necessary part of that law. He observed that there was no obstacle in applying integrally the provisions of Code Civil in the matter of legitim to Hindus.

Thus, it is seen that the Courts in Pondicherry have consistently allowed to the children the right to attack the acts of liberalities of their parents when such acts had the effect of depriving them substantially of their legitimate right to succeed and that in the course of time the very principle of legitim as understood in French law has come to be accepted.

The sons have a right of legitim in the property of their father and the daughters have the same right in the property of their mother.

The French jurists did not make any distinction between ancestral properties and self acquired properties, except Laude who stated that the father could not dispose of the immovables left by the ancestors at his pleasure and that the children had the right to attack the excessive liberalities by invoking their right of legitim, that in respect of self acquired properties the father had the right of disposal subject to the right of children to attack it as in the Roman law (querela inofficiosi testamenti) in case they were deprived by the father without valid reason.



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this author only made a difference in respect of the remedy but the right of disposal was limited in both classes of properties."

22. The position thus appears to be clear that during the life time of the father, the son cannot ask for partition. The only remedy he can have appears to be to seek an interdiction or the appointment of a judicial counsel, that is to say, the son has the right to resort to the means of protection, defined by Chapters I and II of XI of Code Civil. We will revert to this interdiction a little later.

23. As regards the "Quantum of Legitim", the learned Judge observed as follows:

"To sum up, the French jurists and judges came to the conclusion that the quantum was left by the Hindu law to be determined by the Court. They were first in favour of allotting the share of the father as his disposable quota and when the consultative commission proposed the fixed ratio of 1/8th they adopted that solution. Again the ratio 1/8th as the disposable quota may be found to be too small in some cases. That is why the decision dated 4 February 1936, which for the first time applied this quantum reserved for the Court the right to vary it in case the father had given his reasons to favour in a particular manner any of his descendants. But, it is rare to find such justifications in the deeds embodying acts of liberality."

21. In (2018) 3 SCC 117 [Theiry Santhanamal Vs. Viswanathan and Others], the Hon'ble Supreme Court affirmed a Judgment of the Division Bench of this Court reported in 2004 (3) CTC 81 [Viswanathan and another Vs. Savarimouthurayan and others], and with respect to applicability of the Hindu



Customary Law to Indian Christian in Pondicherry, held as follows:-

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"25. As already pointed out above, the foremost question pertains to the validity of the partition deed dated 15-3-1971 and other arguments would arise for consideration only if the appellant is able to cross this hurdle. At this stage, it would be pertinent to point out that even after holding that during the lifetime of their father, sons cannot claim partition of the properties as per the said customary Hindu Law, the High Court has accepted the fact that the father is still enabled to distribute and partition his property between the children and the descendants. As per the High Court, this can be done either by instruments inter vivos or by will and further that the settlement or will must comply with the formalities, conditions and rules laid down for donations inter vivos and wills and the partitions made by donation inter vivos must include only those properties which the donor then possesses. In respect of this assertion, the High Court has referred to Articles 1075 and 1076 of the French Code. From the aforesaid, the High Court has observed that the father can distribute or partition the property between the children and the descendants only by gift or family settlement between the parties themselves. According to it, the plaintiffs had not set up their claim on that basis as they did not rely on Articles 1075, 1076 or 1077 of the French Code in respect of their claim.

26. We may reproduce Articles 931, 1075, 1076 and 1077 of the French Code at this juncture:

"931. Every instrument containing a donation inter vivos shall be executed before notaries in the ordinary form the contracts, and the original shall remain with them; otherwise such instruments shall be void. Civ. C. 894, 948, 949, 1339, 1340.



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1075. Fathers and mothers and other ascendants may make a distribution and division of their property between their children and descendants Civ.C. 745, 914, 968, 1076 et seq.

1076. These divisions may be made by donations or by wills in accordance with the formalities, conditions and rules laid down for donations inter vivos and wills.

1077. If all the property which are ascendants leaves at the time of his death has not been included in the division, such property as has not been included shall be divided according to law. Civ. C. 723 et seq., 815 et seq., 887 et. seq."

27. Questioning the aforesaid approach of the High Court, the submission of the learned Senior Counsel for the appellant was that the High Court committed error in deciding the issue by applying the French Code, which was not applicable in the instant case. As per him, the Hindu Succession Act was made applicable to the territory of Puducherry in the year 1963 and, therefore, relationship of the parties was governed as per the said Succession Act and not the French Code.

28. The aforesaid argument is misconceived for more than one reason. First of all, the argument ignores that Oubegaranadin and his sons (Respondents 3 to 5) are Christian by religion. Therefore, the Hindu Succession Act would not govern, even if it has been enforced in the territory of Puducherry in the year 1963. The High Court has dealt with this aspect in detail in its judgment, as pointed out above, and has come to the conclusion that insofar as Christians are concerned, old Customary Law continues to apply. No attempt was made by the learned Senior Counsel for the appellant to dislodge the same. Even otherwise, it is the



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Customary Hindu Law which has been applied to decide the case which approach is perfectly justified.

29. We also find that the plea to the effect that the Hindu Succession Act to be enforced in the Union Territory of Puducherry w.e.f. 1963 and, therefore, the French Code was not applicable thereafter, has taken for the first time in this Court that too during the arguments. Interestingly, even in the special leave petition, it is accepted that in the plaint filed by Respondents 3 to 5, it was specifically mentioned that they were governed by French Civil Law. The learned Single Judge while deciding appeals filed by the appellant herein as well as Respondents 3 to 5 (plaintiffs) in the suit have also dealt with the matter in the light of the French Code. Even if it is assumed that Oubegaranadin and his sons are governed by the Hindu Succession Act, this Act has no applicability to the transaction in question. The said Act governs the succession of the property when a Hindu dies intestate. The manner in which his properties would devolve on his successors is laid down in the scheme of the said Act. Here, the plaintiffs did not claim (nor could they claim) that they became owner of the property by way of succession as per the provisions of the Hindu Succession Act. On the contrary, they claimed right in the property on the basis of the partition deed dated 15-3-1971 which was executed by their father, namely, Oubegaranadin during his lifetime. "

22. I would also concur with the Judgment of the Division Bench of this Court reported in AIR 1977 Madras 270 [Pauline Lucas Vs. Jerome], wherein it had been held as follows:-

"The Christian in the State of Pondicherry are governed by the Hindu Customary Law and as the Act does not apply to the Christians in that State, the



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Succession Law applicable to Christians is not the Hindu Succession Act, 1956, but it is the Hindu Customary law prevalent in that state prior to the introduction of the Act into that State."

23. In 1993 (2) MLJ 481 [T.S. Sadagopan (Deceased) vs T.N.K. Ramanujam], a Division Bench had held as follows:-

"22. It is now necessary to make a reference to a fallacy contained in the judgment of the Division Bench rendered on the earlier occasion in A.S. No.150 of 1976. The law which prevailed in Pondicherry was set out clearly in the judgment of the trial court on the first occasion and it was pointed out that a two tier system of civil status was applicable to French nationals even prior to the promulgation of code civil was confirmed by Arrete dated 6.4.1819 namely one, the statute as defined in Code Civil, i.e., the French personal Law which was the ordinary law and two, the local status which could be Hindu and Mahommedan customs as they prevailed in Pondicherry at that time, which was the exceptional law. The trial court also pointed out that the first status was applicable to all French nationals of French origin, their descendants, foreigners who acquired French nationality and French indigenous people who renounced their personal status and prayed for being covered for the future by the French Code Civil and the second status was applicable only to the remaining indigenous people. It was clearly stated that the exceptional law which was neither the French Law nor the Hindu Law Applied in the other parts of the country, but a local custom should be restricted to those who were recognised as following that custom from generation to generation and not extended to others as a law of general appliance. It was further stated that the assurance given by the French Government the time of the French settlement and reiterated in Article 3 of Arrete dated 6.4.1819 could apply only to



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the indigenous stock of population, which was brought under French power by force or treaty with local Indian princes and not to British people who acquired French nationality individually and out of their will. The Division Bench accepted the statement of law found in the judgment of the trial court that there was a two tier system of civil status applicable to French nationals even prior to the promulgation of Code Civil. But, after holding on the facts that Nannayya was a French national because of his birth in Pondicherry, the Bench took the view that it was necessary for the parties to prove that Nannayya's parents were of indigenous stock and stated the proposition of law as follows:

Once Nannayya Bagavadar in found to be a French national, then the customary Hindu Law applicable to Hindus in Pondicherry will automatically apply to the estate of Nannayya Bagavadar.

With great respect to the learned Judges, we must point out that the proposition is erroneous. Once the two tier system in civil status is recognised, it cannot be held that all Hindu nationals would be governed by the customary Hindu law of Pondicherry. As rightly held by the trial court, the customary law is applicable only to those Hindus who were adopting the customary law prevailing in Pondicherry and it would not apply to Hindus who did not choose to change their personal law which was applicable to them in the place of their origin. When admittedly the parties were Sourashtra Brahmins belonging to Madurai, the normal presumption in Hindu Law is that they were governed by the personal law which was prevalent in Madurai, unless there is evidence on record to prove that the family had adopted the customary law prevailing in Pondicherry. It is not as if the family had been living in Pondicherry for several generations. The best that could be said on



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the evidence is that Nannayya Bagavathar's father had some properties in Pondicherry in addition to his properties in Madurai and Nannayya Bagavathar was born in Pondicherry. The fact that almost all the marriages in the family had taken place in Madurai and all the brothers of Nannayya died at Madurai, would only show that the family had not given up their place of origin, even if it assumed that they had migrated to Pondicherry. Even in the event of a migration by a Hindu from one territory to another, the personal law is carried by him and he will be governed thereby. In Mayne's Hindu Law & Usage, 12th Edition at page 72, the following passage is found:

It becomes the personal law, and a part of the status of every family which is governed by it. Consequently, where any such family migrates to another province, governed by another law, it carries its own law with it, including any custom having the force of law.

23. In *Mallathi Anni v. Subbaraya Mudaliar* I.L.R. 24 Mad. 650, a Division Bench of this Court held that migration by the widow of a Hindu subject of French India to British India, and acquisition of British Indian domicile, does not change the character of the estate held by the widow, and if she does not adopt the system of law prevalent among Hindus in British India, the property inherited by her from her husband will be held by her according to the customary law of French India."

In fact in the above judgment the Division Bench has found fault with the earlier Division Bench and held that once the two tier system in civil status is recognised, it cannot be held that all Hindu nationals would be governed by the customary Hindu law of Pondicherry. It is also held that the Hindus who did not choose to change their personal law they were governed by the



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principle of Hindu Law and not by the Customary Hindu Law. This judgment has not not been brought to the notice of the subsequent Division Benches which were relied upon by the learned Senior Counsel."

24. It is thus clear that the domicile of the plaintiffs or the defendant in France will have no effect since the father, who executed the settlement deed was an Indian Christian residing in Pondicherry. Therefore, he was governed under the Hindu Customary Law as applicable to Indian Christians in Pondicherry.

25. The further argument that the settlement should have been called in question in the suit has also to be rejected since the defendant also relied on the very same settlement deed to claim the ground floor in its entirety and if the settlement deed were to be interfered with and set aside as null and void, then, the suit itself will suffer and none of the parties can be considered for grant of any share in the property since the sisters have not been made parties to the suit and on the issue of non joinder of parties, the suit would suffer.

26. Therefore, I hold that the Judgment under Appeal does not suffer from any infirmity.

27. To answer the points taken up for consideration, I hold that the parties are governed by the Hindu Customary Law as applicable to Indian Christians in Pondicherry and are not governed of French Law. They have taken up French Nationality more for their convenience but when they relate back to a property which had been purchased by their father and on a document executed by the father, the law applicable at that particular point of time to the father alone would be applicable. At that point, the father was restricted by Customary Law to deal with the property only to the extent of 1/8th undivided share.

28. The Judgment under appeal has to be necessarily upheld and affirmed and the First Appeal is therefore dismissed.



29. In view of the relationship of the parties, I am not inclined to grant costs.

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SD/-

ASSISTANT REGISTRAR

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SUB ASSISTANT REGISTRAR

vsg

To:

1. The II Additional District Judge,
Pondicherry.
2. The Section Officer,
VR Section,
Madras High Court, Chennai.

+lcc to Mr.S.Kalyanaraman, Advocate Sr.11271

+lcc to Mr.V.Venkkatasamy, Advocate Sr.11158

A.S.No. 535 of 2018

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