

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 05.01.2023

CORAM

THE HONOURABLE MR.JUSTICE S.S.SUNDAR
and
THE HONOURABLE MR.JUSTICE A.A.NAKKIRAN

AS. Nos.577 and 575 of 2016

AS.No.577 of 2016

Chandrasekaran

.. Appellant

Versus

1. Vijaya
2. Suseela
3. Selvi
4. Muthaiyan
5. Jamuna Rani
6. Velmurugan
7. Balu

.. Respondents

PRAYER: First Appeal filed under Section 96 of C.P.C. Order 41 Rule 1 of CPC, against the judgment and decree in OS.No.155 of 2013 on the file of III Additional District and Sessions Judge, Cuddalore at Virudhachalam, dated 31.07.2015.

For appellants	: Mr.V.Raghavachari
For respondents	
for RR2 & 3	: Mrs.Hema Sampath, Senior Counsel for M/s.R.Meenal
for RR1, 4, 6 to 8	: No Appearance
for R5	: Incorrect address

AS.No.575 of 2016

Chandrasekaran

.. Appellant

Versus

1. Suseela
2. Vijaya
3. Selvi
4. V.Anbalagan
5. V.Murugan
6. A.Rajendra
7. Muthaiyan
8. Jamuna Rani

.. Respondents

[8th respondent's name changed from Umarani.
Amended as per the order dated 20.01.2010
in I.A.354/2009]

PRAYER: First Appeal filed under Section 96 of C.P.C. Order 41 Rule 1 of CPC, against the judgment and decree in OS.No.9 of 2010 on the file of III Additional District and Sessions Judge, Cuddalore at Virudhachalam, dated 31.07.2015.

For appellants : Mr.V.Raghavachari
For respondents
for RR2 : Mrs.Hema Sampath, Senior Counsel
for M/s.R.Meenal
For RR1, 3 to 5 & 7 : No Appearance

COMMON JUDGMENT

(Judgment of the Court was delivered by S.S.SUNDAR, J)

These 2 appeals arise out of the judgment and decree in OS.No.9 of 2010 and OS.No.155 of 2013, on the file of the III Additional District Court, Cuddalore at Virudhachalam. While AS.No.575 of 2016 is against the judgment and decree in OS.No.9 of 2010 and AS.No.577 of 2016 is against the judgment and decree in OS.No.155 of 2013. The plaintiff in the suit in OS.No.9 of 2010, who is also the first defendant in OS.No.155 of 2013, is the appellant in both the appeals.

2. The brief facts that are necessary for disposal of these appeals are as follows:

i) One of the daughters of Pachamuthu Udayar, filed the suit in OS.No.155 of 2013 for partition of 1/4th share in the suit properties described as suit items 1, 2, 3 and 4. Each item consists of several properties. The first defendant is the son of Pachamuthu Udayar and the defendants 2 and 3 are the other daughters of Pachamuthu Udayar.

ii) It is the case of the plaintiff in OS.No.155 of 2013 that the suit properties items 2 and 3 consists of Joint family properties which are acquired by sale deeds either in the name of Pachamuthu Udayar or in the name of first defendant out of income from the properties or by alienating properties, allotted to Pachamuthu Udayar in a family partition dated 20.03.1955. The properties which are described in item No.4 are admittedly the properties of Rayammal, who is the wife of Pachamuthu Udayar and mother of the plaintiff in the suit.

iii) It is the further case of the plaintiff in OS.No.155 of 2013/daughter of Pachamuthu Udayar is that the properties described as 1st item are the properties bequeathed by her father Pachamuthu Udayar in her

favour under the Will dated 23.08.2007. Since the plaintiff in OS.No.155 of 2013 claimed that father is entitled only 1/5 share and admit that the Will is valid in respect of father's 1/5 share, no relief is prayed for in the suit as regards properties in suit 1st item. It is further stated that the plaintiff is entitled to 1/4 share in all the properties left by her father and mother which are shown as items 2 to 4.

3. The plaintiff in OS.No.9 of 2010 is the only son of Pachamuthu Udayar. He filed the said suit for declaration of his exclusive title to the suit properties and for consequential permanent injunction restraining the defendants from interfering with the peaceful possession and enjoyment of the suit properties. Fourth defendant is the husband of first defendant, fifth defendant is the husband of second defendant, who is the plaintiff in OS.No.155 of 2013, and the sixth defendant is the husband of third defendant. Defendants 7 and 8 in OS.No.9 of 2010 are the alienees of some of the suit properties and they are entitled to a fraction of share to which their vendors are entitled to. The defendants 6 and 7 in OS.No.155 of 2013 are also alienees.

4. No one has represented the alienees or the sons-in-law of Pachamuthu Udayar. Therefore, having regard to the facts admitted, this Court is not inclined to decide the rights or title of alienees as it can be worked out at the time of final decree proceedings.

5. The Trial Court, in view of the common issues that arose for consideration in both the suits, disposed of both suits by a common judgment and decree dated 31.07.2015. The plaintiff in OS.No.9 of 2010, who is the son of Pachamuthu Udayar filed the above suit based on the Will, dated 18.10.2007 alleged to have been executed by Pachamuthu Udayar. The Trial Court held that the Will relied upon by the plaintiff in OS.No.9 of 2010 is not proved in the manner known to law and therefore the suit in OS.No.9 of 2010 is dismissed for declaration of title and consequential injunction. However, while declaring the share of the plaintiff in OS.No.155 of 2013, the Trial Court held that the plaintiff and defendants 1 to 3 are all entitled to 1/5th share in the suit items 2 and 3 and 1/4th share in IV schedule property and also entitled to 1/4th share each out of 1/5 share of of

Pachamuthu Udayar in the suit properties. Since the properties described in the IV schedule are the properties of mother Rayammal, the plaintiff in OS.No.155 of 2013 was granted decree for partition of her 1/4th share in item 4. Aggrieved by the judgment and decree in both the suits, the plaintiff in OS.No.9 of 2010, who is also the first defendant in OS.No.155 of 2013, has preferred the above appeals.

6. The learned counsel appearing for the appellant in both the appeals submitted that the Will, dated 23.08.2007 executed by the appellant's father Pachamuthu Udayar is invalid as the properties are joint family properties and he has no competence to execute the Will, which is marked as Ex.A4. He also stated that since the Will was not proved in the manner known to law, the Trial Court ought to have granted alternative relief by granting a preliminary decree of partition in respect of appellant's 1/4th share in the suit first item also.

7. The learned counsel for the appellant then submitted that the Court below failed to appreciate the intention of Pachamuthu Udayar while

executing the Holograph Will under Ex.A5. It is further contended by the learned counsel that the appellant has not been granted any right under the Will, which was marked as Ex.A4.

8. The learned counsel appearing for the plaintiff in OS.No.155 of 2013, who is also the second defendant in OS.No.9 of 2009, fairly admitted that she is not claiming any right under the Will. Therefore, this Court is of the view that the plaintiff in OS.No.9 of 2009 viz., the appellant, is also entitled to 1/4th share in all the properties.

9. The learned counsel appearing for the appellant in both the appeals submitted that there is a disruption of joint family and there was a severance of status by execution of the Will dated 22.03.2000, which is marked as Ex.A2. Though the said Will was subsequently cancelled, the learned counsel submitted that the appellant/plaintiff is entitled to half share and the remaining half share by birth as the properties are joint family properties of his father.

10. The learned counsel for the appellant further submitted that the Hindu Succession Amendment Act 39 of 2005 will have no application to the case on hand as there was no joint family when 2005 Act came into force.

11. The learned counsel also relied upon the judgment of the Hon'ble Supreme Court in the case of ***Mr.N.Aryamurthy and another vs. Mr.M.D.Subbaraa Setty reported in 1972 (4) SCC 1***. The learned counsel relied upon paragraph 20 of the judgment, wherein it reads as follows:

*“20. That being the position, the question arises whether the defendants would, in law, be liable to account to the plaintiff for the profits earned by the defendants in their own business or for the acquisitions made by them in that business. We agree with the High Court that they were not so liable. On a partition by severance of the joint status, the members of the family become tenants-in-common of the family property. If one of the members remains in possession of the entire properties of the family, here is no presumption that the property, which as acquired by him after severance of the status, must be regarded as acquired for the family. See ***Gulabroao Fakirrao v. Baburao Fakirrao and Another.****

*Where rents and profits are received by the member in possession, he would be liable to account for the rents and profits received by him. But the funds in the hands of that member do not become impressed with any trust in favour of the other members. See **John Kennedy v. Mary Annette De Trafford and Others**. Therefore, if such a member acquired some property with the funds in his possession, the other members could claim no share in that property. Hence we agree with the High Court that the business carried on by the defendants on and after July 11, 1940 should be considered as the exclusive business of the defendants, and the plaintiffs would have no right to claim any share in the profits or the acquisitions made out of that business. What is true about this business carried on by the defendants is also true of the business carried on by the plaintiff. The defendants have not claimed and cannot claim any share in the business run by the plaintiff after July 11, 1940 or in the profits and acquisitions made by him that business. This finding, however, is not to be understood to mean that the securities and stock-in-trade already referred to are not to be taken into account as family assets for the purpose of partition, nor can the parties decline the liability to account to each other for the income derived by them from the family assets in their possession.”*

12. This Court has no hesitation to follow the above judgment but the portion that was relied upon by the learned counsel for the appellant does not support the case put forth by the learned counsel for the appellant. No doubt it is true that the consequence of severance of status is considered in the above judgment. If there is a severance or description of joint family by partition by other means, the members of the family become tenants in common of the family properties. If any one of the members of the family acquired any property after severance of status, the acquisition should be regarded as the acquisition of the individual and there cannot be a presumption that the property acquired by an individual should be regarded as a property of the family. The members of the family after disruption of joint family status or severance of family is entitled to account for the rents and profits that are received by the member in possession. The funds in the hands of that member do not become impressed with any trust in favour of other members, as it has been repeatedly held by several precedence. The situation that was considered by the Hon'ble Supreme Court in the above judgment has no application to the present facts, wherein it is admitted by

the appellant's counsel that all the properties were acquired by the father during his life time. Several properties were allotted to him in the family partition, he had with his brothers in 1955 and the suit properties were acquired by Pachamuthu Udayar as admitted by the appellant and the respondents before the Court below. Therefore, the submission of the learned counsel appearing for the appellant that the Hindu Succession amendment Act 2005 (Act 39 of 2005) has no application to the facts of the case, cannot be countenanced in view of the recent judgment of the Hon'ble Supreme Court. In a recent judgment in Vineeta Sharma Vs. Rakesh Sharma reported in **2020 [9] SCC 1**, a 3 members Bench of Hon'ble Supreme Court has held as follows:

137. Resultantly, we answer the reference as under:

137.1. The provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after the amendment in the same manner as son with same rights and liabilities.

137.2. The rights can be claimed by the daughter born earlier with effect from 9-9-2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before the 20th day of December, 2004.

137.3. Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9-9-2005.

137.4. The statutory fiction of partition created by the proviso to Section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class I as specified in the Schedule to the 1956 Act or male relative of such female. The provisions of the substituted Section 6 are required to

be given full effect. Notwithstanding that a preliminary decree has been passed, the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

137.5. In view of the rigour of provisions of the Explanation to Section 6(5) of the 1956 Act, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been affected (sic effected) by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and to be rejected outrightly.

13.From the above judgment, none of the Wills alleged to have been executed by the father which should come into effect after his death in 2007 will affect the rights of female heirs to claim their share by birth and disposition by Wills are not saved. Further that the learned counsel for the appellants has not challenged the findings of Trial Court regarding proof of Will under Exs.A5 and A8.

14.The appellant in OS.No.9 of 2010 also prayed for alternative relief, viz., preliminary decree of partition and separate possession of plaintiff's 5/8th share in all the suit properties. This Court already held that the appellant is entitled to 1/4th share in all the suit properties as that of each daughters of Pachamuthu Udayar. Before the Trial Court, the plaintiff in OS.No.155 of 2013 has not prayed for any relief in respect of the I item, as properties described in first item and available, are also shown in other items. However, it is now admitted by the learned counsel for the plaintiff in OS.No.155 of 2013 that the plaintiff in OS.No.9 of 2005 is also entitled to a share in all the properties. Therefore, the appellant is entitled to the alternative relief of partition of 1/4th share in the properties. Hence, the

appeal in AS.No.577 of 2016 is dismissed and the judgment and decree in OS.No.155 of 2013 on the file of III Additional District and Sessions Court, Cuddalore at Vridhachalam is confirmed. Further, the appeal in AS.No.575 of 2016 is also dismissed and the suit in OS.No.9 of 2010, stands dismissed. No costs.

(S.S.S.R.J.) (A.A.N.J.)
05.01.2023

Speaking Order : Yes / No
Index : Yes / No
pvs

To
1. III Additional District and Sessions Judge,
Cuddalore at Virudhachalam
2. The Section Officer,
V.R.Section, High Court, Madras

AS. Nos.577 and 575 of 2016

S.S.SUNDAR, J.
and
A.A.NAKKIRAN, J.

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