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A.S.No.505 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.04.2023

Pronounced on : 25.05.2023

CORAM

**THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN
ACTING CHIEF JUSTICE
AND**

THE HONOURABLE MRS.JUSTICE R.KALAIMATHI

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1. K.Chakrapani
2. C.Komala
3. C.Vijayakrishna
4. C.Gokulkrishna

... Appellants

Versus

1. N.Brindha
2. P.Alamelu
3. R.Parimala
4. K.Sowrirajan
5. P.Devaki

6. State Bank of India
Padi Branch,
represented by its Branch Manager
No.80/4, First Floor,
Harikrishna Complex,
M.T.H.Road, Padi,
Thiruvallur District

7. State Bank of India
Vridhachalam Branch
represented by its Branch Manager,
Cuddalore Road,
Vridhachalam, Vridhachalam Taluk,
Cuddalore District.

8. Lakshmi Vilas Bank
Chennai Anna Nagar Branch,
represented by its Branch Manager

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Anna Nagar, Chennai – 600 040

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9. City Union Bank Ltd.
Anna Nagar Branch
represented by its Branch Manager,
No.3, First Floor, Anna Plaza, AB Block,
Second Avenue, Anna Nagar,
Chennai – 600 040.
10. Chennai Central Co-operative Bank Limited,
Chennai District – represented by its
Branch Manager, Thirumangalam,
Anna Nagar West, Chennai – 600 101.
11. The Kumbakonam Mutual Benefit Fund Ltd.
Vridhachalam Branch,
represented by its Branch Manager,
No.35/10, Bazaar Street,
Vridhachalam – 606 001.
12. The Kumbakonam Mutual Benefit Fund Ltd.
Chennai Ambathur Branch,
represented by its Branch Manager,
No.1, M.T.H.Road, Ambatur,
Chennai – 600 053.
13. The Kumbakonam Mutual Benefit Fund Ltd.
Registered Office at No.145,
Big Street, Kumbakonam represented
by its General Manager

(Respondents 7,8,9 and 11 are not
necessary parties to the appeal)

... Respondents

PRAYER : Appeal is filed under Order 96 of Civil Procedure Code praying to allow this first appeal and set aside the Judgment and decree dated 07.01.2019 passed in O.S.No.4 of 2013 on the file of the III Additional District and Sessions Judge, Cuddalore at Vridhachalam.

For Appellants : Mr.R.Gururaj

For Respondents : Mr.P.B.Ramanujam



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[for R1, R3 and R5]

Mr.P.V.Muralidhar

[for R2]

Mr.T.Dhanasekaran

[for R4]

Notice served on RR7 to 13 dated

11.02.2021

JUDGMENT

Judgment was delivered by R.KALAIMATHI, J.,

Being not satisfied by the Judgment and decree passed in O.S.No.4 of 2013 by the III Additional District and Sessions Judge, Cuddalore at Vridhachalam dated 07.01.2019, one of the sons of deceased V.S.Kothandapani along with his wife and children have preferred this appeal against the plaintiffs who are the sisters, brother, Banks and other Financial Institutions.

2. The three daughters of deceased V.S.Kothangapani namely N.Brindha, P.Alamelu and R.Parimala filed a suit for preliminary decree for partition of plaint schedule amounts to grant 1/6th share each to the plaintiffs and for injunction. The trial Court upon hearing the arguments of both sides and on appreciating the oral and documentary evidence, has decreed the suit and preliminary decree was passed in favour of the plaintiffs, D1 and D3 by granting 1/6th share each in the suit properties and the defendants No.7 to 14 were restrained by means of permanent injunction from paying the plaintiffs, D1 and D3's share in the suit properties to other sharer.



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3. The learned counsel for appellants reiterating the grounds given in the memorandum of appeal would strenuously argue that this is the 4th suit and it is clearly barred by Order 2 Rule 2 C.P.C., Principles of Res-judicata and the Specific Relief Act. All the deposits are made to be received by either or survivor and hence, the suit for partition would not lie at all and prayed to set aside the Judgment and decree passed by the trial Court.

4. Per contra, the learned counsel appearing for R1, R3 and R5 / plaintiffs 1, 3 and 3rd defendant would vehemently argue that their father deceased V.S.Kothandapani, has not made any disposition. The plaintiffs and the defendants 1 to 3 are children of V.S.Kothandapani, are entitled to inherit 1/6th share in the plaint schedule property. He would further contend that the deceased V.S.Kothandapani had deposited the amounts under “Either or Survivor” and the defendants 1, 2 and 4 to 6 are the nominees/survivors in the deposits. The survivors/nominees are only in the position of trustees to the amount so far as the other heirs of the depositor.

5. Connected to this matter, he would further state that the 1st plaintiff filed O.S.No.261 of 2011 against the defendants No.12 to 14 and it is pending before the Sub Court, Vridhachalam, for an injunction restraining them from paying the amounts to the nominees. Yet another suit was filed by



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the 1st plaintiff in O.S.No.388 of 2011 against the defendants 8 to 11 and it is pending before the District Munsif Court, Vridhachalam, for an order of injunction to restrain the defendants from paying the deposit amount with accrued interest to the nominees. Hence, the plaintiffs are entitled for 1/6th share each in the deposits.

6. Whereas, the learned Counsel for the 2nd respondent / 2nd plaintiff would reiterate the above said details of arguments and to buttress his arguments, he relied on the Judgment of this Court in **Parvathi Vs.Valliyammal and Another** (S.A.No.106 of 1994) reported in CDJ 2005 MHC 450, wherein, it is held that the intended advancement in favour of either depositor cannot be presumed and should be proved by way of act of gift. It has been further held that in the absence of a gift pleaded and proved, the survivor of the fixed deposit receipt will not be entitled to release the amount exclusively for herself.

7. The trial Court framed the following issues;

1. Whether the plaintiffs are entitled to 1/6 share each in the suit items?
2. Whether the release deed dated 24/08/2011 is true, valid and enforceable?
3. Is it true that there was already a partition effected on



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05.03.1960 as alleged by 2nd defendant?

4. Whether the suit is barred by limitation?

5. Whether the suit is hit by Principle of Resjudicata and under Order 2 Rule 2 CPC as alleged by D2?

6. Whether the 1st defendant is entitled to 1/6 share in the suit properties as claimed by D1?

7. Whether the defendants 2, 4 to 6 alone are entitled in the suit properties as alleged by D2?

8. Whether the plaintiffs are entitled to the preliminary decree of partition as prayed for?

9. To what other reliefs the parties are entitled to?

8. On the side of the plaintiffs, to substantiate the plaint details, the 2nd plaintiff was examined as P.W.1 and no document was marked by the plaintiffs. On the defendants' side, the 2nd defendant Tvr.K.Chakrapani has been examined as D.W.1 and Ex.B1 to Ex.B.20 have been marked.

9. Based on the grounds of memorandum of appeal, the following points have arisen for consideration:-

1. Whether the suit is hit by Principles of Res-judicata and under Order 2 Rule 2 CPC or not ?

2. Whether the trial Court was incorrect in granting 1/6th share each to the plaintiffs ?

3. Whether this appeal is to be allowed or not ?



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Point No.1

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10. The learned counsel for the appellants would submit that this suit is the 4th suit against the defendants. As similar nature of suits have been filed, the suit is not maintainable and barred by the Principles of Res-judicata, Order 2 Rule 2 CPC and also under the Specific Relief Act.

11. It is discernible from the close perusal of the records that suits mentioned supra (in para no.4) are still pending. It appears that O.S.No.138 of 2011 was filed in respect of the immovable properties of V.S.Kothandapani for relief of partition and it was disposed of and the appeal is pending before this Court. For proper understanding, it is better to refer to Section 11 of CPC.

Section 11 CPC:

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.-- The expression former suit shall denote a suit which has been decided prior to a suit in question whether or not it was instituted prior thereto.

Explanation II.-- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.--The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.



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Explanation IV.-- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.-- Any relief claimed in the plaint, which is not expressly granted by the decree, shall for the purposes of this section, be deemed to have been refused.

Explanation VI.-- Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating .

1[Explanation VII.-- The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.-- An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.]

12. This provision of law namely Section 11 of CPC, embodies the rule of conclusiveness as a evidence. This provision bars the plea of issue tried in an earlier suit founded on a plaint in which the matter is directly and substantially in issue and became finally. Section 11 of CPC operates as a bar to try the same issue once over, in order to prevent multiplicity of the proceedings and accords finality to an issue. Admittedly one suit which was



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filed for partition in respect of immovable properties of the deceased

V.S.Kothandapani was disposed of in O.S.No.138 of 2011. This suit is filed for partition in respect of Fixed Deposits made in various Banks and Financial Institutions. Therefore, the relief sought for in this suit is for the first time it was filed and decreed. Therefore, we are of the considered opinion that this suit is not barred by the Principles of Res-judicata.

13. The learned counsel for the appellants would strenuously put forth that the suit is hit by under Order 2 Rule 2 CPC.

SUIT TO INCLUDE THE WHOLE CLAIM:

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim- Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3)

Explanation-

For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

14. The object behind this Section is that the plaintiff cannot split up the claim so as to omit one part of claim and sue for the other. If the cause of

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action is same, the plaintiff has to place all his claims before the Court in one suit. The burden is on the defendant to establish that the subsequent suit is founded on the cause of action which is identical with that on which the earlier suit was founded and for that purpose, he should have filed a copy of the plaint of the earlier suit. Admittedly, in this case, the copy of plaint in O.S.No.388 of 2011 of District Munsiff Court, Vridhachalam, is marked as Ex.B2. That suit is filed for relief of partition in respect of immovable properties of deceased V.S.Kothandapani.

15. It is relevant to refer to the decision of this Court in **Mohammad Khalil Khan Vs Mahbub Ali Mia** reported in 1948 2 MLJ 328. The Privy Council has summed up the Principles under this Rule.

1. The cases falling under Order 2 Rule 2 CPC is whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit?

2. The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the Judgment?

3. If the evidence to support these two claims is different, then the cause of action are also different.

16. Suit in O.S.No.138 of 2011 was filed for the partition of immovable properties of the deceased V.S.Kothandapani which was also disposed of. This case is filed for the relief of partition in respect of the Fixed Deposits made in various Banks and Financial Institutions by the said deceased



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V.S.Kothandapani. Here the claims are distinct. Therefore, we are of the firm opinion that as the claim is totally different in the suit, the suit is not hit by Order 2 Rule 2 CPC.

POINT NO.2:

17. V.S.Kothandapani had 4 daughters (Plaintiffs 1 to 3 and 3rd defendant) and 2 sons (defendants No.1 and 2) and he had deposited huge amounts as Fixed Deposits with the defendants No. 7 to 13 (various Banks and Financial Institutions) and he died on 03.10.2011 leaving behind the legal heirs as mentioned supra. His wife pre deceased him on 12.02.2011. These above said facts are not in dispute.

18. As mentioned supra, the 3 daughters of deceased V.S.Kothandapani have filed the suit for the relief of partition of 1/6th share each and for permanent injunction. The plaintiffs have stated that V.S.Kothandapani died intestate which was not admitted by the 2nd defendant. The certified copy of release deed executed by the deceased V.S.Kothandapani dated 24.08.2011 has been produced and marked as Ex.B15. The recitals found in Ex.B15 relates to the immovable properties. As many as 4 immovable properties have been shown in the said release deed, specifically 2 house properties and 2 house plots have been dealt with in Ex.B15. When that be the case, as the Fixed Deposit details are not found in Ex.B15/release deed, it should not lie in the mouth of 2nd defendant that his

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father V.S.Kothandapani has executed release deed in respect of Fixed Deposits also.

19. Apart from the above said details, the 1st appellant was examined as D.W.1 who has given answers during his cross examination as follows which would further dilute the 2nd defendant's above said contention;

“Either or Survivor என்று இருந்தாலும் அனைத்து டெபாசிட்டுகளும் என் தகப்பனாருடையதுதான் என்றால் அவர் எனக்கு விடுதலை பத்திரம் எழுதிக்கொடுத்துள்ளார்”.

20. The 2nd defendant when he was in the dock, has stated indirectly as mentioned supra that the amounts are deposited by his father and his father has executed a release deed in his favour. It is already held that Ex.B15 Release Deed pertains to the immovable properties. Therefore, outrightly, the claim of 2nd defendant falls on the ground.

21. Therefore, whether based on “Either or Survivor, the survivor in the position of trustee to the amount, is expected to disburse equally in the absence of any disposition or not is the core question.

22. To strengthen the above said details, the learned counsel for the respondents have referred to the following decisions:



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1. Govindan Chettiar (Died) Vs. Akilandam alias Seethalakshmi and 24 others reported in 1997-3- L.W. 673.
2. Parvathi Vs. Valliyammal and Another in S.A.No.106 of 1994 reported in CDJ 2005 MHC 450.
3. G.Ramakrishnan Vs. G.Subramanian and others in C.S.No.633 of 2011 of this Court dated 11.02.2015.

23. In order to have a proper understanding about the details what is meant by “Either or Survivor”, in Tannan's Banking Law and Practice in India” 18th Edition, Page 195 it is said thus;

“Banks have now accepted the view that in an account, where the operation is by ”Either or Survivor”, the survivor is the only person who is entitled to the balance thereof after the death of one of the account holders. This practice is based on the principle that the terms of operation form part of contract of deposit.”

24. In **Anumati Vs. Punjab National Bank** reported in (2004) 8 Supreme Court Cases 498 wherein, it was observed as follows;

“12. The fixed deposit receipt is merely a written acknowledgement by the bank that it holds a certain sum to the use of its customers and that the bank is thus a debtor to the account-holders in respect of the amount deposited - a debt which is repayable by the bank to the account-holders with interest on



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expiry of an agreed period. An “either or survivor” clause in such an account means that the amount payable by the bank on maturity of fixed deposit may be paid to either of the accouter-holders by the bank in order to obtain a valid discharge.”

Thus, it is found that it is only in order to obtain a valid discharge under a tripartite agreement, the bank may be right in disbursing the amount to the survivor. But, when once controversy arose, inter se the depositors, then, we have to anticipate a gift deed and as mentioned in the cases cited earlier, there being no presumption of intended advancement in favour of the other person in India. Unless there is a gift, the survivor can only receive the amount as a trustee of the surviving other heirs of the deceased depositor and the surviving depositor cannot have any exclusive interest over the same simply because it was deposited under the scheme “Either or Survivor”.

25. The same point is reiterated by this Court in **Parvathi Vs.Valliyammal and Another** in S.A.No.106 of 1994 reported in CDJ 2005 MHC 450, wherein it has been observed that;

"Hindu Law – Receiving Fixed Deposit – Payment to Either or Survivor – The arrangement of payment to either or survivor in a tripartite agreement will only enable the bank to dispose of the amount and when rivalry between the depositors comes, this Court have held uniformly that unless there is proof of gift by one of the depositors to the other and upon the death of one of the depositors who had gifted, the other cannot draw the amount in the capacity of a survivor. Thus the intended advancement in favour of either depositor cannot be presumed and should be proved by way of act of gift – The position of law is well understood, that in



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the absence of a gift pleaded and proved, the survivor of fixed deposit receipt will not be entitled to release the amount exclusively for herself and what is made in the prayer of the appellant/plaintiff is, about her exclusive right and that cannot be allowed. The appellant/plaintiff was rightly non-suited and there is nothing to interfere in the judgment of the first appellate court."

26. With regard to the amounts lying in the Banks and Financial Institutions which belongs to V.S.Kothandapani after his death, two suits have already been filed and pending and this suit pertains to the Fixed Deposits obviously interse dispute has arisen.

27. From the reading of the above said details, it is made very clear that though the amounts are deposited under either or survivor unless there is a gift deed, the survivor can only receive the amount as trustee of other surviving heirs of the deceased depositor. In this case, it is decided that the amounts have been deposited by the deceased V.S.Kothandaani. Therefore, as per law, in the absence of any deed of Gift or any other disposition, 1st appellant Thiru K.Chakrapani, is not entitled for the money in full.

28. The trial Court has taken much pains by discussing elaborately. Based on the above said facts and circumstances, obviously the "survivor namely 2nd defendant cannot lay an exclusive claim over the Fixed Deposits made by his father V.S.Kothandapani in the 7th to 14th defendants Banks and Financial



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Institutions.

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29.

29. As regards, Distribution of properties among heirs on clause 1 is dealt with in Section 10 of Hindu Succession Act 1956. Section 10 of Hindu Succession Act, 1956 culled out as mentioned herein under;

Section 10 of Hindu Succession Act:

10. Distribution of property among heirs in class I of the Schedule.—The property of an intestate shall be divided among the heirs in class I of the Schedule in accordance with the following rules:—

Rule 1.— The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.

Rule 2.— The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3.— The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share.

Rule 4.— The distribution of the share referred to in Rule 3—

(i) among the heirs in the branch of the pre-deceased son shall be so made that his widow (or widows together) and the surviving sons and daughters gets equal portions; and the branch of his predeceased sons gets the same portion;

(ii) among the heirs in the branch of the pre-deceased daughter shall be so made that the surviving sons and daughters get equal portions.



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30. In this case, Section 10 Rule 2 would squarely apply based on the said provision. The father V.S.Kothandapani died intestate leaving behind his sons and daughters.

31. It is the evidence of D.W.2 namely the 1st appellant herein that the moneys were deposited by his father V.S.Kothandapani. Therefore, based on the above said provisions, the survivor 1st Appellant, his brother and sisters are entitled to equal share in the suit property - Fixed Deposits.

32. Therefore, we are of the considered view that the plaintiffs no.1 to 3 who are the daughters of the deceased V.S.Kothandapani are entitled to 1/6th share each in the Fixed Deposits together with accrued interest as on the date of disbursement namely suit properties.

33. In the result, the Appeal Suit is dismissed. The Judgment and decree passed by the trial Court is hereby confirmed. Considering the relationship between the parties, there is no order as to costs.

[S.V.N., A.C.J.,] [R.K.M.,J.,]
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Speaking/Non-Speaking Order
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To
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III Additional District and Sessions Judge,
Cuddalore at Vridhachalam.

S.VAIDYANATHAN, A.C.J.,
and
R.KALAIMATHI, J.,

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Pre-Delivery Judgment in
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