



A.S.(MD).No.126 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 20.10.2023

Delivered on: 01.12.2023

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

AND

THE HONOURABLE MR.JUSTICE P.B.BALAJI

A.S.(MD).No.126 of 2018

and

C.M.P.(MD)Nos.6559 & 7774 of 2018

1.Makmutha Beevi (Died) ... Appellant / 1st Defendant

2.P.Mohamed Anies

3.P.Mohamed Muthu Meeran

(A2 & A3 are brought on record as LR's of the

deceased sole appellant vide Court order

dated 25.02.2022,in CMP(MD) No.10626/2021)

... Appellants

Vs.

Mohamed Meeran (died) (1st plaintiff)

1.Ismail Meeran ... 1st Respondent / 2nd Plaintiff

Khader Mohaideen (died)(3rd plaintiff)

2.Masoodu Avuliya ... 2nd Respondent / 4th plaintiff



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Mohamed Ismail (died) (5th plaintiff)

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|------------------|---|
| 3.Kani | ... 3 rd respondent / 6 th plaintiff |
| 4.Rahamathulla | ... 4 th respondent / 7 th respondent |
| 5.Sahul Hameed | .. 5 th respondent / 8 th plaintiff |
| 6.Maheetha Begam | .. 6 th respondent / 9 th plaintiff |
| 7.Ayisha Banu | .. 7 th respondent / 10 th plaintiff |

Syed Usami (died) (11th plaintiff)

- | | |
|--------------------|--|
| 8.Saiyadu Majeetha | .. 8 th respondent / 12 th plaintiff |
|--------------------|--|

Sinthal Beevi (died) (2nd defendant)

- | | |
|-------------------|---|
| 9.Makmuthal Beevi | .. 9 th respondent / 3 rd defendant |
|-------------------|---|

Abdul Rahim (died) (4th defendant)

- | | |
|-------------------------------|---|
| 10.Khader Mydeen | .. 10 th respondent / 5 th defendant |
| 11.Mohamed Syed Masood (died) | .. 11 th respondent / 6 th defendant |
| 12.Liyagath Ali | .. 12 th respondent / 7 th defendant |
| 13.Mumtaj Begam | .. 13 th respondent / 8 th defendant |
| 14.A.Fatima | .. 14 th respondent / 9 th defendant |
| 15.Masood Beevi | .. 15 th respondent / 10 th defendant |
| 16.A.Rakkaia Beevi | .. 16 th respondent / 11 th defendant |
| 17.S.Jameela Begam | .. 17 th respondent / 12 th defendant |



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18.Mariyam Khader

.. 18th respondent / 13th defendant

19.M.Sahul Hameed

.. 19th respondent / 14th defendant

20.Mohamed Hussain

.. 20th respondent / 15th defendant

21.Ahamed Mydeen

.. 21st respondent / 16th defendant

22.Rasool Beevi

23.Mohamed Ismail Begam

24.Samsudden Makkey

25.Shegu Haseena

26.Mohammed Zarfudeen

(R22 to 26 are brought on record as LR's of the
deceased 11th respondent vide Court order, dated
13.10.2022, in CMP(MD)Nos.9300,9560&9561/2022)

Prayer:- Appeal filed under Section 96 of the Code of Civil Procedure,
against the preliminary decree and judgment passed in O.S.No.54 of 2004,
dated 29.09.2016, on the file of the IV Additional District Court,
Tirunelveli.

For Appellants : Mr.M.V.Venkateseshan

For Respondents : Mr.S.Maharajan for R2,3,19,20 &21

: Mr.G.S.Ashok Adhithyan for R22 to R26



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JUDGMENT

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RMT.TEEKAA RAMAN, J.
and
P.B.BALAJI, J.

The first defendant in a suit for partition is the appellant before us. After the demise of the first defendant, his legal representatives have been impleaded as appellants 2 and 3.

2. For the sake of convenience, the parties are referred to as per the ranking before the trial Court.

3. The suit was originally filed by Mohamed Meeran and others, seeking declaration of 234/448 share of the plaintiffs 2 to 12 in 6 items of the suit property. The case of the plaintiffs before the trial Court was that the suit property belonged to one Kadhar Mydeen Rowther, the husband of the first defendant. The said Kadhar Mydeen Rowther died intestate and without any issue, on 17.07.2000 and therefore, the first defendant was entitled to 1/4th share and the plaintiffs were entitled to 3/4th share. It is further stated in the plaint that the father of said Kadhar Mydeen Rowther, viz., Peer Mohamed Rowther had two brothers, viz., Muthu Meeran



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Rowther and Sheik Mydeen Rowther. The said Sheik Mydeen Rowther had two sons, viz., Mohamed Hussain and Ahamed Rowther. Both of them were no more. The 4th plaintiff is the son of Mohamed Hussain and the 5th plaintiff is the son of Ahamed Rowther. The other brother of Peer Mohamed Rowther, Muthu Meeran Rowther has a son, viz., Muthu Meeran, who was also no more. The plaintiffs 1,2,3 are the sons of Muthu Meeran. Samsudeen Rowther is the uterine brother of Kadhar Mydeen Rowther and stating that the plaintiffs are together entitled to 234/448 shares, prayed for a preliminary decree, along with a decree for future mesne profits and Rs.1,00,000/- as past mesne profits.

4. The first defendant filed her written statement resisting the suit for partition on the ground that her husband, Kadhar Mohideen Rowther orally gifted all his properties including the suit properties to her on 17.03.2000 and since the first defendant had accepted the gift, she has been in possession and enjoyment of all the properties and therefore, the plaintiffs do not have any right over the suit property and she sought for dismissal of the suit in entirety.



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5. The fourth defendant filed a separate written statement stating that the plaintiffs have no right in the suit property and only the defendants 2,3 and 6 have together $3/4^{\text{th}}$ share, the remaining $1/4^{\text{th}}$ being the share of the first defendant.

6. The defendants 5 and 6 filed separate written statements stating that the plaintiffs are not legal heirs of the deceased Kadhar Mohideen Rowther and that at the time of his death, the properties dwelled only on his wife and uterine brother -Samsudeen Makthi Rowther. The said Samsudeen Makthi Rowther died on 31.08.2000 and both the first defendant and the said Samsudeen Makthi Rowther were alive at the demise of the Kadhar Mydeen Rowther and only the legal heirs of said Samsudeen Makthi Rowther and the first defendant are entitled to the suit properties and hence, they have also prayed for dismissal of the suit.

7. The first defendant filed an additional written statement stating that the first defendant had orally gifted the first schedule property to Mohamed Meeran, son of Peer Mohamed and that she orally gifted 5^{th} and 6^{th} items of the plaint schedule properties to Sahul Hameedu, Kadhar



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Mydeen and Mohamed Meeran. That apart, she has also gifted orally 2nd item of the 4th schedule to Mohamed Anees and Mohamed Muthu Meeran and 4th schedule of 5th item to Kadhar Mydeen and Mohamed Meeran and all have accepted their respective gifts and they have been in possession of the respective properties gifted to them. None of them were impleaded in the suit and that the suit was also bad for non-joinder of necessary parties.

8. The 5th defendant filed an additional written statement stating that pending the suit, the first defendant had created documents in excess of her 1/4th share and therefore, neither the plaintiffs nor the defendants 7 to 15 had any right over the suit property.

9. Before the trial Court, the 3rd plaintiff examined himself as P.W.1 and P.W.2 to P.W.4 were examined in support of the plaintiffs' case and 15 documents were marked as Ex.A1 to Ex.A15 on the side of the plaintiffs. On the side of the defendants, 5th defendant examined himself as D.W.1 and 5 documents were marked as Ex.B1 to Ex.B5.



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10. The trial Court, after assessing and analysing the oral and documentary evidence on record, rendered a finding that the plaintiffs and the defendants 7 to 16 have failed to establish that they are entitled to shares. The trial Court came to the finding that the first defendant was entitled to 1/4th share and the defendants 3, 5 and 6 would be entitled to the remaining 3/4th share. The trial Court also disbelieved the plea of oral gift in favour of the first defendant.

11. Despite the suit being dismissed as against the plaintiffs, it was the first defendant, who, aggrieved by the said judgment and decree has come up with the appeal on the ground that the trial Court ought to have enhanced the share of the first defendant applying the Doctrine of Return and as per Mulla's Principles of Mahomedan Law, contended that first defendant's 1/4th share stood enlarged to 50% and the remaining 50% alone would be available for defendants 3,5 and 6.

12. We have heard Mr.M.V.Venkateseshan, learned Senior Counsel for the appellants, Mr.S.Maharajan, learned counsel for the respondents



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2,3,19,20,21 and Mr.G.S.Ashok Adhithyan, learned counsel for the respondents 22 to 26.

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13. Though specific grounds with regard to the oral gift being rejected have been taken in the appeal grounds, the same has not been seriously pressed by the learned Senior Counsel for the appellants.

14. The short question before us is as to whether the share of the wife would get enlarged from her $1/4^{\text{th}}$ to a $1/5^{\text{th}}$ share in the given circumstances. It is very clear that the defendants 3, 5 and 6 and the plaintiffs are not in the picture any longer. The learned Senior Counsel appearing for the appellant would contend that applying the Doctrine of Radd or the Doctrine of Return, the appellants' share would automatically stand enlarged to a $1/2$ from the original entitlement of $1/4^{\text{th}}$ which according to the learned Senior Counsel, the trial Court has lost sight of. The learned Senior Counsel would also take through the relevant passages from Mulla's Principles of Mahomedan Law and invite our specific attention to the illustrations given under the Doctrine of Radd (Doctrine of Return).



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15. Per contra, the learned counsel for the contesting respondents, viz., defendants 3, 5, and 6 would contend that the wife's share would never got enlarged and would remain fixed at $1/4^{\text{th}}$ and by seeking to apply the Doctrine of Radd (Doctrine of Return), the wife of the deceased cannot claim any additional share to her actual entitlement of $1/4^{\text{th}}$ share.

16. There is no dispute with regard to the relationship between the parties. The appellants' case revolves around the application of the Doctrine of Radd (Doctrine of Return), viz., Rule 66 from Mulla's Principles of Mahomedan Law is extracted for ready reference:

“66. Return (Radd): If there is a residue left after satisfying the claims of Sharers, but there is no Residuary, the residue reverts to the Sharers in proportion to their shares. This right of reverter is technically called “Return” or Radd.

Exception.- Neither the husband nor the wife is entitled to the Return so long as there is any other heir, whether he be a Sharer or a Distant Kinsman. But if there be no other heir, the residue will go to the husband or the wife, as the case may be, by Return.”



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17. We also deem it fit to extract illustration “(p)” which would be most relevant in the present case and apply to the facts of the present case since the said illustration deals with the legal heirs being wife and uterine brother / uterine sister.

(p) Wife	1/4				=2/8
U.brother	1/6	increased to	1/2	of (3/4)=3/8	
U.sister	1/6	“	1/2	of (3/4)=3/8	
	----				----
	7/12				1

18. Though the learned Senior Counsel for the appellants would draw our attention to the said illustration and contend that since in the present case only one uterine brother was available and not any uterine sister, the share of the wife as well as the uterine brother would stand increased to a $\frac{1}{2}$ each and therefore, he would rely on the said Doctrine of Radd and pray for the appeal being allowed, modifying the share of the appellants to a $\frac{1}{2}$ share.



Doctrine of Return and Exception thereto:

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19(a). The exception to Rule 66 (which we have extracted herein above) assumes great significance in the facts of the present case. In case where any heir is present, whether he is a sharer or a distant kinsman, neither the husband nor the wife would be entitled to Return or any right by reversion. Only where there is no other heir, the residue will go to the husband or the wife, as the case may be, by way applying the Doctrine of Return (Radd).

19(b). Here, admittedly one uterine brother is available and the same is not in dispute. Then, the facts of these squarely falls under exception clause. Thus, applying the exception Clause, the wife's share of $1/4^{\text{th}}$ does not get enlarged as the Doctrine of Return cannot be applied in the presence of the uterine brother.

19(c). Though the learned Senior Counsel would place reliance on the illustration “(p)”, we are unable to countenance for a simple reason that even in the illustration, the wife's share of $1/4^{\text{th}}$ is not shown to be increased in the presence of uterine brother / uterine sister. It is only for



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the purpose of calculation of shares, the wife's $\frac{1}{4}^{\text{th}}$ is shown as " $\frac{1}{4}=\frac{2}{8}$ ".

Even in the illustration "(p)" what is increased is only the share of the uterine brother and uterine sister from " $\frac{1}{6}$ to $\frac{3}{4}$ ", with the share of the wife remaining as $\frac{1}{4}^{\text{th}}$. In other words, the entirety of the remaining share, after factoring the wife's $\frac{1}{4}^{\text{th}}$ share, goes only to the uterine brother. If there was a uterine sister alive, then the $\frac{3}{4}^{\text{th}}$ share would be jointly taken by the uterine brother and uterine sister, then too, without in any manner affecting the $\frac{1}{4}^{\text{th}}$ share of the wife.

20. The trial Court also rightly found that the 2nd item of the suit property belonged to Peer Mohamed Rowther and Kadhar Mydeen Rowther. Therefore, the preliminary decree was passed only in respect of the items 1, 3 to 6. There is no illegality or perversity in the finding arrived at the finding of the trial.

21. We therefore do not see any ground for interfering with the preliminary decree for partition passed by the trial Court, declaring the $\frac{3}{4}^{\text{th}}$ share of the defendants 3, 5 and 6 and $\frac{1}{4}^{\text{th}}$ of the first defendant in the available item Nos.1, 3 to 6.



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22. There is no merit in the appeal and consequently, the Appeal Suit is dismissed. There shall be no order as to cost. Consequently, connected Miscellaneous Petitions are closed.

(T.K.R.J.) & (P.B.B.J)

01.12.2023

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RMT.TEEKAA RAMAN, J.,
and
P.B.BALAJI,J

Ls

To

- 1.The IV Additional District Court,
Tirunelveli.
- 2.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

judgment in
A.S.(MD).No.126 of 2018

01.12.2023