



WEB COPY

S.A.No.100 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.10.2024

CORAM

THE HONOURABLE MR. JUSTICE R. SAKTHIVEL

S.A.NO.100 OF 2021

AND

C.M.P.NO.2141 OF 2021

- 1.N.Marithoppai (died)
- 2.M.Rajenthiran
- 3.Thangamani
- 4.Mani

... Appellants/
Respondent/
Plaintiff

(Note: Appellants 2 to 4 are brought on record as legal representatives of the deceased - 1st appellant vide Order of this Court dated August 08, 2023 made in C.M.P.No.16883 of 2023 in S.A.No.100 of 2021)

Vs.

- 1.Alamelu
- 2.Nallan

... Respondents/
Appellants/
Defendants

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908, praying to set aside the Judgment and Decree dated July 16, 2020 made in A.S.No.24 of 2012 on the file of the Subordinate Court, Sankari, reversing the Judgment and Decree dated July 30, 2012 made in O.S.No.196 of 2010 on the file of the District Munsif Court. Sankari.

For Appellants : Mr.N.Manoharan



WEB COPY



S.A.No.100 of 2021

For Respondents : Mr.P.Valliappan
Senior Counsel
for Mr.R.Marudhachalamurthy

J U D G M E N T

This Second Appeal is directed against the Judgment and Decree dated July 16, 2020 made in A.S.No.24 of 2012 by the 'Subordinate Court, Sankari' [henceforth 'First Appellate Court'], reversing the Judgment and Decree dated July 30, 2012 passed in O.S.No.196 of 2010 by the 'District Munsif Court, Sankari' [henceforth 'Trial Court'].

2. For the sake of convenience, hereinafter, the parties will be referred to as per their array in the Original Suit.

Plaintiff's case:

3. The Suit Properties originally belonged to one Angammal, wife of Chinnappa Gounder. She died leaving behind her two daughters, namely Periya Mallammal and Chinna Mallammal, as her legal heirs. Aforesaid Chinna Mallammal died issueless leaving behind her sister Periya Mallammal as her sole legal heir. Periya Mallammal died on December 7, 2009 leaving behind her husband - Marithoppai (Plaintiff) and her daughter Alamelu (1st Defendant), as her legal heirs. After the



demise of the plaintiff's wife - Periya Mallammal, the plaintiff and the 1st defendant are each entitled to half-a-share in the properties of Periya Mallammal viz., the Suit Properties. The plaintiff and the 1st defendant are jointly enjoying the Suit Properties without partition.

3.1. Due to some misunderstanding between the plaintiff and the 1st defendant, the 1st defendant executed a Power of Attorney in favour of the 2nd defendant in respect of the Suit Properties on March 31, 2010. On the same day, the 2nd defendant sold the Suit Properties to the 1st defendant. The defendants have no right to create such documents including the share of the plaintiff. The said Sale Deed dated March 31, 2010 was created by the defendants themselves with a view to defeat and defraud the lawful rights of the plaintiff over the Suit Properties. Hence, the aforesaid Sale Deed will not bind the plaintiff. The plaintiff issued Legal Notice dated May 17, 2010 to the defendants through his Counsel seeking partition. After receiving the Legal Notice, the defendants issued a Reply Notice dated June 2, 2010, through their Counsel with false averments. Hence, the plaintiff filed the Suit for partition of Suit Properties into two equal shares and allotment of one such share in his favour.



S.A.No.100 of 2021

Defendants' Case:

WEB COPY

4. The defendants filed their Written Statement denying the averments made in the Plaint. The sum and substance of the Written Statement is that the Suit Properties are the absolute properties of Angammal, who is none other than the grandmother of the 1st defendant and wife of Chinnappa Gounder. She had two daughters, namely Periya Mallammal and Chinna Mallammal. Angammal executed a registered Will dated August 30, 1978, registered as Document No.24/1978 in the office of Sub-registrar, Jalagandapuram, bequeathing the Suit Properties in favour of her two daughters. The Will came into force after the demise of Angammal. Her daughter - Chinna Mallammal died issueless leaving behind her sister - Periya Mallammal. Thus, Periya Mallammal acquired the Suit Properties absolutely. Periya Mallammal died intestate leaving behind her daughter by name Alamelu (first defendant). After the demise of Periya Mallammal, the 1st defendant alone is the absolute owner of the Suit Properties.

4.1. The plaintiff is none other than the husband of Periya Mallammal. The plaintiff deserted and divorced his wife Periya Mallammal



S.A.No.100 of 2021

by way of caste custom (தருமபு அருப்ப) 45 years ago and married another woman. The plaintiff is not a dutiful husband of Periya Mallammal and father of the 1st defendant. After the death of Periya Mallammal, the plaintiff is living happily with one Palaniammal and they have two sons and one daughter. The defendants denies that the plaintiff is a legal heir of Periya Mallammal and that the plaintiff is entitled to ½ share in the Suit Properties. Accordingly, the defendants prayed to dismiss the Suit.

Trial Court:

5. During the trial, the plaintiff was examined as P.W.1 and Ex-A.1 to Ex-A.4 were marked on the side of plaintiff. On the side of defendants, the 1st defendant was examined as D.W.1, one Nalla Gounder was examined as D.W.2 and Ex-B.1 to Ex-B.10 were marked.

6. The Trial Court after full-fledged trial came to the conclusion that the defendants failed to establish the customary divorce between the plaintiff and Periya Mallammal as pleaded and that after the demise of Periya Mallammal, the plaintiff and the 1st defendant are her legal heirs under Section 15 (1) (a) of the Hindu Succession Act, 1956 and



S.A.No.100 of 2021

accordingly, decreed the suit and thereby, passed a Preliminary Decree declaring that the plaintiff is entitled to $\frac{1}{2}$ share in the Suit Properties.

First Appellate Court:

7. Dissatisfied with the Judgment and Decree passed by the Trial Court, the defendants filed an appeal before the First Appellate Court, which after hearing both sides, concurred with the finding of Trial Court that the customary divorce as pleaded by the defendants, has not been established; and that the plaintiff and the 1st defendant are the legal heirs of Periya Mallammal under Section 15 (1) (a) of the Hindu Succession Act. However, the First Appellate Court allowed the appeal and set aside the Judgment and Decree of the Trial Court, by stating that the plaintiff is not in joint possession and enjoyment of the Suit Properties along with the 1st defendant and hence, the Court Fee paid under Section 37 (2) of the 'Tamil Nadu Court-Fee and Suits Valuation Act, 1955' ['T.N.C.F. Act' for short] is incorrect.

Second Appeal:

8. Dissatisfied with the Judgment and Decree passed by the



First Appellate Court, the plaintiff filed this Second Appeal under Section 100 of the Code of Civil Procedure, 1908, on January 25, 2021. During the pendency of this Second Appeal, the appellant - Marithoppai passed away on May 29, 2021. The appellants 2 to 4, who are the sons and daughter of the deceased – appellant, were brought on record as the legal representatives of the deceased - appellant vide this Court's Order dated August 08, 2023 made in C.M.P.No.16883 of 2023 in S.A.No.100 of 2021.

9. This Second Appeal was admitted on February 16, 2021 on the following substantial questions of Law:

- “(a) *Whether the learned First Appellate Court has committed an error in non-suiting plaintiff on the ground that he failed to prove his possession over the Suit Properties to value the suit under Section 37(1) [Sic 37(2)] of the Tamil Nadu Court Fees and Suits Valuation Act, 1955?*
- (b) *Has not the Firsts Appellate Court erred in not following the position of Law that a co-owner/co-sharer is presumed to be in constructive possession and enjoyment of the property along with other co-heirs as held in Jagannath Amin v. Setharama (2007 (1) SCC 694?*
- (c) *Whether the First Appellate Court is right in holding that*



the suit ought to have been valued under Section 37(2) of the Court Fees Act, 1955, especially in the absence of a plea of ouster or exclusion of the plaintiff in possession is proved as held in Nelavathi v.N.Natarajan (1980 (2) SCC 247?”

Arguments:

10. Mr.N.Manoharan, learned Counsel appearing for the appellants / plaintiff would submit that the Suit Properties were originally owned by one Angammal, who executed a Will in favour of her two daughters, namely Periya Mallammal and Chinna Mallammal. After demise of Angammal, the Will came into effect and Periya Mallammal and Chinna Mallammal were in possession and enjoyment of the Suit Properties. Thereafter, Chinna Mallammal died issueless and Periya Mallammal inherited the share of Chinna Mallammal as her sole legal heir. Thus, the Suit Properties absolutely came to hands of Periya Mallammal. There is no dispute with regard to the aforesaid facts.

10.1. Further, the learned Counsel would submit that, admittedly, Periya Mallammal is none other than the wife of the plaintiff



and in their wedlock, they had a daughter, the 1st defendant. He would submit that the Trial Court as well as the First Appellate Court concurrently held that the plaintiff and the 1st defendant are the legal heirs of Periya Mallammal under Section 15(1)(a) of the Hindu Succession Act, 1956. Hence, the First Appellate Court ought to have dismissed the appeal and confirmed the Judgment and Decree of the Trial Court. Instead, the First Appellate Court strangely recorded a finding that the plaintiff is not in joint possession of the Suit Properties, and hence, the Court Fee paid is incorrect, and accordingly, it dismissed the Suit.

10.2.Further, the learned Counsel would submit that Periya Mallammal died on December 7, 2009. The Suit was filed by the plaintiff on August 04, 2010. The moment Periya Mallammal died, her estate devolved in favour of the plaintiff and the 1st defendant. The plaintiff and the 1st defendant are co-heirs and co-owners. The First Appellate Court failed to rightly consider the Law with regard to co-owners. Law presumes that the plaintiff is in constructive possession and enjoyment of the Suit Properties along with the 1st defendant. Hence, the plaintiff rightly valued the Suit under Section 37(2) of T.N.C.F. Act. The said findings of the First



Appellate Court with respect to joint possession & enjoyment and the Court Fee is perverse and an erroneous approach. They deserve to be interfered with by this Court. Accordingly, he prayed to allow the Second Appeal, set aside the Judgment and Decree of the First Appellate Court and restore the verdict of the Trial Court.

10.3.In support of his contentions, the learned counsel appearing for the appellants has relied upon the following Judgments:

- (i) ***Neelavathi and others vs. N.Natarajan and other***, reported in ***(1980) 2 SCC 247***,
- (ii) ***Jagannath Amin vs. Seetharama (dead) by legal representatives and others***, reported in ***(2007) 1 SCC 694***,
- (iii) ***Govindasamy vs. E.Muthulakshmi and others***, reported in ***2014 (1) MWN (Civil) 704***.

11. In response to the above arguments, Mr.P.Valliappan, learned Senior Counsel instructed by Mr.R.Marudhachalamurthy, learned Counsel on record for the respondents would contend that during the lifetime of Periya Mallammal, the plaintiff married one Palaniammal and



S.A.No.100 of 2021

through her, the appellants 2 to 4 were born. During the lifetime of Periya

Mallammal, the plaintiff was never in possession and enjoyment of the Suit

Properties. After demise of Periya Mallammal, the 1st defendant alone is in possession and enjoyment of the Suit Properties. Further, the learned

Senior Counsel would contend that while the 1st defendant has pleaded

that the plaintiff deserted and divorced his wife - Periya Mallammal by

way of caste custom (துரும்பு அருப்பு) 45 years ago, the plaintiff has not

filed any Rejoinder to deny the said fact. Though the 1st defendant is

unable to prove the Customary divorce that took place 45 years ago

satisfactorily, this Court can infer the same from the facts and

circumstances of this case. The First Appellate Court rightly allowed the

appeal and set aside the Judgment and Decree of the Trial Court. There is

no warrant to interfere with the same. Accordingly, he prays to dismiss the

Second Appeal.

11.1. Further, the learned Senior Counsel would submit that if this Court comes to the conclusion that the plaintiff is entitled to share in the Suit Properties, since the plaintiff died during the pendency of the Second Appeal leaving behind the appellants 2 to 4 and the 1st defendant



as his legal heirs, the appellants 2 to 5 are entitled to 3/8 share and the 1st defendant is entitled to 5/8 share in the Suit Properties. To that effect, a preliminary decree shall be passed, if this Court arrives at such a conclusion. He has made it clear that the above said argument is advanced without any prejudice to the case of the 1st defendant.

Discussion:

12. This Court has considered the submissions made on either side and perused the materials available on record.

13. Admittedly, the Suit Properties are the absolute properties of Periya Mallammal. She died intestate on December 7, 2009. The 1st defendant in his evidence deposed that the plaintiff is the husband of Periya Mallammal and she is the daughter of the plaintiff. Case of the 1st defendant is that the plaintiff divorced his wife - Periya Mallammal by way of caste custom viz., (துரும்பு அருப்பு), 45 years ago. Even after the commencement of the Hindu Marriage Act, 1955, customary divorce can be pleaded and established, in view of Section 29(2) thereof. The Law is well settled that a person who asserts customary divorce has to plead and



prove the same. In this case, though the 1st defendant has pleaded the alleged customary divorce that took place between the plaintiff and Periya Mallammal 45 years ago, the 1st defendant has failed to establish the same. Hence, as per Section 15(1)(a) of the Hindu Succession Act, 1956 the plaintiff and the 1st defendant are the legal heirs of Periya Mallammal. The Trial Court as well as the First Appellate Court have concurrently held so. Notably, the defendants did not prefer any appeal against the said finding.

14. As regards the substantial questions of law framed by this Court, as stated *supra*, the plaintiff and the 1st defendant are legal heirs of Periya Mallammal. The moment she passed away on December 7, 2009, her interest in the Suit Properties devolved upon the plaintiff and the 1st defendant and they become the co-owners of the Suit Properties. It is settled law that even if one co-owner is not in actual possession, the Law presumes that he/she is in constructive possession of the Suit Properties along with the other co-owners, unless ouster or exclusion is proved. Thus, even while assuming the moment that the plaintiff is not in actual possession in the Suit Properties along with the 1st defendant, the plaintiff is in deemed possession of the Suit Properties. Hence, this Court is of the



S.A.No.100 of 2021

considered view that the valuation of the Suit under Section 37(2) of the T.N.C.F. Act, is perfectly correct.

15. The case laws relied on by the learned Counsel appearing for the appellants is squarely applicable to this case. The Hon'ble Supreme Court in *Neelavathi and others v. N.Natarajan and others* reported in **(1980) 2 SCC 247**, at Paragraph No. 8, has held as follows:

“(8) Section 37 of the Tamil Nadu Court Fees and Suit Valuation Act relates to Partition Suits. Section 37 provides as follows:-

“37(1) In a suit for partition and separate possession of a share of joint family property or of property owned, jointly or in common, by a plaintiff who has been excluded from possession of such property, fee shall be computed on the market value of the plaintiff's share.

37(2) In a suit for partition and separate possession of joint family property or property owned, jointly or in common by a plaintiff who is in joint possession of such property, fee shall be paid at the rates prescribed.”

It will be seen that the court fee is payable under S. 37(1) if the plaintiff is 'excluded' from possession of the



property. The plaintiffs who are sisters of the defendants, claimed to be members of the Joint Family, and prayed for partition alleging that they are in joint possession Under the proviso to S.6 of the Hindu Succession Act, 1956 (Act 30 of 1956) the plaintiffs being the daughters of the male Hindu who died after the commencement of the Act, having at the time of the death an interest in the Mitakshara coparcenary property, acquired an interest by devolution under the Act. It is not in dispute that the plaintiffs are entitled to a share. The property to which the plaintiffs are entitled is undivided 'joint family property!'; though not in the strict sense of the term. The general principle of law is that in the case of co-owners, the possession of one is in law possession of all, unless ouster or exclusion is proved. To continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. Equally it is not necessary that, he should be getting a share or some income from the property. So long as his right to a share and the nature of the property as joint is not disputed the law presumes that he is in joint possession unless he is excluded from such possession. Before the plaintiffs could be called upon to pay court fee under Section 37(1) of the Act on the ground that they had been excluded from possession, it is necessary that on a reading of the plaint, there should be a clear and specific averment in the plaint that they had been "excluded" from joint possession to which they are entitled in law. The averments in the plant that the plaintiff could not remain in joint possession as he was not given any income from the joint family property would not amount to his exclusion from possession. We are unable to read into the



plaint a clear and specific admission that the plaintiff had been excluded from possession.”

(Emphasis supplied by this Court)

16. The afore-cited decision has been subsequently followed by the Hon'ble Supreme Court in ***Jagannath Amin vs. Seetharama (dead) by legal representatives and others***, reported in ***(2007) 1 SCC 694***.

17. Further, Hon'ble Supreme Court in ***Omprakash and others vs. Radhacharan and others*** reported in ***(2009) 15 SCC 66***, in comparable facts and circumstances, has held as hereunder:

“10.This is a hard case. Narayani during her lifetime did not visit her in-laws' place. We will presume that the contentions raised by Mr Choudhury that she had not been lent any support from her husband's family is correct and all support had come from her parents, but then only because a case appears to be hard would not lead us to invoke different interpretation of a statutory provision which is otherwise impermissible.

11.It is now a well-settled principle of law that sentiment or sympathy alone would not be a guiding factor in determining the rights of the parties which are otherwise clear and unambiguous. In HSIDC v. Hari Om Enterprises[(2009) 16 SCC 208 : (2008) 9 Scale 241] this



WEB COPY



S.A.No.100 of 2021

Court held: (SCC p. 226, para 38)

“38. This Court applied the doctrine of proportionality having regard to a large number of decisions operating in the field. This Court, however, also put a note of caution that no order should be passed only on sympathy or sentiment.”

12. In Subha B. Nair v. State of Kerala [(2008) 7 SCC 210 : (2008) 2 SCC (L&S) 409] this Court held: (SCC p. 216, para 21)

“21. This Court furthermore cannot issue a direction only on sentiment/sympathy.”

13. In Ganga Devi v. District Judge, Nainital [(2008) 7 SCC 770] this Court held: (SCC p. 776, para 22)

“22. The court would not determine a question only on the basis of sympathy or sentiment. Stricto sensu equity as such may not have any role to play.”

14. If the contention raised by Mr Choudhury is to be accepted, we will have to interpret sub-section (1) of Section 15 in a manner which was not contemplated by Parliament. The Act does not put an embargo on a female to execute a will. Sub-section (1) of Section 15 would apply only in a case where a female Hindu has died intestate. In



such a situation, the normal rule of succession as provided for by the statute, in our opinion, must prevail. For the aforementioned purpose, the golden rule of interpretation must be applied.

15.This Court in Bhagat Ram v. Teja Singh [(1999) 4 SCC 86] held as under: (SCC pp. 88-89, paras 6-7)

“6. On a perusal of the two sub-sections we find that their spheres are very clearly marked out. So far as sub-section (1) is concerned, it covers the properties of a female Hindu dying intestate. Sub-section (2) starts with the words ‘Notwithstanding anything contained in sub-section (1)’. In other words, what falls within the sphere of sub-section (2), sub-section (1) will not apply. We find that Section 15(2)(a) uses the words ‘any property inherited by a female Hindu from her father or mother’. Thus property inherited by a female Hindu from her father and mother is carved out from a female Hindu dying intestate. In other words any property of a female Hindu, if inherited by her from her father or mother would not fall under sub-section (1) of Section 15. Thus, property of a female Hindu can be classified under two heads: every property of a female Hindu dying intestate is a general class by itself covering all the properties but sub-section (2) excludes out of the aforesaid properties the



WEB COPY



S.A.No.100 of 2021

property inherited by her from her father or mother.

7. In addition, we find the language used in Section 15(1) read with Section 16 makes it (sic out) clearly, the class which has to succeed to the property of a Hindu female dying intestate. Sub-section (1) specifically states that the property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16. So, in case sub-section (1) applies, then after the death of Santi, Indro cannot inherit by succession but it would go to the heirs of the predeceased husband of Santi.”

16.For the aforementioned reasons, we find no merit in this appeal. The appeal is dismissed accordingly. However, in the facts and circumstances of this case, there shall be no order as to costs.”

18. This Case is also a hard case. On the strength of the afore-cited case laws, this Court is of the view that the findings of the First Appellate Court that the plaintiff is not in joint possession of the Suit Properties and that, consequently, the Court Fee paid under Section 37(2) of T.N.C.F. Act is incorrect, are perverse and erroneous. The First Appellate Court in a sympathetic manner has rendered these findings. Hence, the said findings deserve to be interfered with by this Court.



Conclusion:

WEB COPY

19. To sum up, this Court decides that the First Appellate Court has committed an error in non-suiting the plaintiff on the ground that he failed to prove his possession over the Suit Properties to value the Suit under Section 37(2) of the T.N.C.F. Act, especially in the absence of plea of ouster. Further, the First Appellate Court erred in not following the position of Law that a co-owner/co-sharer is presumed to be in constructive possession and enjoyment of the Suit Properties along with other co-heirs or co-owners. The Substantial Questions of Law are answered accordingly in favour of the appellants and against the respondents.

20. In view of the foregoing reasons, this Court is of the view that the plaintiff is entitled to 1/2 share in the Suit Properties. The plaintiff died intestate during the pendency of this Second Appeal, leaving behind the appellants 2 to 4 and the 1st defendant as his legal heirs under Section 8 of Hindu Succession Act, 1956. Hence, appellants 2 to 4 are entitled to 3/8 share in the Suit Properties, while the 1st defendant is entitled to 5/8 share ($1/2 + 1/8 = 5/8$) in the Suit Properties [See *Phoolchand and another vs. Gopal Lal* reported in *AIR 1967 SC 1470*].



S.A.No.100 of 2021

21. In the result, this Second Appeal is allowed and the Judgment and Decree of the First Appellate Court is set aside. The Judgment and Decree of the Trial Court is modified as hereunder:

- (i) The appellants 2 to 4 are entitled to 3/8 share in the Suit Properties.
- (ii) To that effect, Preliminary Decree is passed in favour of the appellants 2 to 4.
- (iii) Considering the facts and circumstances, there shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is closed.

30.10.2024

Index : Yes
Speaking order : Yes
Neutral citation : Yes
mps/tk

To

- 1.The Subordinate Judge, Sankari.
- 2.The District Munsif, Sankari.

R. SAKTHIVEL, J.



WEB COPY



S.A.No.100 of 2021

mps/tk

S.A.NO.100 OF 2021

30.10.2024