

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.04.2024

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A.No.2046 of 2001

1.E.K.M.Liaquat Ali (died)

2.Beema

3.Mohideen

4.Bismillah Khan

5.Mohammed Meeran

...Appellants

(Appellants 2 to 5 are brought on record as LR's of the deceased sole appellant vide Court order dated 08.04.2024 made in CMP(MD)Nos.11301, 11302 and 11303 of 2017)

-Vs-

1.Hameedal (died)

2.Hameeba

3.Peer Ammal

4.Mariam

5.Sara Banu

6.Minor Shamboor Shava

7.Minor Meera Sheriff

8.Minor Irufana

9.Minor Ayisha

(Minors 6 to 9 rep.by Mother and guardian 5th Appellant)

10.Hameedal Beevi

11.Kadar Mohideen

12.Bala

13.Rasin

14.Meera Shakila

15.Jainambo

16.Minor Larasmin

(Minor Rep. by her mother and guardian 10th Appellant)

17.Alimal Beevi

18.Mohammed Ismail

19.Sultan Bakith

20.Mahabooba

21.I.Jameela

22.I.Maideen

23.I.Badhusha

24.I.Mohameed Basha

... Respondents

(Respondents 21 to 24 are brought on record as LR's of the deceased first respondent vide Court order dated 08.04.2024 made in CMP(MD)Nos.11298, 11299 and 11300 of 2017)

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree in A.S.No.172 of 1998 on the file of the II Additional District Court, Tirunelveli, dated 08.11.2000 confirming the judgment and decree in O.S.No.16 of 1996 on the file of the Additional Sub Court, Tenkasi, dated 08.10.1998.

For Appellants : Mr.R.T.Arivukumar
for Mr.N.GA.Natraj

For R4 : Mr.D.Nallathambi

JUDGMENT

The first defendant in the suit originally filed this second appeal. The deceased first respondent - sister of the deceased first appellant, filed a suit claiming 130/1440 share in the suit properties. The said suit was decreed by the trial Court and the appeal filed by the deceased first appellant Liaquat Ali was also dismissed. Aggrieved by the same, the deceased first appellant filed the second appeal. Pending second appeal, the first appellant died and his legal representatives were brought on record as appellants 2 to 5.

2. The first respondent/plaintiff Hameedal also died pending second appeal and her legal representatives were brought on record as respondents 21 to 24.

The deceased first respondent - sister of the deceased first appellant herein filed a suit for partition. According to the first respondent, the suit properties originally belonged to her father Mohideen Sahib and he died in the year 1960 leaving behind her mother Meeral and four sons and four daughters.

3. For the sake of convenience, the rank of the parties in the second appeal are mentioned as per their ranking in the suit.

4. The plaintiff Hameedal is one of the daughters of Mohideen Sahib. The defendants 2 to 4 are other daughters. The first defendant Liaquat Ali is one of the sons of Mohideen Sahib. The other three sons of Mohideen Sahib were dead even at the time of filing of the suit and their legal representatives were shown as defendants 5 to 20. According to the plaintiff, after the death of Mohideen Sahib all the sons and daughters were entitled to share in the suit properties. She claimed all the daughters are entitled to $1/12^{\text{th}}$ share each and the the sons were entitled $2/12^{\text{th}}$ share each. The plaintiff, claiming $130/1440$ share in the suit properties, laid the suit for partition.

5. The first defendant filed a written statement and the same was adopted by the defendants 10, 11 and 14 to 20. The other defendants namely 2 to 9, 12, 13 remained ex parte. The contesting defendants claimed that the father of the parties Mohideen Sahib and his brothers conducted a family business in the name and style of Mohamed Ismail Sahib & Brothers and out of the earnings from the family business, the suit properties were purchased. It was claimed that after the death of Mohideen Sahib his sons continued the family business and on 15.07.1973 the family business and the properties acquired through family business, were partitioned. The suit properties were shown as 5th item in the partition deed and allotted to the share of first defendant and his brothers separately. Hence, the plaintiff and her sisters were not entitled to any share in the suit properties. It was claimed by the first defendant that from the date of partition, he and his brothers have been in possession and enjoyment of the suit properties to the exclusion of the sisters and therefore, the plaintiff was ousted from the suit properties. It was also claimed by the first defendant that subsequently, there was a partition among the first defendant and his brothers in the year 1978. On these pleadings, the contesting defendants sought for dismissal of the suit.

6.Before the trial Court, the plaintiff was examined as P.W.1 and six documents were marked as Ex.A1 to Ex.A6. On behalf the defendants, the first defendant was examined as D.W.1 and 16 documents were marked as Ex.B1 to B16.

7.The trial Court on appreciation of oral and documentary evidence available on records, came to the conclusion that the plaintiff was entitled to decree for partition as prayed for. Aggrieved by the same, the first defendant preferred an appeal in A.S.No.172 of 1998 on the file of the Second Additional District Court, Tirunelveli. The first appeal was dismissed by the the First Appellate Court by affirming the findings of the trial Court. Aggrieved by the concurrent findings, the appellant is before this Court.

8.At the time of admission, this Court formulated the following substantial questions of law by order dated 12.12.2001:-

1.Whether both the Courts below erred in holding that the suit properties are family properties and that the plaintiff has share in the said property?

2. Whether both the Courts below failed to note that there was a partition of the suit properties and that the properties have been partitioned and hence the plaintiff has no right on the suit properties?

3. Whether both the Courts below failed to note that the appellant had prescribed title by adverse possession and by ouster?

Questions of Law 1& 2:

9. It is the specific case of the appellant/first defendant that there was a partition in the family after the death of father of the parties on 15.07.1973 and the said document was marked as Ex.B7. Under Ex.B7, the suit properties were allotted to the share of the first defendant and his brothers. The Courts below on consideration of Ex.B7 came to the conclusion that Ex.B7 was entered into only among the first defendant, his brother and brothers of Mohideen Sahib. Neither the plaintiff nor her sisters were made party to Ex.B7. In such circumstances, the partition dated 15.07.1973, which was entered only among male members of the family, will not bind the plaintiff and her sisters, who were not made as parties to the document. When the plaintiff was examined as P.W.1, she deposed that she

was not aware of any partition among the male members. There is no evidence available on record to suggest that the partition was made known to the sisters. The first defendant failed to examine any independent witness except himself to prove that the partition among the male members of the family was made known to the plaintiff and her sisters. In such circumstances, the questions of law 1 and 2 are answered against the appellants.

Question of law No.3

10.The learned counsel for the appellants vehemently contended that the suit properties and the family business were partitioned among the male members of the family under Ex.B7 on 15.07.1973 and from that date onwards the suit properties were dealt with by the defendants and his brothers exclusively with the full knowledge of the plaintiff and her sisters. Therefore, the first defendant and his brothers prescribed title to the suit properties. The learned counsel also referred to various documents filed by the defendants to prove that the properties were assessed in the name of first defendant and his brothers. It is settled law that merely because the revenue documents stand in the name of one of the co-owners, we cannot come to the conclusion that the other co-owners are excluded from

enjoyment. The possession of the co-owner is not only for himself and also for the benefit of the other co-owners. When the properties is assessed in the name of the male members, that itself is not sufficient to come to the conclusion that his sisters and other female members of the family are excluded from enjoyment of the suit properties. Further, the Courts below relied on commentaries of Mulla under Section 57 of Mahomedan Law. The commentaries of Mulla under Section 57 reads as follows:-

“Section 57:-Joint family and joint family business.- (1) When the members of Mahomedan family live in commensality, they do not form a joint family in the sense in which that expression is used in the Hindu law. Further, in the Mohomedan law, there is not, as in the Hindu law, any presumption that the acquisition of the several members of a family living and messing together are for the benefit of the family. But if during the continuance of the family properties are acquired in the name of the managing member of the family and it is proved that they are possessed by all the members jointly, the presumption is that they are the properties of the family, and not the separate properties of the member in whose name they stand.

(2) If after the death of Mahomedan his adult sons continue their father's business and retain his assets in the

business, they will be deemed to stand in a fiduciary relation to the other heirs of the deceased, and liable to account as such for the profit made by them in the business. If after the death of Mohamedan sons the business is continued by their sons or by other heirs, they also will be liable to account on the same footing.

11. A perusal of the same would suggest that if the sons of deceased Mohideen continued the business and retained the assets of the business, they will be deemed to stand in a fiduciary relation to the other heirs of the deceased Mohideen, namely, the daughters. In such circumstances, merely because the first defendant and his brothers continued the family business of the deceased father, that itself cannot be taken as they enjoyed the properties adversely to the exclusion of the sisters. Therefore, absolutely there is no evidence available on record to suggest that the sons of Mohideen enjoyed the properties to the exclusion of the sisters. On behalf of the defendants, the first defendant alone was examined as D.W.1 and no other independent witnesses were examined in support of the plea of ouster. Therefore, on proper appreciation of evidence available on record, both the Courts below came to the conclusion that the first appellant/first defendant failed to prove the plea of ouster and consequently, came

to the conclusion that the deceased first respondent/plaintiff was entitled to decree for partition as prayed for. Therefore, the third question of law is also answered against the appellants.

12. In view of the answers to the questions of law 1 to 3 against the appellants, this Second Appeal stands dismissed. No costs.

08.04.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
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To

- 1.The II Additional District Judge,
Tirunelveli.
2. The Additional Subordinate,
Tenkasi.
- 3.The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

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S.SOUNTHAR, J.

cp

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