

Chandu Vs. Kunhamed

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Court : Chennai

Decided On : Apr-02-1891

Reported in : (1891)ILR14Mad324

Judge : Arthur J.H. Collins, Kt., C.J. and ;Handley, J.

Appellant : Chandu

Respondent : Kunhamed

Judgement :

1. As to the first question decided against the appellant by the Subordinate Court, whether the suit is maintainable, we think the lower Appellate Court was in error. The case appears to have been treated in the lower Court as one of partition amongst members of a family governed by Hindu Law. But it was stated by the appellant's vakil before us and not denied on behalf of the respondent that defendants Nos. 1, 2 and 3 are governed by the Muhammadan law of succession, and that this is so further appears from the nature of the claim in the former suit, Original Suit No. 521 of 1882. This being so, the principle laid down in Venkatarama v. Meera Labai I.L.R. 13 Mad. 275, and the cases there followed have no application to the present case. A sharer by Muhammadan law has a right to a specific share in each [item of property left by the person from whom he inherits] and can sue to recover that share from any person in possession of the property. No doubt there might be cases in which a Muhammadan sharer would not be allowed to sue for his share in a particular item of property when he could in

the same suit sue for his share in the whole property of the person under whom he inherits. But that is on a different ground to avoid multiplicity of actions. In the present case no other persons but plaintiff, and his mortgagor, defendant No. 1, on the one side and defendants Nos. 2 and 3 on the other, have any interest in the paramba in dispute, and therefore a division of the properties as yet undivided between defendants? Nos. 1, 2 and 3 and their co-sharers could not be made in this suit, the plaintiff having no concern with it. We think, therefore, the suit is not open to the objection that it relates to the first defendant's share in one only of the properties inherited by him and his co-sharers from Kunhamed. On the merits, the second defendant's contention in this case is that the paramba in dispute was not part of the property of Kunhamed divisible amongst the first defendant and his co-sharers, but was originally the separate property, called stridhanam with that misuse of Hindu Law terms common among Muhammadans on the West coast, of his the second defendants's maternal grandmother and through her became the separate property of his mother on her marriage. He appears to have raised the same defence in Original Suit No. 521 of 1882 which was brought by other sharers for recovery of their shares in this paramba and other properties. An issue (the fifth) was raised in that suit whether this paramba was partible or not, and decided against present defendant No. 2 who was defendant No. 6 in that suit. In this judgment the Munsif observed:-'The witnesses examined for the plaintiffs swear that the property No. 25 (the paramba now in dispute) in the plaint is in the possession of defendant No. 1. Defendant No. 6, who claims these properties adversely to the plaintiffs, has not offered any evidence. I therefore find the third to fifth issues for the plaintiffs.' There can be no doubt therefore that the title now set up by defendant No. 2 was decided against him in that suit, and the only question is, was it a judgment inter partes, and therefore conclusive as between the plaintiff and defendant No. 2 in this suit. Defendant No. 1 under whom the plaintiff claims was a party, first defendant, to the former suit, but he was ex parte, and, therefore, the title of defendant No. 2 cannot be said to have been actively contested between the present defendants, Nos. 1 and 2, in that suit so as to bring the case within the decision in Venkayya v. Narasamma I.L.R. 11 Mad. 204. But the contest in that suit as to this particular paramba was between the plaintiffs in that suit asserting that it was property in which they and present defendant No. 1 and their

other co-sharers were entitled to share, and present defendant No. 2 denying the same and claiming it as his own property, and therefore present defendant No. 1 and the other co-sharers may be said to claim under the plaintiffs in that suit by explanation V of Section 13 of the Code of Civil Procedure. We think, therefore, the decision in that suit adverse to the second defendant's title is res judicata and conclusive against him in this suit, and on this ground the plaintiff is entitled to succeed in this suit.

2. We set aside the decree of the lower Appellate Court and restore that of the Court of First Instance. Defendant No. 2 must pay the plaintiff's costs in this and the lower Appellate Court.

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