

Chellammal and anr. Vs. Valliammal

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Court : Chennai

Decided On : Aug-22-1977

Reported in : AIR1978Mad21; (1978)1MLJ391

Judge : N.S. Ramaswami, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100; Hindu Law; Hindu Women's Rights to Property Act, 1937; [Hindu Succession Act, 1956](#) - Sections 14(2); [Transfer of Property Act, 1882](#) - Sections 111

Appeal No. : Second Appeal No. 1833 of 1974

Appellant : Chellammal and anr.

Respondent : Valliammal

Advocate for Def. : S. Nainarsundaram, ;V. Natarajan and ;V. Nicholas, Advs.

Advocate for Pet/Ap. : T.R. Ramachandran and ;T.R. Rajagopalan, Advs.

Disposition : Appeal dismissed

Judgement :

N.S. Ramaswami, J.

1. The defendants are the appellants. The appeal arises out of a suit for declaration of title in respect of the suit properties, for permanent injunction in

respect of one item and for recovery of possession and other reliefs in respect of another.

2. The plaintiff and the first defendant are the widows of one Kandaswami Gounder who died on 18-9-1942. He had no issue. He left considerable irrmoveable properties in the shape of agricultural lands. The case of the plaintiff has been that even in the year 1943 there had been a final partition of the properties by metes and bounds between the two widows by mutual consent, that in the said partition the suit properties fell to her (plaintiff's) share, that in respect of one of the suit properties (item 2 of first schedule) the second defendant who is no other than Kandaswami Gounder's brother's son became a tenant under the plaintiff and that as the second defendant failed to pay the rent and began disputing her title along with the first defendant, the suit was necessitated. It is under Ex. A-1 dated 12-2-1964, the second defendant became a lessee of one of the suit properties under the plaintiff, but within five months thereafter, that is, under Ex. A-5, dated 13-7-1964, the first defendant purported to gift to the second defendant an undivided half share in the properties left by her late husband, Kandaswami Gounder. The second defendant, by virtue of the above settlement deed disputed his lessor's (plaintiff's) title contending that he had 'become the owner of an undivided half share in the suit properties. Only thereafter the suit out of which this second appeal arises came to be filed.

3. As I said, the case of the plaintiff has been that there had been a final partition by metes and bounds by mutual consent between her and the first defendant even in the year 1943 and that in the said partition, the suit properties fell to her share. It is her further case, that by virtue of the [Hindu Succession Act, 1956](#), she became the absolute owner of the properties including the suit properties which fell to her share in the above said partition.

4. The defendants inter alia contended that there was no final partition as claimed by the plaintiff, that the division of the properties was only for the purpose of convenient enjoyment and not a final and absolute partition and that therefore there is no question of the plaintiff getting a declaration of title in respect of the suit properties.

5. The trial Judge gave a halting finding regarding the question of partition. He found that the partition as claimed by the plaintiff was not true but still there was a partition arrangement under which she became entitled to the properties in question. Therefore, the learned Judge held that the settlement deed, purporting to gift an undivided half share of the properties executed by the first defendant in favour of the second defendant, is not valid in respect of the properties in question, that the plaintiff is entitled to an injunction in respect of item 1 and recovery of possession of item 2 of the plaintiff first schedule properties and that she is also entitled to arrears of mesne profits at a particular sum in respect of item 2. The future mesne profits regarding this item was directed to be determined in separate application. He awarded costs to the plaintiff, but limited it to a certain sum.

6. The defendants filed an appeal to the District Judge of Coimbatore against the decree and judgment of the trial court. The plaintiff filed a memorandum of cross-objections claiming that the trial court ought to have awarded past mesne profits at a higher rate and it was also not right in restricting the quantum of costs.

7. The first appellate court, on a review of the entire evidence, has given a finding that the partition of the year 1943 between the plaintiff and the first defendant was a final and absolute partition by metes and bounds of the properties left by Kandaswami Gounder and that therefore the plaintiff was entitled to the relief of declaration of title in respect of the suit properties as well as for injunction in respect of item 1 and for possession in respect of item 2 of the plaintiff first schedule properties. It had been contended before the first appellate Court that the second defendant was in any event entitled to the benefits of the Cultivating Tenants Protection Act and that therefore he cannot be evicted from item 2. This contention has also been negated by the first appellate court and the decree for possession granted by the trial court was confirmed. The appellate Judge further held that the plaintiff was not entitled to any amount more than the amount awarded by the trial court regarding arrears of mesne profits, but the trial Court was not right in restricting the costs. Only regarding the question of costs, the memorandum of cross-objections was allowed. The appeal filed by the defendants was dismissed with costs.

8. In this second appeal by the defendants, the contention of Mr. T. R. Ramachandran, learned counsel for the appellants, is that in 1943, there could not in law be a final and absolute partition between the two widows, that then they had only a widow's estate in all the properties left by their late husband, Kandaswami Gounder, that they could divide only the usufructs from the properties and for the purposes of convenience, they were in separate possession of the properties, that the right of survivorship between the two widows continued and that on the coming into force of the [Hindu Succession Act, 1956](#), both the widows became absolute owners of the entire estate left by Kandaswami Gounder. It is his contention that only after the coming into force of the Hindu Succession Act, the question of a final partition by metes and bounds between the two widows would arise and that therefore the plaintiff's suit for a declaration of title in respect of the suit properties on the ground that they had been allotted to her in the partition of the year 1943 is not well-founded. In respect of item No. 2 which is in the possession of the second defendant as a lessee, the further contention is that even if the defendants fail on the first point, the plaintiff would not be entitled to recovery of possession of item No. 2. The contention is that the second defendant has not forfeited the lease on the ground of denial of title as contended by the plaintiff and that therefore, as a lessee, he would be entitled to protection under the Cultivating Tenants Protection Act and not liable to be evicted.

9. I am unable to accept any of these contentions. The main contention is about the plaintiff's title to the suit properties. It is to be noted that the present contention of the learned counsel, as referred to earlier, is raised for the first time only now. There is admittedly no pleading, nor was it raised in the court below. What is more, it had not been raised even in the grounds of second appeal. Even so the question being one of law, the learned counsel was allowed to put forth his arguments on the question. The contention, as already seen, is that in law there cannot be a final and absolute partition between two widows inasmuch as they had only a widow's estate and the joint title of the widows cannot be put an end to. Learned counsel referred to certain passages in Mayne's Hindu Law for the purpose of pressing his point that one of the two widows in this case had no right to demand a final and absolute partition. There can be no dispute that in 1943, when the Hindu Women's Right to Property Act had not become applicable to agricultural lands, neither the

plaintiff nor the first defendant in this case had a right to demand an absolute and final partition which would put an end to joint title to the estate. But what the learned counsel overlooked is that even before the Hindu Women's Right to Property Act was made applicable to agricultural lands, there can be a final and absolute partition between the two widows by mutual consent.

10. In *Karpogathachi v. Nagarathinathachi*, : [1965]3SCR335 , it is pointed out that when two widows inherit their husband's properties, they take together one estate as joint tenants with rights of survivorship and equal beneficial enjoyment and that one without the consent of the other cannot enforce an absolute partition of the estate so as to destroy the right of survivorship. However, it was recognised that there can be an absolute and final partition of the estate destroying the right of survivorship by mutual consent of the widows. In that case, on facts it was found that there had been no final and absolute partition and that the partition arrangement was only for the purpose of convenient enjoyment. But in the present case, as already seen, the finding of fact by the first appellate Court which cannot be challenged, and in fact rightly not challenged by Mr. T. R. Ramachandran, is that by content of the two widows there had been a final and absolute partition by metes and bounds of the properties left by Kandaswami Gounder. In the face of such a finding, it is idle to contend that the right of survivorship continued even after the said partition of the year 1943. It must be remembered that even under the Hindu Law it is open to the co-widows to put an end to the right of survivorship and if there had really been a final and absolute partition by metes and 'bounds, as held by the first appellate court, there can be no further right of survivorship between the two.

11. Even the theory that one of the two co-widows is not entitled to demand a final and absolute partition so as to put an end to the right of survivorship had been given the go-by under the Hindu Women's Right to Property Act, 1937. Under that Act, on the death of her husband, the widow gets the same share as the son. That means she would be entitled to enforce a final and absolute partition even though the co-widows or any other sharer may not consent for such a partition. In *Munnalal v. Rajkumar*, : AIR 1962 SC1493 , it is pointed out that the Legislature by enacting the Hindu Women's Right to Property Act, 1937 made a significant

departure from the textual law.

12. But it is pointed out on behalf of the defendants that in the present case Kandaswami Gounder having died in 1942 and the partition between the two widows being in 1943, when the Hindu Women's Right to Property Act, 1937 had no application to agricultural lands, the change effected under that Act has no application to the present case. Per contra, it is contended on behalf of the plaintiff respondent that after the 1937 Act was made applicable to agricultural lands (it was so made applicable in November, 1946 by Madras Act 26 of 1947) one widow could have demanded a final and absolute partition so as to put an end to the right of survivorship and that the mere fact that there had already been a partition between the two could not make any difference.

13. But I think it is unnecessary to pursue this point because it cannot be disputed that even prior to the application of the 1937 Act, under the textual law, there can be a final and absolute partition so as to put an end to the right of survivorship by mutual consent of the widows. That is what has happened in this case. It is needless to stress that in this case the finding of fact by the first appellate Court is that by consent of the plaintiff and the first defendant, there had been a final and absolute partition of the properties left by Kandaswami Gounder.

14. Mr. T. R. Ramachandran, learned counsel for the appellants, contended that the plaintiff in this case cannot be said to have acquired the suit property under the partition of 1943, inasmuch as she along with the first defendant had inherited a widow's estate on the death of Kandaswami Gounder and that therefore it cannot be claimed by the plaintiff that by virtue of Section 14(1) of the Hindu Succession Act, she had become the absolute owner of the suit properties, in this connection, learned counsel referred to *Sampathkumari v. Lakshmiammal*, : AIR1963 Mad50 . There the question was whether Section 14(2) applied because of the recitals contained in the partition deed 'between the widows. At page 60, the Division Bench observed that the partition deed does not in any way restrict the ordinary Hindu widow's estate which each of the widows would otherwise have had in the properties on that date. It was further pointed out that the recitals in the partition deed merely stated what would otherwise have happened, namely, that the

property would go to the heirs according to law, and that there was no clause whatever in the deed restricting the ordinary Hindu women's estate which the two widows would normally have. It was further pointed out that the widows did not 'acquire' the right to the property only under the partition deed, for the simple reason that they had acquired the right even previously by inheritance as widows of their husband and the partition merely divided the property by allotting some to one widow and the rest to the other widow. On behalf of the appellants herein the observations of the Division Bench that the word 'acquired' in Section 14(2) means that prior to the acquisition the widows should not have had any interest in the lands whatever is pressed.

15. It is settled law that if a partition deed or any other instrument only recognised a pre-existing right of the widow, it is not a case of the widow 'acquiring' the property as contemplated under that sub-section and that under such circumstances that sub-section, would have no application. But when Section 14(1) speaks of a female Hindu acquiring property before or after the commencement of the Act, the question is whether the acquisition contemplated should necessarily be without any preexisting right whatsoever. The explanation to Section 14(1) defines the word 'property' occurring in that sub-section as including both moveable and immoveable property acquired by a female Hindu 'by inheritance or devise, or at 3 partition, or in lieu of maintenance or arrears of maintenance etc. The contention on behalf of the plaintiff-respondent is that in this case, in any event, there having been a partition (whether the widows were entitled to enter into a final and absolute partition or not) in the year 1943, it must be held that the plaintiff acquired the suit properties under the said partition as contemplated under Section 14(1) and as she is in possession, her widow's estate became an absolute estate. However, the contention on behalf of the appellants is that the plaintiff did not 'acquire' the suit properties under the partition inasmuch as she along with the first defendant had inherited a widow's estate in the properties on the death of their husband. But it should be remembered that the explanation to Section 14(1) specifically refers to acquisition of properties under a partition. One can get a share under a partition only if he or she had some pre-existing right in the same. It is true that in a partition in a family, a woman may be allotted certain properties even though she had no pre-existing right to a share because of her

right to maintenance or arrears of maintenance. But as already seen the explanation to Section 14(1) specifically refers to property acquired in lieu of maintenance or arrears of maintenance apart from property acquired at a partition. What I stress is that the words 'acquired by a female Hindu..... at a partition' would not refer to properties given to a female Hindu (even though it might be under a partition deed) in lieu of maintenance or arrears of maintenance, for the simple reason, the explanation refers to acquisition of properties in lieu of maintenance or arrears of maintenance as distinct from property acquired at a partition. If a female Hindu does not have a pre-existing right to a share and she is not given property in lieu of maintenance or arrears of maintenance, but still if property is given to her under a partition deed it would be a case of pure gift. The mere fact that the property is given to the female Hindu under a partition deed would not mean that she did not acquire the property by way of gift and that she so acquired 'at a partition'. I am of the view that the words 'acquired by a female Hindu.....) at a partition' do not mean that she should not have had any pre-existing right in the property.

16. Assuming that the plaintiff did not acquire the suit properties under the partition on the ground that she had acquired them even earlier; I fail to see how the defendants can resist the plaintiff's claim. Undoubtedly the plaintiff was in possession of the suit properties when the Hindu Succession Act came into force. There can be no dispute that the widow's estate of the plaintiff in the suit properties enlarged into an absolute estate by virtue of Section. 14(1). But the purport of the contention of Mr. T. R. Ramachandran is that not only the plaintiff but also the first defendant should be deemed to have been in possession of the suit properties (as well as other properties left by their husband), that the plaintiff cannot be said to have been in exclusive possession of the suit properties and that there re not only the plaintiff but also the first defendant got an absolute title to the suit properties and other properties. This contention is fallacious.

17. For the present discussion I am assuming that the 'partition of the year 1943, even though factually a final and absolute partition by consent of the two widows, is not valid in law as contended by the learned counsel for the defendants - appellants. But the question is whether in spite of the partition the first defendant

can be deemed to have been in joint possession of the suit properties with the plaintiff on the date when the Hindu Succession Act came into force. It is needless to stress that on facts there is a clear finding by the first appellate Court that by consent of the two widows there was a final and absolute partition of the properties left by their husband and that each widow was in separate possession of the properties that fell to her respective share. Even assuming that the widows had no right to effect such an absolute partition putting an end to the right of survivorship, I fail to see how the two widows can be said to have been in joint possession of the suit properties and other properties left by their husband. It cannot be disputed and in fact it is not disputed that whatever be the legal effect of the partition of the year 1943, the two widows were bound by that partition during their lifetime. In other words, they having effected by mutual consent a final partition, it was not open to any one of them to claim a re-allotment or possession of the properties allotted to the other. Under such circumstances, I am unable to agree with the contention that both the widows should be deemed to have been in joint possession of the entire estate in spite of the division of the year 1943. It is true that 'possession' contemplated in Section 14(1) need not necessarily be physical possession but it would include constructive possession also. But I am quite clear that the first defendant cannot be deemed to have been in constructive possession of the suit properties in view of the partition of the year 1943, by which the two widows were bound during their lifetime. That means the first defendant does not get any right to the suit properties by virtue of Section 14(1) of the Hindu Succession Act.

18. There is no use saying that the right of survivorship continued on the ground that the widows had no right to effect a final and absolute partition. Assuming such a right continued, on the coming into force of the Hindu Succession Act, that right comes to an end (vide *Nagama Naicker v. Ponnuchinnayyan*, (1) 1870 MLJ 437 . The plaintiff by virtue of the partition was in exclusive possession of the suit properties and the right of survivorship, even assuming that it continued, came to an end when the Hindu Succession Act came into force and the first defendant was neither in physical nor constructive possession of the suit properties nor had she any right to possession because to the partition of the year 1943 and therefore only the plaintiff's right to the suit properties enlarged into an absolute estate by

virtue of Section 14(1),

19. The only other question argued is whether the second defendant is a cultivating tenant in respect of item No. 2 of the suit properties and whether he is entitled to protection under the Cultivating Tenants Protection Act. The contention on behalf of the defendants, as already said, is that the second defendant never denied the plaintiff's title and therefore the courts below are not right in holding that he has forfeited the lease. I am unable to agree with this contention. In *Mohamed Amir v. Municipal Board, Sitapur*, : AIR 1965 SC1923 , on facts it had been held that there was no denial of title by the tenant. But that decision has no application to the present case because here undoubtedly the second defendant had denied the plaintiff's title and under the circumstances there can be no doubt that such denial was wilful. It is to be noted that within five months of the execution of the lease deed in favour of the plaintiff, the second defendant obtains a gift deed from the first defendant in respect of all the properties inclusive of the properties which he took on lease. The very taking of the gift from the first defendant would go to show that he set up title in the first defendant and in himself. It is true that in the written statement the second defendant states that he neither denies nor affirms the plaintiff's title. But such a stand has evidently been taken only to get over the plaintiff's plea that the second defendant had forfeited the lease. Ex. A-2 is the office copy of the notice dated 13-3-1968 sent by the plaintiff to the defendants. In this notice the plaintiff charges the second defendant of having taken the settlement deed from the first defendant in derogation of his position as a lessee under her. Ex. A-4 dated 29-3-1968 is the reply notice by the second defendant through his advocate, in this reply the stand taken is that the gift under the settlement deed is perfectly valid. That undoubtedly means, the second defendant claims title to an undivided half share in item 2 of the suit properties (which is the one which he had taken on lease) among other properties, in fact, even in the suit, he does not give up his claim under the settlement deed. Under such circumstances, the self-serving statement by the second defendant made in his pleading that he neither denied nor affirmed the plaintiff's title is of no avail. Undoubtedly he is setting up a hostile title and therefore the finding that he has forfeited the lease is right.

20. The second appeal fails and the same is accordingly dismissed with costs.

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