

Kumaraswami Gounder and ors. Vs. Subba Gounder and ors.

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Court : Chennai

Decided On : Feb-07-1977

Reported in : (1978)1MLJ305

Appellant : Kumaraswami Gounder and ors.

Respondent : Subba Gounder and ors.

Advocate for Def. : Mr. Varadarajan

Judgement :

Ramaprasada Rao, J.

1. Defendants 2 to 4 and 6 to 9 in O.S. No. 17 of 1965 on the file of the Subordinate Judge of Coimbatore, are the appellants. The plaintiffs came to Court for a partition and separate possession of their half share in the suit properties under the following circumstances. Kandaswami Gounder is the common ancestor. He had two sons, Nanjappa Gounder the first defendant and Palani Gounder the first plaintiff. His other son Subba Gounder died as a bachelor in 1959. Palaniammal is his daughter. The first defendant, who is the eldest son who died pending suit is herein represented by his legal representatives, defendants 2 to 10. In fact, it is the second defendant who is contesting the action. Plaintiffs 2, 3 and 4 are the sons and daughter of the first plaintiff. The fifth plaintiff is the wife of the first plaintiff and the 4th plaintiff is the wife of the 1st defendant. The plaintiffs' case is that Kandaswami Gounder died in Adi 1955, prior to the Hindu Succession

Act of 1956 and that therefore, Palaniammal, the daughter of Kandaswami Gounder cannot be reckoned as a sharer to the estate of Kandaswami Gounder. The plaintiffs contention is that after the death of Kandaswami Gounder in 1955, the only persons entitled to share the estate of late Kandaswami Gounder was the 1st plaintiff and his branch, Nanjappa Gounder and his branch and Subba Gounder. Subba Gounder died in 1959. Prior to his death, it is the case of the plaintiffs, that the family properties which were situate in two different villages were being enjoyed by the sons of late Kandaswami Gounder independently for the purpose of convenience and pursuant to the said arrangement, the 1st plaintiff was in charge of lands situate in Thalakarai village and the other lands situate in Ramapatnam were in the possession and convenient enjoyment of the father Kandaswami Gounder when he was alive and Nanjappa Gounder and Subba Gounder. Such convenient enjoyment of those properties having been acceded to and worked upon by the parties out of their own will and volition, continued till the death of Kandaswami Gounder in. 1955, and. Subba Gounder in 1959. On the death of Subba Gounder the specific case of the first plaintiff is that there was a readjustment about the lands and their enjoyment by each of the surviving members of the family. As a result of such re-allocation, if that expression could be used, the first plaintiff was also entrusted with certain areas of lands in Ramapatnam village besides the lands in Thalakarai, but the first defendant continued to be in charge of the lands in Ramapatnam village Apparently this re-casting of the extent of the lands in the possession of the two surviving brothers was made consequent upon the death of Subba Gounder who was by then a third sharer in the family. In this context, therefore, the plaintiffs' case is that the 1st plaintiff and his branch would be entitled to one-half of the estate of late Kandaswami Gounder and to the other half the 1st defendant and his branch would be entitled. It is to secure independent and separate possession of such a half share, the plaintiffs came to Court. The 1st defendant's case is that Kandaswami Gounder died on 2nd August, 1956 and not in 1955 and that the date of death was after the induction of the Hindu Succession. Act of 1956 and, that therefore, Palaniammal, his sister as a daughter of Kandaswami Gounder would also be a statutory heir under the Act and that her share should be allotted to her. The 1st defendant's further case is that the plaintiffs have failed to include in, the

partible estate, a house which was constructed by the 1st plaintiff in the lands (at) Thalakarai which were in his enjoyment and as such a construction was only possible because the 1st plaintiff and his branch were solely enjoying the income from the lands in their convenient enjoyment and as no partition by metes and bounds of the family properties ever took place, it should be presumed that the said property built by the first plaintiff should be deemed to be an accretion to joint family property and that it should be brought to the hotchpot for partition. Incidentally, he would also concede that he would be responsible for bringing into the pot for purposes of division such of the income which in law he is accountable for to the other members of the family in respect of the lands which he was conveniently enjoying as per this internal scheme of arrangement already referred to. The 1st plaintiff however, in reply would say that the house was built up several years ago and in particular, was put up by him prior to the modified arrangement internally made as between them on the death of Subba Gounder which resulted in the plaintiffs' branch being entrusted with certain lands in Ramapatnam village also for their convenient enjoyment along with the lands already held by them in Thalakarai village. In effect, the first plaintiff's case was that the house was put up by him when he was in enjoyment of the Thalakarai lands which scheme was in vogue even during the lifetime of his father and which arrangement was thought of solely for the purpose of convenient enjoyment of the family lands as between the members. Therefore, the plaintiffs resist the claim of the first defendant to bring the house property referred to in the written statement of the 1st defendant as one of the partible properties to be included in the hotchpot for the purpose of division. We are not summarising the pleading in the usual manner as it is unnecessary to do so having regard to the two main issues which were argued before us by the learned Counsel in this appeal. On the pleadings, the following issues were framed by the learned Judge-

1. Whether the prior partition pleaded by the defendant is true?
2. To what share, if any, is the plaintiff entitled?
3. What are the properties available for partition?
4. Whether the Suit is bad for nonjoinder of necessary parties?

5. Whether the defendant is entitled to value of improvements and if so to what amount?

6. To what relief?

The following additional issue was framed on 9th August, 1966-

1. Whether the sale deed dated 15th September, 1965 is true and valid and whether the 2nd defendant is entitled to any share under the document?

The following additional issues were framed on 28th October, 1969-

2. Whether the plaintiffs are entitled to partition?

3. What is the date of death of the father Kandaswami?

The following additional issue was framed on 24th November, 1969-

4. Whether the suit is bad for partial partition?

2. The lower Court was of the view that Kandaswami Gounder died in Adi 1955 and not in August 1956, as alleged by the first defendant and therefore, negated the defendants' plea that Palaniammal also should be considered as a sharer in the estate of Kandaswami Gounder. On the other issue whether the property claimed by the 1st defendant is the property of the family, he agreed with the plaintiffs that the same would not be joint family property as according to him, the income which a member obtained from the properties held by him and possessed by him, though for convenient enjoyment, would be his separate property and cannot be treated as joint family property in which the other sharers would have an identifiable share. Therefore, he found that the only items available for partition are the plaint schedule properties and disagreed with the 1st defendant that the suit is one for partial partition. He decreed the suit on the above findings. We are not called upon in this appeal to decide whether there was a prior partition as pleaded by the defendants or whether certain other allegations regarding the sale of certain family properties is true or not. We have already prefaced by saying that the two points that are raised by the learned Counsel appearing before us are-(1) whether the house property claimed by the 1st defendant and latterly by his heirs,

the appellants before us, is to be treated as joint family property or not and (2) what is the date on which Kandaswami Gounder died?

3. We shall now take up the first question whether in the circumstances of this case, the property claimed by the defendants-appellants is to be included in the hotch-pot for the purpose of division amongst the sharers. This would depend upon the fact whether the nucleus with which the property was put up by the first plaintiff was joint family asset or joint property. It is not in dispute that the properties were under the convenient and separate enjoyment of the members of the family and that such an arrangement was acceded to and followed up even when the father, the ancestor, was alive. P.W. 1 in his evidence would say that the house property was put up by the 1st plaintiff about 15 to 20 years ago. This not having been contradicted, would mean that the property was put up prior to the date of death of Subba Gounder. The family conceived of a scheme whereby the lands which were situate in two different villages could conveniently be enjoyed by two different sets of members without any interruption by one branch over the other. It is common ground that Kandaswami Gounder, Nanjappa Gounder and Subba Gounder as one unit were in Ramapatnam village and were in charge of the lands situate therein. Equally it is not in dispute that Palani Gounder was put in charge of the other lands of the family but situate in Thalakarai village. It is, therefore, clear that the enjoyment of each of the units as above was pursuant to a domestic scheme conceived by the father in co-ordination with his sons and it cannot be said that it was pursuant to any overt act well thought of by the members resulting in an allotment of those properties to the above units with the intention that each of such units should enjoy the income therefrom absolutely. If in a given case there was some evidence of treatment of the joint family properties by the members of the coparcenary or joint family in and by which the allotment of properties was thought of and as a result of such scheme forged by the members, one or the other of the members of the family, either individually or conjointly was put in possession of identified and identifiable properties belonging to the family, then it is quite possible to imply or presume that the members as a whole in a family council decided amongst themselves that such an allotment is not an empty one but is with a purpose. It would serve as a pointer to the conclusion that the income derived by each of such members or units of the family put in possession of such

separated properties should enjoy the income as if it is their own without any responsibility to account therefor to the other members or other units of the family.

4. Under the old orthodox Hindu Law, it was not clear whether in a case where there was an internal arrangement as between the coparceners of a Hindu undivided family to enjoy joint property separately for convenience, any of the members would be entitled to plead such an arrangement inter partes, to escape the liability to account for the income of such enjoyed properties, in a latterly instituted action for partition by metes and bounds by any one or more of the other numbers. Mullah's Hindu Law, 14th Edn., page 293, dealing with rights of coparceners states-

The whole income of the joint family property must be brought, according to the theory of an undivided family, to the common chest or purse, and there dealt with according to the modes of enjoyment by the members of an undivided family....

But the learned author noted the strides and consequent developments made to this well-established principle by citing judicial precedents. In *Ramayya v. Kolanda* : (1939)2MLJ639 , the ratio laid down in *Bengal Insurance and Real Property Co. Ltd. v. Velayammal* : AIR1937 Mad571 , was accepted. These authorities always rested on the well-known principle that if an allotment of property to any member was made by the manager of the joint family, then such allotment should be presumed to have been made by him not with the intention of making the allottee member accountable for the income of the property allotted. The learned Judges said.-

The idea, undoubtedly when an arrangement of this kind is made, is that while the corpus of property should continue to remain joint the income should exclusively belong to and be at the disposal of the member concerned.

But, in the case before us, the allotment was not made by the manager or the head of the family, Kandaswami Gounder. The evidence discloses that what was taken over by the 1st plaintiff during the lifetime of his father was not in pursuance of an allotment of land, but pursuant to an arrangement for purposes of convenient and sole, enjoyment. Until Subba Gounder died, the plaintiff did not have anything

to do with Ramapatnam lands. It was only after the death of Subba Gounder an allotment, if at all, was thought of by the family. Prior to it, there was no such domestic, internal adjustment equitable to an allotment of properties which was done by the manager in the two reported decisions cited above. We are, therefore, constrained to make a distinction between the two well-known situations which may normally arise. In a case where the members of a family decided for purposes of convenience to take charge of certain properties of the family and administer them, it does not axiomatically follow that the person who has been charged with the responsibilities of possessing such properties is not to account for the income which the properties of which he has taken charge would yield. But the position is different if at a family council the parties exercise their minds and carve out certain properties of the family for purposes of allotment to each of the branches and allot them to such of those sharers who are entitled to it in lieu of their maintenance and the maintenance of their branch. If the evidence in a case establishes that there was such an allotment with the avowed purpose as above, then the ratio in the above two decisions would apply and the income derived by the allottees from the possessed properties would be their own and they would not be in any sense accountable for such income to the other members of the family. That this appears to be the only way to reconcile the situations is clear from the observations of the Division Bench of our Court in *Nagayasami Naidu v. Kochadai Naidu* : AIR1969 Mad329 . The learned Judges said:

The Very idea of allotment for convenient enjoyment, though reserving a right to effect a final partition by metes and bounds, carries with it the necessary implication that the two branches were entitled to deal with the income accruing from the properties allotted to them in any manner they like and either branch will have no claim as against the other in respect of properties purchased out of such income.

The learned Judges laid an accent on the word 'allotment'. We are also of the view that by a mere arrangement, domestic as it ought to be, whereby a certain unit of a joint family or an individual takes charge of certain, carved-out properties he cannot plead that such properties were allotted to him in the realistic sense of the word so as to avoid his responsibility to account for the income from such

properties which he derived by reason of his enjoyment. But if it is a case of an allotment of such properties by reason of a decision which is expressive and positive amongst the members of the family which gives a reasonable impression that such allotment was always intended to give to the allottee an absolute right over the income of the allotted properties, then it follows that if any other properties are purchased from and out of such income, it would be the properties of the allottee and his branch.

5. In the instant case, however, there is no proof that the property sought to be included by the appellants in the joint pool was built or accreted to the joint family by the first plaintiff at a time when there was an allotment of the joint family properties pursuant to a decision taken by the members and the sharers thereof. On the other hand, it has been brought out that the suit property was put up about 15 to 20 years prior to the date when P.W. 1 was examined, which takes us back to a date before the death of Subba Gounder. It is the common case of all parties that prior to the death of Subba Gounder, the father, the first defendant and Subba Gounder as a unit were in possession of the Ramapatnam village lands whilst Palani Gounder was in possession of Thalakarai lands. This was not in pursuance of a scheme of allotment, but only a casual arrangement entered into between the family members for purposes of convenient enjoyment. If this distinction is borne in mind, then the 1st plaintiff cannot escape the obligation to account for the income which he secured by way of surplus income and which obviously went into the building of the property in question. It was pleaded that P.W. 1's maternal uncle helped his father in putting up the superstructure. But, there is no record to support P.W. 1's statement. The learned Judge sweepingly applied the proposition that everything which is an accretion, everything which is an improvement to joint family properties, cannot be treated as joint family property if it is the case of the litigants that such property was in the enjoyment of one or the other of the sharers separately even though for convenience. According to the lower Court, if each branch had been given certain properties for their own maintenance or convenience, they are not accountable for the income and that the first plaintiff had used his savings from such income to construct the house and therefore, it would not become the joint family property. As a general proposition, this is a correct statement of law. But on the facts and circumstances of this case, there is no

evidence to show that the properties in Thalakarai were entrusted to the 1st plaintiff's branch for their maintenance or were allotted to them with no responsibility to account for the income which they derived from such possessed properties. In the view we have taken that in the absence of proof of allotment of such identifiable properties by virtue of a scheme thought of openly by the members of the joint family, it could only be said that the parties were in enjoyment of it for purposes of convenience and that their ancillary responsibility to account does not disappear as a matter of course. We, therefore, agree with Mr. Ramalingam that the lower Court though it stated the proposition of law correctly ought not to have held that the property in dispute which was admittedly put up by the 1st plaintiff (at a time when he was only conveniently enjoying certain lands of the joint family in a particular village) out of the income of such properties can axiomatically be said to be his property on the foot that he was enjoying those lands in Thalakarai as if they were allotted to him and his branch for purposes of their maintenance. The first point is, therefore, found in favour of the appellants. To this extent, the appeal has to be allowed.

6. The second point is as to when Kandaswami Gounder, died. Whilst the appellants would say that he died on 2nd August, 1956, the respondents would say that he died in Adi 1955. Mr. Ramalingam, himself hesitantly contended that Kandaswami Gounder died after the passing of the Hindu Succession Act. Reliance was sought to be placed on Exhibit B-7 which is a death extract relating to one Kandaswami Gounder, No corroborative proof has been adduced to show that Exhibit B-7 relates to Kandaswami Gounder, the father of the 1st plaintiff, the first defendant and Subba Gounder. The lower Court rightly said that intrinsically Exhibit B-7 cannot relate to Kandaswami Gounder, who is the common ancestor in this litigation. The informant has not been shown to be any near relation of Kandaswami Gounder, but he is shown in Exhibit B-7, as the son of Kandaswami Gounder. This itself belies that Exhibit B-7 has anything to do with the father of the first defendant. As against this and the other oral evidence let in by the defendants we have Exhibit A-28, which is an application, sent by the 1st plaintiff, 1st defendant and their sons to the Secretary of the Land. Mortgage Bank Ltd., Pollachi for obtaining transfer of certain shares standing in the name of Kandaswami Gounder in favour of Nanjappa Gounder. This is dated 15th October,

1959. All the contesting parties to the present litigation concede that Kandaswami Gounder died about 4 years prior to the date of the application and that he discharged the debt payable to the Bank by 3rd November, 1955. The parties do not dispute the genuineness of Exhibit A-28. If Kandaswami Gounder died 4 years prior to the date of the application, Exhibit A-28, obviously it means that he died in 1955 and not in the year 1956 at all. If it is not in the year 1956, it follows that it is prior to the induction of the Hindu Succession Act. The argument of Mr. Varadarajan, learned Counsel for the respondents that if really Palaniammal did secure certain rights, it is easily conceivable that she could have also been made a party to the said application. That has not been done. One other document Exhibit A-32 on. which reliance was sought to be placed is an entry made in the chitta register by the village karnam. In the remarks column, there is an entry by the karnam which is said to have been made on 15th September, 1956, wherein he purports to have mentioned the name of the pattadar, Kandaswami Gounder who died on 2nd August, 1956. But it is curious that the karnam of the village appended to the report in this chitta a recital which is totally unconnected with the subject with which he was dealing. The karnam is not examined on the ground that he was very enfeebled. We are unable to place any reliance on the entry written in Exhibit A-32, which remains uncorroborated and which is completely out of the context in which it was written that Kandaswami Gounder died only after the passing of the Hindu Succession Act, to wit, on 2nd August, 1956. The Court below rightly held that the entry regarding the date of death of the pattadar in a chitta register is a very unusual mode of recital when a question of transfer of registry is in issue. In fact, the lower Court compared the disputed entry with other similar entries and did not find any such remarks about the date of death of the prior pattadar in any other case referred to in the chitta. Obviously, therefore, the karnam was helpful enough to the defendants and this entry purporting to notify the date of death of the quondam pattadar is purely a self-serving one. The other documentary evidence relied upon by the defendants such as Exhibits B-14, A-21, A-26 and A-27 do not help them either. Exhibit B-14 is a kist receipt book in respect of the lands in Ramapatnam village. It is found that the kist was paid in the name of Kandaswami Gounder till 1956. Therefore, it is sought to be made out that Kandaswami Gounder was alive in 1956. It is not unusual to expect that public

records are not changed and mutation is not effected promptly by the heirs after the death of the quondam owner. This necessitates the continuance of the name of the ancestor in such public records and payments also are accepted in such names. This by itself is not conclusive. To a similar effect are Exhibits A-21, A-26 and A-27. It is unnecessary for us to consider any other evidence in this case in the light of Exhibit A-28 to which all concerned are parties and Palaniammal was significantly not a signatory to the said application. The lower Court was, therefore, right in having held that Kandaswami Gounder died before the Hindu Succession Act became law and in fact, he died in 1955 and not in 1956. We are unable to agree with the second contention of the learned Counsel for the appellants.

7. Whilst therefore we sustain the judgment of the Court below, we allow this appeal in part and direct that the house mentioned by the first defendant as the property to which the plaintiffs are accountable shall be treated as joint family property. The appellants in their turn Ought to account for the income from the joint family properties in their possession until a re-adjustment and an allotment of the properties were made after the death of Subba Gounder in 1959. The parties will, therefore, account for the income from the properties which were in their respective, possession from 1948 till 1959 when the new scheme of allotment was thought of and implemented. As regards the mesne profits payable by one to the other in respect of their respective occupation of the joint family properties, the parties are relegated to an independent enquiry thereof under Order 20, Rule 12, Civil Procedure Code.

The appeal is accordingly allowed in part and there will be no order as to costs.