
(2008) 10 MAD CK 0076
In the Madras High Court
Case No : A.S. No. 1397 of 1994

Chinnammal (died) and Others

APPELLANT

Vs

Chokkanna Gounder (died) and Others

RESPONDENT

Date of Decision : 23-10-2008

Acts Referred:

Citation : (2008) 10 MAD CK 0076

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Advocate : V.K. Muthuswamy for K. Kalyansundaram, for the Appellant; S.V. Jayaraman and N. Manokaran, for Respondents 1, 2, 6 to 13 and NDW for Respondents 3 and 5, for the Respondent

Final Decision : Allowed

Judgement

K. Kannan, J.—I. The basis of plaintiffs' claim that failed:

The plaintiff's suit for partition of 1/4th share in A and B schedule properties was made on the basis that the suit property belongs to one Apachi Gounder and he died on 21.4.1959 leaving the plaintiff as a daughter and the first defendant as son as his only legal heirs. It was the further contention of the plaintiff that her father had ancestral properties and the acquisitions were therefore of joint family character. The plaintiff conceded that at a notional partition, her father was entitled to 1/2 share and the first defendant was entitled to 1/2 share and on the death of father, the plaintiff was entitled to 1/4th share and the first defendant was entitled to the additional 1/4th share and in all, 3/4th share. The defendants 2 to 5 had been added as purchasers of portions of the properties which were set out in B schedule. The plaintiff had not been a party to the sale transactions and she was entitled to ignore the same and seek for partition.

II The contentions in defence:

2. The first defendant did not deny the availability of the properties, but only contended that the properties did not belong to the father, but they were

properties allotted to him in a partition that took place in the year 1935, without any further specific details. But, according to him, the oral partition fetched about 13 acres to the father and about 14 acres which were in the suit to the first defendant. The father had sold away all the properties that were allotted to him and there were none available for the plaintiff to stake a claim.

III. The lower Court's approach:

3. The trial Court made particular reference to Ex.A8 dated 15.3.1955 and Ex.B24 dated 24.7.1942 which were documents of sale by the father and found, as contended on behalf of the defendants that the first defendant himself had brought about a partition amongst his sons and himself. It said that though it was not binding on the plaintiff, it was an act consistent with his holding as separate owner of the properties. The defendants' further contention was that his daughter had been married to the plaintiff's son, but his daughter had committed suicide in the year 1984 and ever since then, there had been bad blood between the plaintiff and the defendant. The father himself had died admittedly in the year 1959 and the plaintiff had not made any claim for share in the properties only on account of the fact that she knew that she had no right to claim and the present claim is made out of recent animosities that have come about subsequent to the death of his daughter.

4. The trial Court, on a consideration of the documents, found that the properties had been allotted to the first defendant in a partition in the year 1935 and whatever property had been allotted to the father Appachi Gounder had been sold by him. The enjoyment of the suit properties by the first defendant and his purchasers were as owners and that the plaintiff is not entitled to any relief.

IV. The contentions in appeal:

5. Learned Senior Counsel Mr. V.K. Muthuswamy appearing for the appellant contended that the joint family character of the properties had not been denied, but the defendants had only set up a plea of partition between the father and the son and that the 1st defendant's father died in the year 1959. According to him, unless the first defendant established that the suit properties had all been allotted in the partition to the first defendant, the plaintiff could not be non-suited. He would say that, there was no evidence worth the name to establish such a circumstance and the inference of a partition by the only fact that the father had sold some properties under EX.A8 and B24 was clearly wrong. It could not prove that whatever properties had been allotted had been sold. He particularly made reference to the extent of properties sold under the aforesaid two documents as comprised in 8.49 acres and if indeed the father had been allotted more than 12 acres of land, it was for the first defendant to show that there were some more items of properties available to lend credence to his contention that all the properties allotted to him had been sold.

6. Mr. S.V. Jayaraman, learned Senior Counsel appearing for the defendant is alive to the burden on him to establish the case of oral partition in the year 1935

and was fair to contend that if the evidence of DW3 who was an elderly person of 85 years, was believed, his statement about the oral partition would conclude the issue. He read through the entire evidence of DW3, who was the only person who spoke about the so called partition other than the evidence of DW1. DW3 has admitted in his evidence that at the time when the partition was made ,no valuation of the properties had been set forth; neither of the parties nor the panchayatdars inspected the lands before the division. He admits that none of the panchayatdars even suggested that a document of partition should be written for the division between the father and the son. In the cross-examination, he admitted that he was not able to either confirm or deny whether the partition which they were making was merely for the sake of convenience or final one bringing about a division of status between the father and the son. He admits to the suggestion that the properties had been divided provisionally only for the convenience because the son (first defendant) was irresponsible and he was not taking interest in the affairs of the family.

V. Evidence of oral partition, inadequate:

The evidence is too fragile to support the case of partition and of allotment of suit properties to the first defendant. If only the father had been allotted 13 acres and that all the properties had been sold by him, the defendant ought to have adduced positive evidence for the same. The plaintiff could not be expected to prove the negative that the father was not possessed of any other properties. On the other hand, if the father had really sold all the properties of 12 acres, as contended by the defendants, it should have been possible for the defendant to adduce proof through registered instruments that all the properties had been covered under various sale deeds. The contention on behalf of the defendant is that the very inaction of the plaintiff for the years since 1959 when the father died, would itself show that the contention of the oral partition must be true. I do not think that such a reasoning is appropriate, especially when the plaintiff and the first defendant had been cordial till very recently and the plaintiff's son had been married to the first defendant's daughter. In such a degree of filialty, the plaintiff might not have thought it necessary to apply for partition of the property from his brother. There is no averment anywhere in the written statement that possession of the first defendant has been exclusive and in denial of plaintiff's right. Not mere expression of the terms "ouster" or "adverse possession", but even an inference of such legal consequences through any other expressions are not available in the written statement. if the oral partition is not established, the inevitable consequence is that the properties belong to the family in which the plaintiff as a daughter to the father is entitled to 1/4th share. The dismissal of the suit by the Court below is under the circumstances clearly wrong.

VI. Examination of legal propositions adverted:

7. The decisions cited by Mr. S.V. Jayaraman learned Senior counsel viz., 1996 1 LW 310 (Valliammal (late and 2 Ors. v. Pachaiaammal and 1993 3 CTC 263 (D.V. Jaganathan and 5 Ors. v. PR. Srinivasan and 5 Ors.) were cases of adverse

possession where persons in exclusive possession for well over 35 years were found to have established their adverse claims. We have no similar situation in this case. As pointed out earlier, there is neither a plea nor an evidence relating to ouster or adverse possession.

8. Learned Senior counsel for the appellant himself referred to the decisions of the Supreme Court in Karbalai Begum Vs. Mohd. Sayeed and Another, to the effect that mere non-participation profits will not oust the claim of a co-sharer. It is too fundamental a principle to require dilation.

VII Conclusion:

9. In the circumstances, I set aside the Judgment of the II Additional Sub Court, Coimbatore in O.S. No. 22 of 1986 and grant a decree to the plaintiff/appellants, as prayed for. The appeal is therefore allowed. There shall be a direction for a preliminary decree for 1/4th share as prayed for. Having regard to the fact that the parties are close relatives, there shall be no direction as to costs.