

(1999) 09 MAD CK 0102

In the Madras High Court

Case No : S.A. No's. 104 of 1987 and 3 of 1989

Guruvammal and another

APPELLANT

Vs

Subbiah Naicker and others

RESPONDENT

Date of Decision : 24-09-1999

Acts Referred:

Transfer of Property Act, 1882 — Section 52

Citation : (1999) 3 CTC 650 : (2000) 1 LW 488

Hon'ble Judges : K. Sampath, J

Bench : Single Bench

Advocate : Mrs. S. Padma, Mr. K. Rajkumar, for the Appellant; Mr. T.M. Hariharan, Mr. A. Ramanathan, for the Respondent

Judgement

1. Plaintiffs 2 and 3 in O.S.No. 135 of 1976 on the file of the District Munsif, Kovilpatti are the appellants in Second Appeal No. 104 of 1987. The plaintiff in O.S.No. 350 of 1976 on the file of the District Munsif, Kovilpatti is the appellant in S.A.No. 3 of 1989.

2. The suit in O.S.No.135 of 1976 was filed by one Ramu Ammal against the respondents herein for declaration and injunction in respect of five items of properties. Pending suit she died and the present appellants who are respectively her daughter and grand daughter came on record as plaintiffs 2 and 3 and pursued the suit. The case as set out in the plaint was as follows:

The suit properties originally belonged to the first respondent herein, the first defendant in the suit and his brother late Krishnaswamy Naicker. The two were divided brothers, the deceased first plaintiff was their mother. Krishnaswamy Naicker died leaving his mother as his only legal heir. The suit properties were allotted to the share of Krishnaswamy Naicker. He was in possession and enjoyment as his exclusive properties. Patta also stood in his name. After his death the first plaintiff as his sale heir was in enjoyment of those properties. The first respondent herein who had no semblance of right, interest or possession over the suit properties interfered with the possession of the first plaintiff. The

second respondent the second defendant in the suit is the wife of the first respondent and respondents 3 to 6 defendants 3 to 6 were the close associates of the first respondent. They were giving out that they would interfere with the first plaintiff's possession and enjoyment of the suit properties and the suit was therefore necessitated.

3. The first respondent filed a written statement and the same was adopted by the other respondents. There was no partition as alleged between the first respondent and his late brother Krishnaswamy Naicker. The suit properties were not purchased by the first respondent and Krishnaswamy Naicker. Items 1 and 2 of the plaint schedule originally belonged to the first plaintiff. She executed a gift settlement deed in favour of the first respondent and his brother Krishnaswamy and since then they enjoyed the said two items as joint tenants. Items 3 to 5 were jointly purchased in the names of the first respondent and Krishnaswamy Naicker. Even though they were jointly purchased the actual consideration affection for his younger brother he had included his name in the sale deeds. The first respondent and Krishnaswamy Naicker were entitled to a half share each in the schedule properties. They enjoyed the properties as joint tenants. After the marriage of the first respondent with the second respondent there were frequent quarrels among the women folk. With a view to avoid family quarrels and unnecessary complications there was a family arrangement entered into between the first respondent and Krishnaswamy Naicker in respect of the properties in the presence of mediators. As per the family arrangement the first respondent and late Krishnaswamy Naicker had lived in the separate house shown as 5th item in the plaint schedule. Items 1 to 4 were given for their enjoyment without any division. There was no partition as alleged. The kist was being paid as per the enjoyment. After the death of Krishnaswamy Naicker the first respondent alone was enjoying the suit properties. The plaintiffs never enjoyed the properties at any time. Respondents 2 to 6 had no interest or right in the suit properties. The value of the 5th item was more than Rs. 10,000. The Munsif Court at Kovilpatti had no jurisdiction to try the suit. The suit was therefore liable to be dismissed.

4. The other suit was filed by the first respondent against the second appellant in the other appeal, one Perumalswamy Naicker, Ramu Ammal and the plaintiff in O.S.No. 135 of 1976 and Sathurappa Naicker the 6th respondent and 6th defendant in O.S.No. 135 of 1976 alleging that the suit properties which are two in number belonged to him. Patta also stood in his name. The respondents herein and the plaintiff in O.S.No. 135 of 1976 were disturbing his possession and enjoyment. He had also prescribed for title by adverse possession.

5. The suit was resisted by the first respondent herein first defendant in the suit by filing a written statement which was also adopted by the other defendants. The suit properties originally belonged to Ramu Ammal the first plaintiff in O.S.No. 135 of 1976 mother of the appellant and Krishnaswamy Naicker. The 1st item was given to the first respondent herein for her maintenance. The second item measuring 38 cents on the east was allotted to the share of Krishnaswamy

Naicker and he was in enjoyment as his exclusive property and after his death the property was enjoyed by the mother Ramu Ammal. The present suit was bad for non-joinder of the daughter of the first respondent. There was no cause of action to file the suit.

6. There was an additional written statement in which the first defendant contended that by virtue of the gift deed dated 28.5.1976 executed by Ramu Ammal the first respondent and her minor daughter Mariammal alone were entitled to the suit properties. The first respondent alone was in possession and enjoyment of the schedule properties.

7. The learned District Munsif framed the necessary issues in the suits and there was a joint trial by consent of all the parties and a common judgment was pronounced dismissing both the suits. The learned District Munsif held that there was no division as alleged by the plaintiffs in O.S.No. 135 of 1976. The brothers were not enjoying the suit properties as joint tenants as alleged by Subbiah Naicker, the partition alleged was also true, the court had no jurisdiction to try the suit, the settlement deed set up was not valid and the first item in O.S.No. 350 of 1976 was not given to the mother for her maintenance.

8. On appeal by both sets of parties, the learned Subordinate Judge, Tenkasi by a common judgment dismissed both the appeals. Aggrieved, both have come on appeal. In S.A.No. 104 of 1987 the following substantial question of law has been framed for decision.

"Whether the dismissal of the suit on the ground that there is no plea of partition between the brothers and ignoring the voluminous documentary evidence of separate possession and enjoyment under separate patta is legal and justified?"

9. In S.A.No. 3 of 1989 the following two substantial questions of law have been framed;

"(1) Whether the Courts below misdirected themselves in dismissing the suit in spite of holding that the settlement deed executed by the third defendant in favour of defendants 1 and 2 is invalid u/s 52 of the Transfer of Property Act?

(2) Whether the Courts below are justified in dismissing the suit instead of granting lesser relief of partition and separate possession of the suit properties on the available evidence on record?"

10. Mrs.S. Padma, learned Counsel for Mr.T.N. Hariharan for the appellants in S.A.No. 104 of 1987 made the following submissions:

The courts below omitted to note the significance of separate enjoyment of the suit properties in O.S.No. 135 of 1976 Krishnaswamy Naicker from 1964 till he died in 1976 as would be evident from Exs.A-2 to A-20 and Exs A-34 to A59 and in particular, the patta transfer orders in favour of the two brothers under Exs. A.64 and A-65 and the separate patta issued to Krishnaswamy Naicker under Ex.A.1. From this, the courts below ought to have held that partition took place

between the brothers even in 1964 and there was transfer of patta in respect of the properties allotted individually to brothers. It is the submission of the learned counsel for the appellant that the courts below were in wrong in holding that there was no proper plea of partition and allotment of the suit items to Krishnaswamy Naicker as claimed. The courts below failed to note that partition could be oral under Hindu Law and in the instant case, the subsequent enjoyments, dealings and transfer of patta would prove the partition and separate possession of Krishnaswamy Naicker. The courts below clearly overlooked that Subbiah Naicker had not produced anything worth while to show his possession of the properties subject matter of O.S.No. 136 of 1976.

11. Mr.A. Ramanathan representing Mr.K. Rajkumar and Mr. Mani for the contesting respondent, besides supporting the findings reached by the courts below with regard to O.S.No. 135 of 1976 on the reasoning given by them, submitted that with regard to the two items claimed by Subbiah Naicker in O.S.No. 136 of 1976 Exs. A -29 and A-30 coupled with the oral evidence of D.W.3 clearly showed that the two items belonged to Subbiah Naicker and the relief of declaration and injunction ought to have been granted as prayed for. The learned counsel further submitted that the courts below had not properly considered the documentary evidence Exs.B-1 to B-3.

12. Admittedly, there is no deed evidencing partition set up by the appellants in S.A.No. 104 of 1987. No doubt, the appellants have produced the patta and the kist receipts in support of their claim of oral partition. Ex A.1 is the patta standing in the name of late Krishnaswamy Naicker and the properties subject matter of O.S.No. 135 of 1976 are covered under the said exhibit. The second plaintiff/first appellant as p.W.4 has not been specific as to the exact date of the partition nor has she spoken about the share allotted to her brother Krishnaswamy Naicker. The Village Munsif has also admitted in his evidence that he has no personal knowledge about the partition set up. The maternal uncle of Subbiah Naicker, the first respondent herein, claimed that he was present at the time of partition, but he had not been able to say as to what were the properties allotted to the share of Krishnaswamy Naicker or the first defendant. The courts below have rightly held that in the absence of any positive reliable evidence, there was no reason to presume that there was a partition actually entered into between Subbiah Naicker and Krishnaswamy actually entered into between Subbiah Naicker and Krishnaswamy Naicker. P.W.3 stated that 1 Acre and 58 cents in S.No. 94/3 had been given to the mother of the brothers, namely, Ramu Ammal for her maintenance and the eastern portion measuring 38 cents was allotted to the share of Krishnaswamy Naicker, but the patta Ex.A-1 does not contain the S.No.120/3. This would clearly show that there could not have been a partition between the brothers and this is further strengthened by the fact that Ex.B-3 patta book issued to Subbiah Naicker would show that the said item was in the joint possession of Subbiah Naicker and Krishnaswamy Naicker.

13. Let us now advert to the separate possession and enjoyment of the items as

claimed by the appellants. Mr.A. Ramanathan, learned counsel for the respondents, referred to several decisions to substantiate his stand that mere convenience of enjoyment would not in any way prove the factum of any partition between the parties. He also relied on the Commentary on Hindu Law by Mayne 14th Edition Page 818 under the heading "Evidence of partition". Let me first refer to the passage from Nayne which is to the following effect:

"....Partition is a new status, and when it is brought about by the consensus of the members of a coparcenary they must intend that their condition as coparceners shall cease. It is not sufficient that they should alter the mode of holding their property. They must alter, the intend to alter, their title to it. They must cease to be joint owners, and become separate owners. The mere ceaser of commensality and joint worship, the existence of separate the holding of land in separated portions, or a mere definition of share in revenue and village papers, do not establish partition, unless such steps were taken with a view to carry out a partition. The question however is one of fact to be decided, with due regard to the cumulative effect of all the circumstances."

14. It is contended on behalf of the appellants that there was transfer of patta in favour of krishnaswamy Naicker and Exs. A-64 and A-65 orders issued by the Tahsildar relating to transfer of patta would clinch the issue in favour of the appellants. There is absolutely no evidence as to how an order came to be passed by a Tahsildar with regard to transfer of patta.

15. In Kuppammal v. Gattipalli Gopaul Chetti and others, AIR 1915 Mad. 614 a Division Bench of this Court dealing with the value of a Collector's certificate in respect of immovable properties, observed that "a certificate is only evidence of revenue registry and affords no title or security as to ownership."

16. In Nageshar Baksh Singh v. Mt. Ganesha, AIR 1920 PC 46 the Privy Council dealing with settlement records held that "entries in those records, although important evidence of matter recorded cannot be conclusive and that facts of partition or separation of shares is not a matter dealt with in such records."

17. In Thakur Nirman Singh and others v. Thakur Lal Rudra Partab Narain Singh and others, AIR 1926 PC 100 it has been held that "mutation proceedings is not a judicial proceeding and does not decide title and is no evidence of exclusion from property."

18. In AIR 1948 210 (Privy Council) it has been held that,

" A definition of snares in khewats or other. Revenue papers can be regarded as only a very slight indication of title. It is not the injunction of the officer who compiles such papers to decide questions of title. In particular the nice distinctions which arise upon an issue whether or not there has been a separation are not for their determination."

19. It has been held in Bharat Singh and Another Vs. Bhagirathi, that, "the mere fact of the mutation entry being made in favour of the respondent on the death

of her husband was no clear indication that there was no joint family."

20. In Navalshankar Ishwarlal Dave and another Vs. State of Gujarat and others, it has been held that, "mutation of name in Revenue Records is not evidence of title, though it may be relevant for other purposes."

21. It has been held in Smt. Sawarni Vs. Smt. Inder Kaur and Others, that, "mutation of a property in the Revenue records does not create or extinguish the title nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question."

22. In Sankalchan Jaychandbhai Patel and Others Vs. Vithalbhai Jaychandbhai Patel and Others, it has been held that, it is settled law that mutation entries are only to enable the State to collect revenues from the person in possession and enjoyment of the property and that the right, title and interest as to the property should be established de hors the entries. Entries are only one of the modes of proof of the enjoyment of the property. Mutation entries do not create any title or interest therein."

23. In Balwant Singh and another etc. Vs. Daulat Singh (dead) by L.Rs. and others, it has been held that,

"mutation entries do not convey or extinguish any title and those entries were relevant only for the purpose of collection of land revenue."

24. In Kuppuswami Nainar Vs. The District Revenue Officer and Others, a Bench of this Court has held as follows:

"Revenue Officers in a patta proceedings may express their views on the question of title, but such expression of opinion or decision is not conclusive and it is only intended to support their decision for granting patta. Ultimately, it is the civil court which has to adjudicate the question as to whether the person claiming patta is the title-holder of the land. Even if the revenue authorities decide the question of title, that will not in any way affect the jurisdiction of the civil court, which has to decide the question without reference to the decision of the revenue authorities."

25. It has been held by Sathasivam, J. in Arulmigu Viswewaraswami and Veeraraghava Perumal Temples Vs. R.V.E. Venkatachala Gounder and Another, as follows:

"Much reliance cannot be placed on municipal extract and tax receipts in order to prove title of any particular part."

26. Thus the position on this aspect is well settled, it has not been shown by the appellants that de hors Exs. A-64 and A- 65 there is any material available to substantiate their case of partition between Krishnaswamy Naicker and Subbiah Naicker.

27. Conceding that there was a separate enjoyment by the brothers, that will not

by itself show that there was any completed partition between the brothers. The legal aspect is well settled. In Appavu @ Lakshmanan Pillai and another vs. Manikkam Pillai and four others ILR 1946 Mad 557 it has been held as follows:

"The fact that the members of a Hindu joint family divide among themselves some of the family assets, such as income from agricultural lands, outstandings and other movable property, does not in itself mean a division in status. In deciding whether a joint family has become divided the Court must have regard to the terms of any instrument bearing on the question and the subsequent conduct of the parties. Statements made by members of the family on certain occasions for certain purposes that they are joint or divided in status are not of much consequence. It is not their statements but their relations with the estate that must be taken into consideration in determining the issue."

28. In P. Kaliappa Gounder and Others Vs. Muthuswami Mudaliar, it has been held by a Bench of this Court that, separate possession for the sake of convenience is no partition. The fact of separate enjoyment of specified portions for making improvements over such portions and of obtaining loans will not turn joint ownership into ownership is severally and in specie in the eye of law.

29. I am clearly of the view that the partition set up by the appellants has not been established. The substantial question of law raised in S.A.No. 104 of 1987 is therefore answered against the appellant and the second appeal is dismissed. There will, however, be no order as to costs.

30. Now going to the other second appeal, the appellant claims that the two items subject matter of O.S.No. 350 of 1976 belonged to him absolutely. As noticed by the courts below, Ex.B.3 patta had been jointly in the names of the appellant and his brother Krishnaswamy Naicker and no kist receipts or any cultivation extracts were placed before the Court to show that the appellant was in exclusive possession of the two items. In fact, as found by the Courts below a gift deed Ex.A.31 had been jointly executed by the appellant and the deceased Krishnaswamy Naicker in favour of their mother Ramu Ammal. No exception can be taken to the finding reached by the Courts below that the items subject matter of O.S.No. 360 of 1976 did not belong to the appellant exclusively and that they were joint properties of the two brothers. In view of the above, the first substantial question of law does not really arise for consideration.

31. So far as the second substantial question of law is concerned, it is seen from the records that all the properties claimed as belonging to the brothers are not subject matter of the suits. There are items left out which are found in the various documents. The relief of partition cannot therefore be granted in the present proceedings. It is open to the parties to have the matter agitated in a comprehensive suit for partition including all the properties and impleading all the parties. The second appeal will stand dismissed. There will, however, be no order as to costs.