

(1891) 04 MAD CK 0008
In the Madras High Court

Narangatile Chengotteri Chandu Nambiar	APPELLANT
Vs	
Murichandiyil Kunhamed Kutti	RESPONDENT

Date of Decision : 02-04-1891

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13

Citation : (1896) 6 MLJ 550

Judgement

1. As to the first question decided against 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 appellant's vakil before us and not denied on behalf of respondent that 1st, 2nd and 3rd defendants are governed

by the Mahommadan law of succession, and that this is so further appears from the nature of the claim in the former suit, O.S. No. 521 of 1882.

This being so, the principle laid down in Venkatarama v. Meera Labai ILR 11 M. 204 and the cases there followed have no application to the

present case. A sharer by Maham-madan 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 Mahammadan 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 [533] case no other persons but

plaintiff, and his mortgagor 1st defendant on the one side and 2nd and 3rd defendants on the other have any interest in the paramba in dispute and

therefore a division of the properties as yet undivided between 1st, 2nd and 3rd defendants and their co-sharers could not be made in this suit,

plaintiff having no concern with it. We think therefore the suit is not open to the objection that it relates to 1st defendant's share in one only of the

properties inherited by him and his co-sharers from Kunhamed. On the merits, 2nd defendant's contention in this case is that the paramba in

dispute was not part of the property of Kunhamed divisible amongst 1st defendant and his co-sharers but was originally the separate property

called stridhanam with that misuse of Hindu law terms common among Mahammadans on the west coast, of his 2nd defendant'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 O.S.

No. 521 of 1882, which was brought by other sharers for recovery of their shares in this paramba and other properties. An issue (the 5th) was

raised in that suit whether this paramba was partible or not,. and decided against present 2nd defendant who was 6th defendant in, that suit. In his

judgment the Munsif observed ""The witnesses examined for plaintiffs swear that the property No. 25 (the paramba now in dispute) in the plaint is

in the possession of 1st defendant. The 6th defendant who claims these properties adverse to plaintiffs has not offered any evidence. I therefore

find the 3rd to 5th issues for plaintiffs."" There can be no doubt therefore that the title now set up by 2nd defendant was decided against him in that

suit and the only question is, was it a judgment inter partes and therefore conclusive as between plaintiff and 2nd defendant in this suit. 1st

defendant under whom plaintiff claims was party, to the former suit but he was ex parte and therefore the title of 2nd defendant cannot be said to

have been actively contested between the present 1st and 2nd defendants in that suit so as to bring the case within the decision in Venkayya v.

Narasamma ILR 11 M. 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 1st defendant and their other co-sharers Were entitled to share, and present 2nd defendant denying the same

and claiming it as his own property, and therefore [834] present 1st defendant and the other co-sharers may be said to claim under 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 2nd defendant's title is

res judicata and conclusive against him in this suit, and on this ground 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. The 2nd defendant must pay plaintiff's

costs in this and the Lower Appellate Court. ?