
(1915) 03 MAD CK 0029
In the Madras High Court

P.S. Shadagopa Naidu and Another

APPELLANT

Vs

P.S. Thirumalaswami Naidu

RESPONDENT

Date of Decision : 29-03-1915

Acts Referred:

Succession Act, 1865 — Section 187

Citation : 30 Ind. Cas. 272

Hon'ble Judges : Kumaraswami Sastri, J

Bench : Single Bench

Judgement

Kumaraswami Sastri, J.—This is a suit filed by the minor plaintiffs through their next friend for an account of the joint family properties

belonging to themselves and their father, the defendant, for a partition of the properties and for delivery to them of their share of the properties.

2. The plaint sets out that the plaintiffs (who are the sons of the defendant) and the defendant are members of an undivided Hindu family possessed

of the joint family properties mentioned in the plaint and that they are each entitled to 1/3rd share therein. The plaintiffs pray for a partition on the

ground that the defendant is leading a reckless and immoral life, that he is living in the house of some prostitute or other after having driven his wife

out of the house, that he is addicted to drink and that he has not been attending to his business. It is also alleged that he has been threatening to

alienate the properties to prejudice the plaintiffs and is denying their rights to the properties, alleging that they are his own absolute properties--

bequeathed under the Will of his father.

3. The defendant tiled a written statement denying the allegation in the plaint as to his conduct and character and pleading that of the properties

mentioned in the plaint the business of Duff & Co. was bequeathed to him absolutely under the Will of his father, that house No. 1/17 and 2/17

mentioned in the plaint was bequeathed to his mother for life and to him absolutely after her death, that the village mentioned in the plaint was

purchased by him after the death of his father for Rs. 8,000, that he paid Rs. 4,000 on account of principal and Rs. 1,000 on account of interest to

the vendor, that he improved the property purchased by building a house in the village at a cost of Rs. 1,000. He denies that he has driven his wife

out of the house and states that she was not behaving properly towards him and was leaving his house frequently without sufficient reason and that

in January 1914, she left his house without his permission and has since then refused to come back to his house though asked to do so. As regards

the allegation in the plaint as to his living in the house of some prostitute or other he states that owing to the conduct of his wife who was also a

sickly woman, he has for sometime been keeping a woman who is living in No. 3/7, Venkatachela Achari Street, Komaleswaranpet, Madras,

which is connected with house No. 17, Chandrabhan Street, referred to in the plaint as its third compartment. He states that the woman is

occupying the house free of rent and that he is paying her only Rs. 15 a month,

4. The following issues were settled:

(1) Is it in the interest of the minors that a partition should be effected?

(2) Did the defendant get the business of Duff & Co. under the Will of his father and if so, is it not partible?

(3) What are the joint properties available for partition?

(4) To what relief are plaintiffs entitled?

5. While the plaintiffs state that the properties mentioned in the plaint are joint family properties, the defendant claims them as his self-acquisitions.

There are three items of properties mentioned in the plaint, viz.;

(1) House and ground No. 1/17 and 2/17, Chandrabhan Street, Komaleswaranpet,

(2) Stock-in-trade, outstandings, goodwill, etc., of the business of Duff & Co., and

(3) Village of Thiruneermalai near Pallavaram.

6. So far as the first two items are concerned, it is admitted that the properties belonged to the grandfather of the plaintiffs. As regards item (3) it is

admitted that the property was purchased after the death of the defendant's father by the defendant. It was conceded by the defendant's Vakil at the trial that if items Nos. 1 and 2 are found to be the joint family properties of the plaintiffs and defendant, item No. 3 which was acquired in part with the aid of income from No. 2 would also be joint family property. So far as items Nos. 1 and 2 are concerned it is alleged that the properties were bequeathed to the defendant under a Will which is marked as Exhibit I. This Will has been proved by P.W. No. 1, Perumal Naidu, who is a retired Sub-Assistant Surgeon and is one of the attesting witnesses to the Will. Probate has not been taken out for this Will and the question is whether the Will can be admitted in evidence on behalf of the defendant. On this question I am of opinion that the balance of authorities in Madras is in favour of the view that a Will, though not probated, may be used by a defendant in order to contest the plaintiff's suit. In *Janaki v. Dhanu Lal* 14 M.k 454 it was held that, although executors cannot establish any right without taking Probate, the existence of a Will cannot be ignored for all purposes whatsoever, and that it is open to the defendant to contest the plaintiff's right by setting up and proving a Will of which Probate was not taken. This case was followed in *Carlapatti Chinna Chunniah v. Cota Wammlivariah* 3 Ind. Cas. 475 where it was held that a defendant was not precluded by Section 187 of the Succession Act from setting up an unprobated Will in answer to a plaintiff's claim and *Janaki v. Dhanu Lal* 14 M.k 454 was relied on. Reference has been made by the plaintiff's Vakil to *Lakshamma v. Ratnamma* 21 Ind. Cas. 698 where it was held that Section 187 of the Succession Act barred not only the executor or legatee from claiming under an unprobated Will, but also a stranger who seeks to use the Will as a *jus tertii*, for the purpose of his defence. *Janaki v. Dhanu Lal* 14 M.k 454 and *Carlapatti Chinna Cunniah v. Cota Wommalivariah* 3 Ind. Cas. 475 are not referred to in the course of the judgment and their Lordships disposed of the question by stating that no authorities have been cited or reasons suggested for the distinction drawn between a plaintiff seeking to prove his unprobated Will and the defendant using the Will as a defence to plaintiff's section. Reference has also been made by the plaintiffs' Vakil to the cases reported as *Basunta Kumar Chuckerbutty v. Gopal Chunder Das* 18 C.W.N. 1136 and *Achyutananda Das v. Jagannath Das* 27 Ind. Cas. 739. In the former case it

was observed that a Will uncovered by Probate or Letters of Administration cannot be used to prove that anybody named therein has any title to the testator's estate but that there was no absolute prohibition to use it for any other purpose. In the latter case Justice Mookerjee observes as follows: That section (Section 187 of the Succession Act) merely provides that no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction shall have granted a Probate of the Will under which the right is claimed or shall have granted Letters of Administration...;this does not debar the use of the Will in evidence for a purpose other than the establishment of a right as executor or legatee." These cases do not support the extreme view taken in the case of Lakshmamma v. Ratnamma 21 Ind. Cas. 698. I am of opinion that I am bound by the reported decisions as Janaki v. Dhanu Lal 14 M.k 454 and Carlapatti Chinna Cunniah v. Cota Wammalivariah 3 Ind. Cas. 475 which have not been referred to or overruled in Lakshmamma v. Ratnamma 21 Ind. Cas. 698 : 25 M.L.J. 556. The Will, therefore, is admissible in evidence although it is not probated.

7. As it is contended by the plaintiffs that the Will even though admissible does not confer any absolute property on the defendant but vests the property in him as joint family property, it is necessary to consider the terms of the Will. Reading the Will as a whole, it seems to me that the scheme of the Will is in favour of the view that the testator intended his sons to take property as joint family property. In paragraph 2 of the Will he sets out the properties he possessed of. In paragraph 3 he gives certain Immovable properties to his daughters. Paragraph 4 which deals with the business of Duff & Co. is as follows:

The (Duff & Co.) business, item (a) mentioned in paragraph 2 above, shall after my life-time be taken by my eldest son Chi. P.S. Tirumalai Naidu for his share with absolute rights and with powers of gift and sale, conducted carefully and enjoyed." The use of the words his share suggests clearly to my mind that it was taken by his son as his share of the property of his father. Paragraph 6 gives his sons certain Immovable properties including house No. 1/27 and 2/27, Chandrabhan street, mentioned in the plaint subject to the life-interest of his wife. The most important paragraph is No. 7 which runs as follows: If any of my sons die issueless leaving

only a widow, the properties comprised in his or their share shall immediately be taken by surviving sons or their male heirs in equal shares and enjoyed and suitable maintenance provided to their widow or widows." It is clear from the above paragraph that the testator intended his sons to take the property as members of a joint and undivided Hindu family with the rights of survivorship inter se. In coming to a conclusion as to whether the properties are taken absolutely or with the incidents of ancestral property, the terms of the Will have to be ascertained as indicating the intention of the testator, and if there are no words indicating a contrary intention, the natural inference is that the father intended his sons to take the property as ancestral property. The principles which are to govern a case like the present have been clearly set out in Nagalingam Pillai v. Ramachandra Tevar 24 M.k 429 where their Lordships observe as follows: "As the father is at liberty to make any disposition he pleases or to leave his self-acquired property to descend as ancestral property, so when making any disposition in favour of his son he is at liberty to preserve for the property the quality of ancestral property. Whether in any given case the property was intended to pass to the son as ancestral property or as self-acquired property must be a question of intention turning on the construction of the instrument of gift. Following the principles laid down in Mohamed Shumsool Hooda v. Shewukram 14 B.L.R. 226. I think that if there are no words indicating the contrary intention, the natural inference should be that the father intended his sons to take his property as their ancestral estate." I am of opinion that the defendant under the terms of his father's Will took the properties as joint family properties and that the plaintiffs have an interest therein.

8. I shall now deal with the issues seriatim:

First Issue: It is now settled law that a minor plaintiff can file a suit for partition if there are circumstances which show that it would be for his

interest to separate his share and that it is not necessary to prove malversation on the part of the adult members. In Mahadev Balvant v. Lakshman

Balvant 19 B.k 99 Mr. Ranade observes as follows:

it is true some of the earlier decisions required proof of malversation or mismanagement, but the later decisions have laid down both a positive and

a negative test, namely,

that no suit by a minor co-parcener...should be allowed, unless his interests are...likely (1) to be advanced thereby, or (2) protected from danger.

9. The question is whether in the present case it is in the interests of the minors to effect a partition, and I have no hesitation in coming to the

conclusion that it is. The defendant has set up a hostile title and has denied the rights of the minor plaintiffs to any share of the properties and while

this is found against it is the duty of the Court to safeguard the interests of the minors by declaring their rights and giving effect to such a declaration.

In *Kamakshi Ammal v. Chidambara Reddi* 3 M.H.C.R. 94 it was held that a minor plaintiff is entitled without proof or anything more to have a

decree for partition as against an adult co-parcener who denies the minor's rights to the properties and sets up an independent and hostile claim.

A similar view was taken in *Thangam Pilled v. Suppa Pillai* 12 M.k 401. In addition to these there is the admitted fact that the defendant is keeping

a concubine who is living in a part of the house although it bears a different number. It is unnecessary in this suit to consider whether he has driven

out his wife or whether she left him voluntarily as she is not a party to the suit: but the fact remains that the defendant (father of the plaintiffs) has

denied the title of his sons and he is now living apart from his wife with a concubine. I think these circumstances are quite sufficient to show that the

interests of the plaintiffs would be jeopardized if their rights are not declared and the 1st defendant prevented from dealing with their rights. I find

the 1st issue in plaintiffs' favour.

Second Issue: I have already given my reasons for holding that the business of Duff & Co. is not the absolute property of the defendant but is

partible.

Third Issue: It is not shown that there are any properties available for partition other than those mentioned in the plaint.

Fourth Issue: There will be a decree declaring that the plaintiffs are each entitled to 1/3rd share in the properties mentioned in the plaint. As regards

item No. 1 their rights to partition can only arise after the death of their grandmother and so at present there would only be a declaration made. As

regards items Nos. 2 and 3 the plaintiffs will be entitled to 1/3rd share each subject to their liability to pay the debt due to K. Rangiah which was

incurred on account of the purchase of item No. 2.

10. Then the next question is whether I ought in this suit to declare a partition by metes and bounds so far as the village is concerned and to wind up the business of Duff & Co., and give the plaintiffs 1/3rd share each in these properties. The plaintiffs have not adduced any evidence of malversation and the plaintiffs" Vakil states that there is no objection to the plaintiffs" rights being declared and their status divided and the defendant appointed as guardian of their person and property. I think this course would, while protecting the plaintiffs adequately, prevent any unnecessary disturbance or disruption in the family. I, therefore, appoint the defendant to be the guardian of the person and properties of the minor plaintiffs and declare that they are members of a divided family from the date of this decree. The defendant will file in Court a balance-sheet every year showing the profits and losses of the business of Duff & Co. As regards the income of properties, I do not think it necessary for the present to make any special order as the plaintiffs are under the protection of the defendant and he will be meeting all their expenses.

11. A decree will be drawn up in the following terms:

(1) declaring that the plaintiffs and defendant are members of a divided family from the date of the decree, plaintiffs being entitled to 1/3rd share each in the properties mentioned in the plaint;

(2) appointing the defendant as guardian of their person and property without any power of alienation of the Immovable properties without the consent of the Court; and

(3) requiring the defendant to file in Court a balance-sheet every year of the business of Duff & Co., and giving him liberty to appropriate the income of the properties towards the maintenance of himself and the other members of the family until further orders of the Court without any necessity to file, any accounts of such expenditure.

12. As regards the costs of the suit, I am of opinion that the defendant should pay the costs of the plaintiffs as he has substantially failed on all the points set up by him.