

(2012) 02 MAD CK 0340
In the Madras High Court
Case No : A.S. No. 423 of 2008

Sulochana and Others

APPELLANT

Vs

Thilakavath

RESPONDENT

Date of Decision : 10-02-2012

Acts Referred:

Hindu Succession Act, 1956 — Section 15, 15(1), 15(2), 16

Citation : (2012) 3 CTC 178

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : P. Valliappan, for the Appellant; G. Purushothaman, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice G. Rajasuria

1. This appeal is focussed by the plaintiffs in the suit, as against the judgement and decree dated 29.8.2007 passed by the Principal District Court at Perambalur, in O.S.No.1 of 2004, which was one for partition. The parties, for the sake of convenience, are referred to hereunder according to their litigative status and ranking before the trial Court.

2. The facts giving rise to the filing of this appeal, as stood exposted from the records, could succinctly and precisely be set out thus:

(i) The appellants herein, as plaintiffs filed the suit as against the sole defendant, seeking partition in respect of the two schedules of properties, with the following prayer:

(i) to pass a preliminary decree for partition and separate possession of plaintiffs' 19/24 share in "A" Schedule property.

(ii) To declare 1st plaintiff's 1/2 share in "B" Schedule property.

(iii) For accounts, and for costs." (extracted as such)

(ii) The defendant resisted the suit by filing written statement. Whereupon issues were framed by the trial Court.

(iii) During trial, the plaintiffs examined themselves as P.Ws.1 to 5 and Exs.A1 to A16 were marked. On the defendant's side, she examined herself as D.W.1 along with D.W.2 and Exs.B1 and B2 were marked.

(iv) Ultimately, the trial Court dismissed the suit.

3. Being aggrieved by and dissatisfied with the judgement and decree of the trial Court, the plaintiffs filed this appeal on various grounds.

4. The indubitable and indisputable or at least the undeniable facts would run thus:

(i) One Ramudu Chettiar got the "A" schedule property, described in the plaint, along with other items, in a partition which emerged between himself and his brothers, as revealed by Ex.A6-the copy of the partition deed dated 4.7.45.

(ii) The said Ramudu Chettiar died on 18.7.72 leaving behind (1) his wife Munirathinam Ammal the deceased first plaintiff, (2) his son Chinnikrishnan the deceased husband of the sole defendant Thilagavathy, (iii) Kasthuri his deceased daughter original second plaintiff and (iv) his one other daughter-D3-Sulochana. D4 to D7 are the legal heirs of Kasthuri.

(iii) It so happened that during the year 1972 the original suit O.S.No.686 of 1972 was filed by the aforesaid Kasthuri and Sulochana, seeking partition in respect of four items of properties including the "A" scheduled property in this suit and the said suit was ultimately dismissed as settled out of Court on 20.8.76.

(iv) It is the contention of the plaintiffs that in fact, no settlement was arrived at and the co-sharers continued to be in joint possession and enjoyment of the properties. The co-sharers jointly sold three items of the joint properties, vide sale deeds dated Ex.A3 dated 18.8.1976, A4 dated 16.5.1977 and Ex.A5 dated 28.2.1978.

(v) The "A" schedule property herein remains undivided and therefore, the plaintiffs did choose to file the present suit for partition. They also claimed their share of income in the joint business referred to in the "B" Schedule of the plaint.

5. Per contra, the defendant would put forth and set forth her contentions, a thumb nail sketch of the same would run thus:

(i) The previous suit O.S.686 of 1972 was dismissed consequent upon the settlement arrived at among the co-sharers. In fact, the sale deeds executed jointly by the co-sharers referred to supra would reveal and demonstrate that such execution of the sale deeds emerged in pursuance of the amicable settlement only and the husband of the defendant, namely, Chinnikrishnan parted with major shares in the sale proceeds in favour of the other co-sharers,

so to say, the plaintiffs and thereby, by 1976 itself the joint status among them came to an end.

(ii) Subsequently, the said Chinnikrishnan sold some portion of the remaining properties, which were retained by him as his exclusive property and at that time, none of the plaintiffs raised any objection or their accusative finger.

(iii) To the knowledge of the plaintiffs, Chinnikrishnan started enjoying the suit properties exclusively as his properties till his death on 19.10.1994. Uptil his death there was no whisper at all from the plaintiffs claiming any share because of the obvious reason that already there was partition emerged between them and amicably their shares were settled. A sum of Rs.30,000/- (rupees thirty thousand) each also was given to other co-sharers by Chinnikrishnan. Only after Chinni krishnan's death, the plaintiff did choose to file this vexatious suit.

(iv) The business referred to in the Schedule-B was started exclusively by Chinnikrishnan and because of his hard work he could carry on with the business; wherefore, the plaintiffs cannot claim any share in the income derived from the business.

(v) The superstructure concerning that business premises also was raised by Chinnikrishnan, over which, the plaintiffs cannot claim any right.

(vi) On the dismissal of the earlier suit O.S.No.686 of 1972, the cause of action for seeking partition, at the instance of the plaintiffs, came to an end and as a sequel ,there is no question of the plaintiffs once again filing the present suit for partition.

Accordingly, the defendant prayed for the dismissal of the appeal.

6. The learned counsel for the appellants/plaintiffs, by placing reliance on the grounds of appeal would pilot his arguments ,inviting the attention of this Court to various portions of the judgement and the warp and woof of the same would run thus:

(a) Consequent upon the death of Ramudu Chettiar, his entire properties, including the "A" schedule property, devolved upon his widow Munirathinam Ammal and his one son and two daughters, as narrated supra.

(b) Consequent upon the death of Chinnikrishnan the husband of the defendant, his share got devolved on his mother Munirathinam Ammal and his wife in equal moiety.

(c) On the death of Munirathinam Ammal, her shares in the suit properties devolved upon her two daughters. Over and above that, Munirathinam Ammal also executed a registered "Will" as contained in Ex.A13 dated 23.11.1994, bequeathing her entire shares in favour of her two daughters. If for any reason, the said Will is held to be not valid, the position remains the same, because, on the death of Munirathinam Ammal, her two daughters alone are entitled to her shares in the suit properties and Munirathinam Ammal's deceased son's wife,

namely, the defendant, as per Sections 15 and 16 of the Hindu Succession Act, was not entitled to any share in the share of Munirathinam Ammal.

(d) Viewing from any angle, the plaintiffs are entitled to 11/16 th share and the defendant is entitled to 5/16th share and over and above that, the defendant also should account for the income derived from the business and in that also, the plaintiffs are entitled to the share.

(e) The trial Court, without considering the pros and cons of the matter and also the salient features involved in this case, simply dismissed the claim of the plaintiffs on mere conjectures and surmises.

Accordingly, the learned counsel for the appellants/plaintiffs prayed for setting aside the judgement and decree of the trial Court and for decreeing the suit as prayed by them in this appeal.

7. Per contra, in a bid to shoot down and torpedo, pulverise and mincemeat of the arguments as put forth and set forth on the side of the appellants/plaintiffs, the learned counsel for the respondent/defendant would advance his arguments ,which could tersely and briefly be set out thus:

(a) The dismissal of the earlier suit O.S.686 of 1972 is certainly a bar for the appellants/plaintiffs to file the present suit and prosecute the same.

(b) Exs.A1 and A2-the certified copies of the decree and judgement in O.S.No.686 of 1972 would demonstrate and connote that D1-Munirathinam Ammal - the deceased P1 in this suit, was directed to pay Court fee, which she failed to comply with; whereupon her claim was rejected and subsequently, the suit filed by Kasthuri Bai and Sulochana was dismissed as settled out of Court. The defendant pleaded ouster and also the facts that subsequent to the settlement emerged among the co-sharers during 1976, Chinnikrishnan started enjoying the remaining properties, including the suit properties as his own properties and he also alienated a portion of it, over which, the other co-sharers, who are now vexatiously and unjustifiably claiming shares did not raise any objection. Only as an after thought and that too, after the death of Chinnikrishnan, the plaintiffs did choose to file this suit, so as to cause harassment and discomfiture to the defendant-the widow of deceased Chinnikrishnan.

(c) Reiterating the averments in the written statement as part of his arguments ,the learned counsel for the respondent/defendant would pray for dismissing the appeal.

8. The points for consideration are as under:

(1) Whether the dismissal of the previous suit O.S.686 of 1972, as revealed by Exs.A1 and A2-the decree and judgement thereon, is a bar for the plaintiffs to file the present suit O.S.No.1 of 2004 and prosecute the same?

(2) Whether the respondent/defendant proved her plea of ouster?

(3) Whether the trial Court was justified in disbelieving the Will-Ex.A13?

(4) Whether the defendant proved that there was settlement emerged among the co-sharers and as a squal ,the defendant's husband Chinnikrishnan paid a sum of Rs.30,000/- each to other co sharers and settled their entire claim over the joint properties?

(5) Whether the trial Court properly applied the principle of burden of proof in deciding the list?

(6) Whether the business referred to in the "B" Schedule of the plaint could be taken as a joint family business and if so whether the plaintiffs are entitled to any share in the income? and to what extent?

(7) Whether there is any perversity or illegality in the judgement and decree of the trial Court?

9. All these points are taken up for discussion, as they are interwoven and interlinked, interconnected and entwined with one another.

In re relationship and coparcenary status:

10. Unassailably and unarguably, the genealogy, as found set out in the plaint is an accepted one. The trial Court unwittingly, ignoring Ex.A6-the certified copy of the partition deed dated 4.7.45, held in paragraph No.16 of the judgement as though the said partition deed was not at all filed in Court, even though in the previous paragraph itself Ex.A6 was referred to under some other context. In the list of documents appended to the judgement of the trial Court, the said Ex.A6 is referred to as the certified copy of a registered Will. By way of adding fuel to the fire, Exs.A3, A4 and A5-the certified copies of the sale deeds were referred to as certified copies of registered Wills. To say the least the trial Court should have been cautious enough in adverting to all these facts before rendering the judgement.

11. At the time of argument ,both sides did not venture to question the coparcenary status of the properties, which came into the hands of Ramudu Chettiar, as per the said partition deed Ex.A6. In the earlier litigation in O.S.No.686 of 1972, as many as four items of suit properties were contemplated; whereas ,in the present suit, out of the those items, the second item alone is referred to as the "A" scheduled property. The remaining properties referred to in the earlier suit were sold, as per Exs.A3 to A5 jointly by all the co-sharers, narrating the history as to how the property came into the hands of Ramudu Chettiar and how, after his death, those properties devolved upon the other co-sharers jointly, namely, the widow, the son and two daughters of the deceased Ramudu Chettiar.

In re notional shares of parties on the death of Ramudu Chettiar:

12. At this juncture, for better discussion and clarity, it is just and necessary to quantify the respective shares, treating the "A" schedule property as the co-

parcenary property. Consequent upon the death of Ramudu Chettiar on 18.10.1972, the properties stood notionally divided into two halves, one in reconsideration of deceased Ramudu Chettiar's entitlement and another in favour of Chinnasamy. Ramudu Chettiar's half share is deemed to have got devolved on his four legal heirs, namely, his widow, his son and his two daughters, referred to supra. As such, Ramudu Chettiar's son Chinnikrishnan was notionally entitled to the said half share plus 1/8th share and his widow and two daughters were entitled to 1/8th share each.

In re bar of present suit:

13. Reverting back to the discussion, it is worthwhile to refer to the contentions of the defendant. Eventhough the legal position would be as aforesaid, according to the defendant, the said widow, namely, Munirathinam Ammal, in view of her conduct in the previous litigation in not paying the Court fee and consequently having got her claim rejected by the lower Court, was not entitled to any share. It is also the contention of the defendant that the dismissal of the suit O.S.No.686 of 1972 would be a bar for the present plaintiffs to prosecute this legal proceeding for partition.

14. The learned counsel for the defendant would try to canvas the case of the defendant by pointing out that consequent upon the dismissal of the earlier suit as settled out of Court, the plaintiffs cannot once again rake up the issue of partition and that too, after getting the matter settled amicably and also receiving various amounts from Chinnikrishnan the husband of the defendant.

15. At the first instance, the law point has to be looked into as to whether the dismissal of the earlier suit as settled out of Court is a bar for the present suit.

16. I would like to fumigate my mind with the following decisions of this Court:

(i) 1996(1) MLJ 375 - P. Paul James Alias Paulus V. P. Jesudas Cyril And Others

(ii) 2009 (3) CTC 760 - Balamani And Another V. S.Balasundaram.

17. Simply because a partition suit was dismissed earlier for default or settled out of Court, the co-sharers are not precluded from instituting a fresh suit for partition, if in reality no settlement got fructified. Compromise decrees are on a different footing, one should not get perplexed or flummoxed by indulging in making false analogy between compromise decrees and suits dismissed as settled out of Court. It is not a case, where, the defendant is trying to put forth a case to the effect that before the dismissal of the previous suit, the matter was completely settled and that the present plaintiffs, by having a volte face and quite antithetical to their earlier stand are trying to canvas the old case itself. According to the defendant, after the dismissal of the suit, there were alienations of the joint family properties by all the co-sharers, as revealed by Exs.A4 and A5 and in fact, Ex.A3 emerged two days before the dismissal of the earlier suit.

18. In this context, I would like to fruitfully refer to the following maxims:

(i) Affirmatis est probate - He who affirms must prove.

(ii) Affirmative ,non neganti incumbit probatio - The burden of proof lies upon him who affirms, not upon one who denies.

19. It is the duty of the person who affirms a particular fact to prove it and he cannot call upon the other side to prove the negative aspect.

20. Accordingly, if viewed, the "onus probandi" is on the defendant to prove clearly and categorically, unambiguously and unequivocally that there was amicable partition and also payment of a sum of Rs.30,000/- each in favour of the other co-sharers by one of the co-sharers, namely, Chinnikrishnan the husband of the defendant. Except the oral statement of D.W.1-the defendant and D.W.2-Rajasekaran-the alleged mediator, there is no documentary evidence in support of the defendant's contention. As such, the depositions of D.Ws.1 and 2 are their ipse dixit.

21. D.W.2 would depose as though a panchayat muchilika emerged. If so, that ought to have been filed before the Court. In fact, D.W.2 went to the extent of deposing during his cross-examination as under:

Vernacular matter deleted

22. I am at a loss to understand as to how D.W.2 can go to the extent of deposing something, which are not borne by records. He would assert as though there emerged a panchayat muchilika, but that was not filed in the Court. He would also state that the alleged factum of the payment of Rs.30,000/- to each of the contesting co-sharers by Chinnikrishnan was also recorded in the Court. If that is so, certified copy of the Court records should have been filed in this proceeding, but that was also not done. It is not known as to how the defendant herself can rely upon such a person's deposition relating to the alleged amicable partition and the consequent settlement of the dispute among the co-sharers.

23. D.W.1 herself would content that there was amicable partition and settlement of disputes without precisely setting out as to when that actually emerged. However, in the written statement she would vaguely plead that during the year 1976 itself, the joint status came to an end, because of the amicable partition. But Ex.A4-the sale deed dated 16.5.1977 and Ex.A5-the sale deed dated 28.2.1978 emerged long after 1976.

24. The recitals in Exs.A4 and A5 would unambiguously and unequivocally detail and delineate, portray and narrate that the properties referred to therein were sold for the purpose of discharging the family loans for meeting the family expenses and for starting business by Chinnikrishnan the husband of the defendant. Whereupon, it is pellucidly and categorically established that even during the year 1978 there existed joint family status among them and some of the joint family properties were sold and out of the sale proceeds the defendant's husband also obtained money for starting his camphor business.

25. Had really a sum of Rs.30,000/- was paid by Chinnikrishnan to other co-sharers and got released their interest in the remaining properties, including the "A" and "B" schedule properties, then certainly he would have got release deed executed in his favour by the other co-sharers, but that was not done so. As such, it is axiomatic and the elephant in the room that the pleas relating to amicable partition during the year 1976 as put forth by the defendant are nothing but a hill of beans fraught with mendacity and falsity and no importance can be attached to them.

In re ouster and adverse possession:

26. Trite law, the plea of ouster should be proved by the defendant, who pleads it. In this connection, I recollect the following decision of the Hon"ble Apex Court:

P.T. Munichikkanna Reddy and Others Vs. Revamma and Others, certain excerpts from it would run thus: 10. In that context it is relevant to refer to JA Pye (Oxford) Ltd. v. United Kingdom wherein the European Court of Human Rights while referring to the Court of Appeal judgment JA Pye (Oxford) Ltd. v.Graham made the following reference:

Lord Justice Keene took as his starting point that limitation periods were in principle not incompatible with the Convention and that the process whereby a person would be barred from enforcing rights by the passage of time was clearly acknowledged by the Convention (Convention for the Protection of Human Rights and Fundamental Freedoms). This position obtained, in his view, even though limitation periods both limited the right of access to the Courts and in some circumstances had the effect of depriving persons of property rights, whether real or personal, or of damages: there was thus nothing inherently incompatible as between the 1980 Act and Article 1 of the Protocol.

11. This brings us to the issue of mental element in adverse possession cases - intention.

.....

14. Importantly, intention to possess cannot be substituted for intention to dispossess which is essential to prove adverse possession. The factum of possession in the instant case only goes on to objectively indicate intention to possess the land. As also has been noted by the High Court, if the appellant has purchased the land without the knowledge of earlier sale, then in that case the intention element is not of the variety and degree which is required for adverse possession to materialise.

18. On intention, Powell v.McFarlane is quite illustrative and categorical, holding in the following terms:

If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("animus possidendi")

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If his acts are open to more than one interpretation and he has not made in perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner.

* * *

In my judgment it is consistent with principle as well as authority that a person who originally entered another's land as a trespasser, but later seeks to show that he has dispossessed the owner, should be required to adduce compelling evidence that he had the requisite animus possidendi in any case where his use of the land was equivocal, in the sense that it did not necessarily, by itself, betoken an intention on his part to claim the land as his own and exclude the true owner.

* * *

What is really meant, in my judgment, is that the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.

A bare poring over and perusal of the said precedent would highlight and spotlight the fact that possession by one co-owner amounts to possession by the other co-owner. Simply because twelve years' period might have got expired without one of the co-sharers being in possession, that would not attract the concept "ouster" in favour of the possessor or owner. There should be clear proof to demonstrate and display that the co-owner in possession started enjoying the said property as his own property detriment to the interest of the other co-sharers not in possession. The maxim "nec vi, nec clam, nec precario" should be borne in mind. Accordingly if viewed, and the evidence available is analysed, it is at once plainly clear that there is no miniscule or molecular, jot or pint, shred or shard of evidence to establish that there was ouster of the plaintiffs at the instance of the defendant's husband relating to the suit properties.

27. The learned counsel for the defendant would invite the attention of this Court to a sentence in the written statement as under:

.....If really the plaintiffs are entitled to a share, they would not have allowed deceased Chinnikrishnan to dispose of the properties exclusively by himself.....

and also to a portion of the deposition of D.W.1 to the effect that some property was sold by Chinnikrishnan to one Selvaraj. I would like to point out that the alleged sale deed executed by Chinnikrishnan in favour of Selvaraj was not produced. Simply because a portion of the suit property was allegedly sold by

her husband, there is no presumption that there was ouster. I recall and recollect the maxim : "Judicis est Judi care secundum allegata et probate - It is the duty of a Judge to decide according to the facts alleged and proved". There is nothing to indicate as to how the "A" scheduled property was enjoyed exclusively by Chinnikrishnan during his lifetime. However, the learned counsel for the plaintiffs would invite the attention of this Court to the answer given by D.W.1 that the business contemplated in the "B" scheduled property was started by Chinnikrishnan from out of the joint family income. When such is the actual position, even by phantasmagorical thoughts one cannot countenance that the business happened to be the exclusive one of Chinnikrishnan.

28. The learned counsel for the defendant would raise a point that after the dismissal of the suit in the year 1976, the present suit was filed only in the year 1994 and that itself is indicative of the fact that the plaintiffs as an afterthought alone did choose to file it for partition and that too, taking undue advantage of the death of Chinnikrishnan. Had there really been no partition and the plaintiffs were entitled to their shares, then they would not have kept quiet

and waited for the death of Chinnikrishnan to file the suit; such was the argument of the counsel for the defendant, as against which the learned counsel for the appellants/plaintiffs would explain and expound by pointing out that amicably Chinnikrishnan started moving with the other co-sharers and so they were under the belief that Chinnikrishnan would give the plaintiffs their aliquot share; inasmuch as he died the untimely death, they in order to avoid further complications and encumbrances being created over the suit properties by the defendant, filed the suit. A judgement cannot be rendered on mere conjectures and surmises. There may always be arguments and counter arguments, but Courts should render the judgement on solid evidence. No doubt, preponderance of probabilities would govern the adjudication in civil cases. Accordingly if applied, the theory of the defendant that there was amicable partition and settlement, turns out to be an improbable one in view of the discussion supra. There is also nothing to indicate that the "A" scheduled property stood in the name of Chinnikrishnan in the revenue records. Had really Chinnikrishnan become the absolute owner of the "A" scheduled property, revenue records should stand in his name and he should have exercised his exclusive right over it, but there is no evidence to that effect at all.

29. I recollect the following maxim:

In re dubia magis initiation quam affirmatio intelligenda : In a doubtful matter, the negation is to be understood rather than the affirmation.

30. When evidence is lacking, it is the negative that could be presumed and not the affirmative. In the absence of evidence on the side of the defendant to establish her plea, her theory cannot be countenanced and upheld as one proved. As such, I am of the view that the plea of ouster as put forward on the side of the defendant is a misconstrued one.

31. There is also nothing to indicate that there was amicable partition emerged among the co-sharers also. The trial Court, to say the least, without applying the aforesaid relevant propositions of law, simply believed the version of the defendant and dismissed the suit for no good reason. The trial Court could not see the wood for trees. It appears, the trial Court did not even take care to peruse the documents and arrive at a reasoned conclusion; the very fact that the learned District Judge went to the extent of wrongly pointing out that the copy of the partition deed dated 04.07.1945, even though it was very much available on record, was not filed, would speak volumes on the lack of, dearth of, paucity of carefulness on her part in dealing with this serious partition matter.

32. In paragraph Nos.14 and 15 of the judgement, the trial Court assumed and presumed certain facts and the ratiocination adhered to in arriving at the conclusion is far from satisfactory. The trial Court refers to Ex.A6 -the said partition deed in para No.15, but in paragraph No.16 of the same judgement, she would state that no such partition deed was filed in Court. Quite against the indubitable and indisputable position that the "A" scheduled property happened to be the co-parcenary property, which came into the hands of Ramudu Chettiar, the trial Court would hold as though "A" scheduled property was not the one which Ramudu Chettiar had obtained in the partition. All these bespeak and betoken the total non application of mind on the part of the trial Court in rendering the judgement, warranting interference in the appeal.

33. Once a co-sharer is having interest in the suit property, the lapse of twelve years" period is not a bar for seeking partition and that proposition is found well exemplified and enunciated in the aforesaid precedent of the Hon"ble Apex Court and no further elaboration in this regard is required.

34. The learned counsel for the plaintiffs inviting the attention of this Court to the reason furnished by the trial Court in para Nos.16 and 17 of the trial Court's judgement, would develop his argument that the lower court for no good reason rejected the registered Will as contained in Ex.A13-the certified copy of the Will and she has not even discussed the evidence of P.W.5 -the attesting witness. A bare perusal of paragraph Nos.16 and 17 of the judgement of the trial Court, would evince and convey that the method and manner in which the trial Court dealt with the issue relating to the Will is far from satisfactory. The Court was expected to discuss the deposition of P.W.5, attesting witness, but the evidence of that witness itself is not found discussed in the judgment. Over and above that, on the plaintiffs" side, P.W.4 -the official from the Registrar's Office was examined to establish that the said Will was duly registered; even his evidence was not discussed, however, holus bolus the trial Court rejected the Will as though the partition deed dated 04.07.1945 was not produced, even though the same Judge in the previous paragraph referred to that partition deed in one other context as stated supra. Be that as it may, at this juncture I would like to highlight that the said Will-Ex.A13 was alleged to have been attested by P2's son namely Janardhanan, who subsequently came to be arrayed as P6 consequent

upon the death of his mother P2-Kasthuri and one other attesting witness was P3-Sulochana's son, namely Narayana Gupta(P.W.5).

35. The learned counsel for the plaintiffs would argue that there is no prohibition for the sons' of the beneficiaries attesting the Will. Such an argument is neither here nor there. Certainly that could be taken as one of the suspicious circumstances also. At this juncture, I would like to point out that irrespective of the fact that as to whether Ex.A13 - the Will is valid one or not, the net result would be the same, for the reasons set out infra.

In re inheriting the shares of deceased first plaintiff :

36. Reverting back to the discussion relating to shares, I would like to point out that Chinnikrishnan predeceased his mother P1-Munirathinam Ammal, leaving behind his wife -the defendant herein and Munirathinam Ammal his mother. He had no issues. In such a case, the already assessed notional share of Chinnikrishnan (5/8) would notionally get divided into two parts, one part should be allotted to the mother and another to his widow. Accordingly his share of 5/8 in the suit properties would stand divided into two at the rate of 5/16th share each. Consequently, the defendant would be getting only 5/16th share and the remaining 5/16th share of Chinnikrishnan would go to his mother who had already been entitled to 1/8th share in the suit properties as the legal heir of her deceased husband Ramudu Chettiar. Consequent upon the death of Munirathinam Ammal, her entire shares stood devolved on his two daughters only, who happened to be the beneficiaries under the Will also. I recollect the popular adage:

Why buy a cow when you could get milk for free.

37. Without undergoing the difficulty in establishing the Will-Ex.A13, the daughters are entitled to the entire share of their mother to the exclusion of the defendant -the widow of Chinnikrishnan, who predeceased his mother Munirathinam Ammal. At this juncture, it is just and necessary to extract hereunder Sections 15 and 16 of the Hindu Succession Act and also the decision emerged thereunder:

15. General rules of succession in the case of female Hindus. (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,-

- (a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;
- (b) secondly, upon the heirs of the husband;
- (c) thirdly, upon the mother and father;
- (d) fourthly, upon the heirs of the father; and
- (e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1),

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter), not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

16. Order of succession and manner of distribution among heirs of a female Hindu.-The order of succession among the heirs referred to in section 15 shall be, and the distribution of the intestate's property among those heirs shall take place according to the following rules, namely:-

Rule 1.-Among the heirs specified in sub-section (1) of section 15, those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

Rule 2.-If any son or daughter of the intestate had pre-deceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

Rule 3.-The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and

(e) of sub-section. (1) and in sub-section (2) of section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

1998 (II) CTC 236 [Seethalakshmi Ammal v. Muthuvenkataramana Iyengar and another]; certain excerpts from it would run thus: 3. This finding proceeds on a misconception of the provisions of the Hindu Succession Act. Section 15 of the Hindu Succession Act provides general rules of succession in the case of female Hindus. Under sub-section (1), the property of a Hindu female dying intestate shall devolve (a) firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the husband; (b) secondly, upon the heirs of the husband. Gomathi Ammal does not have any heirs falling under (a). Therefore, we have to examine who are the heirs of her husband. The heirs of a male Hindu are set out in the Schedule to the Hindu Succession Act. Heirs in Class I include a widow of a predeceased son. The appellant fits this description. But the High Court has held that when Sesha Iyengar, the husband of Gomathi

Ammal died, their son Venkatarama Iyengar was alive. So the appellant cannot be called the widow of a predeceased son.

4. In order to decide who are the heirs of a female Hindu under category (b) of Section 15(1), one does not have to go back to the date of the death of the husband to ascertain who were his heirs at that time. The heirs have to be ascertained not at the time of the husband's death but at the time of the wife's death because the succession opens only at the time of her death. Her heirs u/s 15(1)(b) will have to be ascertained as if the succession to her husband had opened at the time of her death. Thus, if at the time of Gomathi Ammal's death, there is any heir of her husband who fits the description in the Schedule of being the widow of his predeceased son, she will be one of the heirs entitled to succeed. The status of the heir must be determined at the time of the death of the female whose heirs are being ascertained. The appellant was the widow of a predeceased son on the date when Gomathi Ammal died. Therefore, the learned Single Judge was not right in coming to the conclusion that the appellant is not an heir of Gomathi Ammal.

38. Not to put too fine a point on it, the defendant being the widow of the predeceased son of Munirathinam Ammal, cannot be the legal heir of Munirathinam Ammal. Therefore, the controversy got narrowed down and accordingly, no further elaboration relating to the shares of the respective parties are required in the peculiar facts and circumstances of this case.

39. Relating to the "B" scheduled property, the narrations in Exs.A4 and A5 would unassailably and unequivocally as highlighted supra evince and evidence that the business was started only from out of the joint family income. Over and above that, D.W.1(Defendant) herself admitted categorically that her husband started the business from out of the joint family nucleus and in such a case, it is too late in the day on the part of the defendant to have a volte face and turn turtle and plead quite antithetical to what her husband committed himself in black and white in Exs.A4 and A5 as set out supra. Therefore, the contention of the defendant that her husband raised the superstructure for the business in the "A" scheduled property and therefore, only the defendant is entitled to it, is a far fetched plea, which cannot be countenanced and upheld by this Court.

40. To keep the adjudication on an even keel, one important fact cannot be lost sight of; the two daughters of Ramudu Chettiar got married and started living with their respective husbands and they had no role to play in conducting the said business. Whatever income that might have been derived from the business could rightly be understood as the one derived out of the toil and moil of the defendant's husband and in such a case, it would be totally inequitable and unjust to hold that the sisters of Chinnikrishnan are entitled to the income equally on par with Chinnikrishnan or with the defendant. However, in recognition of the plaintiffs' right over the joint family nucleus, nominal shares only could be allotted in the income that would be ascertained during the final decree proceedings as per law.

41. It is not the case of the plaintiffs in the plaint or during trial, that they contributed their own intellectual or physical might in running the business. This Court could take a cue from the case laws pertaining to partnerships. A sleeping partner will not be entitled to equal share with the working partner. The sleeping partner would be getting a meagre or nominal share in the income, so much so, here also Sulochana and L.Rs. representing Kasthuri could be allotted nominal shares in the net income that would be ascertained from the "B" scheduled business and not equal shares. The learned counsel for the defendant would argue that the camphor business did not fetch any sizeable income. Be that as it may, during final decree proceedings, the income derived from such business should be quantified. In order to avoid further complications, in this factual matrix by way of recognising only their interest in the initial capital for starting the business by their brother Chinnikrishnan, I would like to hold that Sulochana would be entitled to 10% of the net income from the "B" scheduled property business towards her share and the legal representatives of Kasthuri would be entitled to another 10% and the rest 80% income shall be allotted to the defendant.

42. Accordingly, the point No.1 is decided to the effect that the dismissal of the previous suit O.S.686 of 1972, was not an embargo for filing the present suit O.S.No.1 of 2004 and prosecute the same.

43. The Point No.2 is decided to the effect that the respondent/defendant did not prove her plea of ouster.

44. The Point No.3 is decided to the effect that the trial Court was justified in disbelieving the Will-Ex.A13.

45. The Point No.4 is decided to the effect that the alleged settlement was not proved.

46. The Point No.5 is decided to the effect that the trial Court properly appreciated the principle relating to burden of proof in deciding the lis.

47. The Point Nos.6 and 7 are decided to the effect that the said business is a joint family business and the plaintiffs are entitled to a share in the income of the joint family, to the extent indicated above. In the result, the appeal is allowed setting aside the judgment and decree of the trial Court and the preliminary decree shall follow as under:

The plaintiffs are entitled to 11/16th share and the defendants are entitled to 5/16th share in the "A" scheduled property. From out of the net income that would be ascertained in the joint family business referred to in the "B" scheduled property during final decree proceedings, P3 shall be entitled to 10% of the said net income and the legal representatives of P2 shall be entitled to another 10% of the income payable by the defendant. The parties are at liberty to file necessary applications before the trial Court for obtaining final decree after getting a Commissioner of Commissioners appointed for suggesting ways and

means of partitioning the "A" schedule property as per the preliminary decree passed in this appeal and also for ascertaining the income derived from the "B" scheduled business. However, there shall be no order as to costs.