

(2011) 08 MAD CK 0072
In the Madras High Court
Case No : C.S. No. 276 of 2009

Urmila Divakaran (deceased) and Mr. Dinesh Divakaran	APPELLANT
Vs	
Mr. K.C. Radhakrishnan, Mr. Vasantha Ravindran, Mrs. Radha and Mr. Vivek Ravindaran	RESPONDENT

Date of Decision : 18-08-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 4 Rule 1
Court Fees Act, 1870 — Section 25

Citation : (2011) 08 MAD CK 0072

Hon'ble Judges : S. Palanivelu, J

Bench : Single Bench

Advocate : Chitra Sampath, for R. Anil Kumar, for the Appellant; K.C. Radhakrishnan, Party-in-Person for D 1 and R. Shymala, for D 3 and 4, for the Respondent

Judgement

S. Palanivelu, J.—This Civil suit filed under Order VII Rule 1 of CPC read with order IV Rule 1 praying to pass preliminary decree for

partition and separate possession of Plaintiffs 1/3th share in the suit schedule property; that to pass a final decree by appointing a Advocate

Commissioner to divide the suit property by meet and bounds as per the preliminary decree; that to allot Plaintiffs 1/3rd share so divided and put

the Plaintiff into possession of the same through Court; that to determine the future mesneprofit under Order XX Rule 12 of CPC and that to

award the cost of the suit.

2. The plaint averments in nutshell are as under:

2.1. It is the case of the Plaintiffs that they are the legal heirs of his grand father, namely, K.M. Vasudevan, who died intestate in 1950, leaving his

three sons and they inherited all the properties and they were in enjoyment and

possession thereof as co-owners. The said K.M. Vasudevan was a member of the Madras Co-operative House Construction Society and entered into hire purchase agreement with it to purchase the suit property. However, after paying eight installments he died in 1950 and on his death, the first Defendant became the Kartha of the joint family consisting of himself and his two younger brothers, namely, Divakaran and Ravindran and the joint family continue to pay the remaining installments under the hire purchase agreement to the Society. After paying due installments, the property was executed in favour of the first Defendant being the Kartha of the joint family. Thereby, each of them are entitled for one third share. While so, the second brother, namely, Divakaran died in the year 2006 leaving the Plaintiffs 1 and 2 as his heirs and so the Plaintiffs became entitled to one third share and last brother, namely, Ravindran also died in the year 2006 leaving behind Defendants 2 to 4 as his heirs. The second Defendant is his widow and the third Defendant is his daughter and the fourth Defendant is his son. Hence, the Defendants 2 to 4 are jointly entitled to one third share of Ravindran. Since the first Defendant is not agreeable for partition, hence the present suit is laid for partition and separate possession of the suit property.

2.2. Earlier, the first Defendant filed a suit against his elder brother, namely, Divakaran in O.S. No. 5591 of 1979 on the file of the XI Assistant City Civil Court, Chennai and the said suit was dismissed by the Court below holding that the suit property is the joint properties. On an appeal preferred by the first Respondent in A.S. No. 239 of 1987, the same was allowed and on a further appeal preferred by Divakaran before this Court in L.P.A. 70 of 1991, the same was dismissed and he carried the matter before the Supreme Court in Civil Appeal No. 15500 of 1996 and the Supreme Court pleased to set aside the findings of this High Court by holding that the first Defendant is the absolute owner of the suit premises and the question of title of the first Respondent to the suit property is left open to be decided. Hence, the Plaintiffs are before this Court for preliminary decree for partition and separate possession.

3. The written statement filed by the first Defendant reads as under:

3.1. The case of the first Defendant is that his father, namely, K.M. Vasudevan, entered into a hire purchase agreement for a period of twenty

years with the Madras Co-operative House Construction Society to hire purchase the suit property in question. While so, after paying eight

monthly instalments, the said K.M. Vasudevan died on 13.04.1950. Thereafter, this Defendant, who is the eldest son of K.M. Vasudevan, was

nominated to remit the remaining installments and after paying the remaining installments, he acquired the property in question by way of a sale

deed dated 20.09.1968 exclusively in his name. The first Defendant averred in the plaint that during the entire period of over 18 years, his brother

namely, K.C. Divakaran, did not join him as a co-purchaser. The said K.C. Divakaran did not pay even a single monthly hire purchase installment

to the Society and in fact, a licence was granted to him to stay in the upstairs portion of the suit property in question and later, it was revoked.

Therefore, he has no title whatsoever to share in the suit property.

3.2. Earlier a suit was filed by the first Defendant against the said K.C. Divakaran in the City Civil Court, Madras for recovery of possession of the

upstairs portion of the suit property, after revocation of the licence granted to him, to occupy it and for mense profits. However, Divakaran, in his

defence contended that he was entitled to one third share of the suit property. The Court below decreed in his favour and on an appeal, before the

High Court, the learned single Judge reversed the findings and again on an appeal, before the Division Bench of this Court in L.P.A. No. 70 of

1991, it observed that ""we are entirely in agreement with the learned single Judge that the property belongs exclusively to the Plaintiff therein, who

is the Respondent herein and that he is entitled to get a declaration to that effect"". Aggrieved over the same, Divakaran appealed before the

Hon"ble Supreme Court and the Hon"ble Supreme Court declined to go into the question of ownership of the suit property, because this

Defendant filed a petition for simplicitor possession and mense profits. During the pendency of the appeal, possession of the upstairs portion was

handed over to the first Defendant. As regards, mense profits, this Court directed the first Defendant to file an application before the Court below

and work out his remedies in accordance with law.

3.3. It is his further case that earlier for declaration of ownership of the suit property was not asked for, for the reason that from the date of

acquiring the property in question since 1950 till 11.06.1979, his exclusive

ownership of the suit property was never disputed at any point of time.

In fact, the sale deed was executed solely in his name by the Madras Co-operative House Construction Society Limited. Till the death of

Divakaran, he did not take any legal action to establish his claim for a title to share a suit property. In fact, as regards the title of the property, the

issue was raised before the Court below by Divakaran and it was duly considered by the learned single Judge as well as the Division Bench of this

Court. Therefore, he averred that he has become the absolute owner of the property in question and he holds the sale deed exclusively in his name

for the past twenty years, that is to say, that the legal heirs of Divakaran have no share in the suit property.

4. In the written statement filed by the second Defendant reads as under:

4.1. It is the case of the Defendants that the Plaintiffs are not the legal heirs of late K.M. Vasudevan, nor did they inherit all property and they

were not in enjoyment and possession as co-owners. Actually, the legal heirs of K.M. Vasudevan are three sons, namely, K.C. Divakaran, K.C.

Radhakrishnan and K.C. Ravindran. In fact, the three brothers were lived separately and there was no joint family relationship and the installments

were not contributed by them to the Society. There was no income at all from any other joint family properties and the suit property is not an

ancestral property and that the deceased K.C. Ravindran never made any claim to a title for a share in the suit property.

5. After hearing both sides and perusing the plaint and written statement, following issues were framed by this Court for trial:

1. Whether the first Defendant as the ""Karthi"" purchased the suit property for the joint family?

2. Whether the Plaintiffs are entitled to 1/3rd share in the suit property?

3. Whether the sums due towards payment of the monthly installments to the Madras Co-operative House Construction Society were paid by

K.C. Divakaran, the husband and father of the first and second Plaintiff?

4. Whether the Plaintiff is entitled to preliminary decree for partition and separate possession of 1/3rd share in the suit property?

5. Whether the Plaintiff is entitled to mesne profits under Order XX Rule 12 of Code of Civil Procedure?

6. To what other reliefs, the parties are entitled to?

Issues No. 1 to 4 and 6

6. The first Defendant, namely, K.C. Radhakrishnan, K.C. Divakaran and K.C. Ravindran are the sons of K.M. Vasudevan. The said Vasudevan

was the member of the Madras Co-operative House Construction Society Limited and through the hire purchase agreement, he was supposed to

get the suit property in question after paying the necessary installments. However, he died on 13.04.1950 after paying eight monthly instalments

and thereafter, the first Defendant, after paying the dues got the property in question in his name from the Society through the registered sale deed.

7. It is the contention of the Plaintiffs that the first Defendant as Kartha of the joint family paid instalments for himself and on behalf of the other two

brothers after getting contribution from them and purchased the suit property in question. The said Divakaran died in 2006 leaving Plaintiffs 1 and 2

as his legal heirs. The second Defendant is his wife and Defendants 3 and 4 are his daughter and son. It is contended that the Plaintiffs are entitled

for one third share and the Defendants 2 to 4 are entitled for one fourth share and the first Defendant will get one third share in the suit property.

8. The contention of the Plaintiffs is repelled by the first Respondent who appears as party-in-person, that he is the exclusive owner of the suit

property, who denies as kartha of the joint family since he purchased the suit property on his own. It is his version that his father Vasudevan paid

only eight monthly hire purchasing instalments and he nominated him to succeed to his share and entrusted the capital of the society and he entered

into the hire purchase agreement with the Society. On 20.09.1968, the sale deed came to be executed by the Society in favour of him. Thereafter,

he filed a suit in O.S. No. 55 of 1979 on the file of the XI Additional Judge Madras against his brother K.C. Divakaran for delivery of vacant

possession of the upstairs and for damages. Ex. D.1 is the copy of the sale deed executed by the Society in favour of the first Defendant with

respect to the suit property. Ex. D.2 is the copy of hire purchase agreement between the Society and the first Defendant. Ex. P.3 series is of the

receipts for the payment of instalments by the first Defendant.

9. It is his case in the said suit that he permitted his brother to live in the upstairs purely on lease from 07.01.1975. But the said Divakaran and his

family members took advantage of the situation and did not vacate the property

in question. Hence, O.S. No. 5591 of 1979 was filed by first Defendant before the XI Assistant City Civil Judge, Chennai and the said suit was dismissed on 18.09.1980 with costs. Ex. P.1 is judgment of the trial Court. Hence, the first Defendant carried the matter in appeal before this Court in Appeal No. 239 of 1981 and the said appeal was allowed on 12.11.1990. Copy of the judgment is marked as Ex. P.2. Aggrieved over the same, K.C. Divakaran took the matter before the Division Bench of this Court in L.P.A. No. 70 of 1991. The said appeal was dismissed by the Division Bench on 18.06.1986, copy of judgment is Ex. P.3. Thereafter, Divakaran preferred Civil Appeal No. 15500 of 1996 before the Hon"ble Supreme Court. The said appeal was disposed of on 17.11.1999 with the following observations. The judgment copy is marked as Ex. P.4. The relevant portion of the said judgment is extracted below:

As indicated earlier, the learned single Judge has not concluded one way or the other as regards the Respondent's (plaintiff's) exclusive title to the suit property. All that has been observed by the learned single Judge is that since the Plaintiff has paid the court fee u/s 25 of the Court Fees Act, the said relief (relief for declaration) could be given even on the very basis of Plaintiff's exclusive title. In our opinion, this could not be said to be a final finding as regards the title of the Plaintiff being an exclusive owner of the suit property. The finding of the Division Bench, namely, that the property exclusively belongs to the Plaintiff could not be said to be a final finding because that was not the issue either before the single Judge or before the Division Bench. In fact, all that we can say about such finding is that the same is incidental and not directly involved in the present controversy having regard to the pleadings of the parties. Such a finding could not have also been rendered when admittedly the third brother was not arrayed as the Defendant in the suit. It may also be stated that the Appellant (plaintiff) at no stage amended the plaint and incorporated the prayer for declaration of ownership in respect of the suit property. The finding, therefore, is beyond the pleading of the parties, inasmuch as no such relief was claimed by the Respondent (plaintiff) in the suit. Since the Plaintiff got the possession of the suit premises during the pendency of the appeal before the learned single Judge, the relief of possession as rightly said by

the Courts below, did not survive. As regards the mense profits, the Respondent (plaintiff) may adopt appropriate proceedings in accordance with law.

In the result, the appeal is disposed of as indicated above. In the circumstances, no order as to costs.

Their Lordships have observed that the finding of the Division Bench, namely, that property exclusively belongs to the K.C. Radhakrishnan could

not be said to be a final finding, because that was not the issue before the Single Judge or before the Division Bench of the Court. Their Lordships

have also indicated that the third brother of the Plaintiff was not arrayed as a Defendant in the said suit. Since possession was handed over to the

said K.C. Radhakrishnan by Divakaran pending appeal before the learned single Judge, it is observed in the judgment of the Supreme Court that

relief of possession claimed by the first Defendant did not survive. The cumulative effect of the judgment is to the effect that in view of the Supreme

Court that the question whether the property exclusively belongs to the Plaintiff/ first Defendant herein is incidental not directly involved in the

present controversy. Hence, the determination of the title to the property has been left open to be decided. In the above suit, the parties did not

call for findings of the Courts as to who is the title holder to the suit property and the said issue remains unsettled.

10. It is contended by the Plaintiffs that Rs. 8,200/- was paid by K.C. Divakaran as evident from the receipt issued by the Tamil Nadu State Co-

operative Bank Limited on 04.08.1980 stating that a sum of Rs. 8,200/- was remitted by him on 22.08.1952 to the credit of the Madras Co-

operative House Construction Society Limited. The certified copy of the receipt issued by the Corporation of Madras is marked as Ex. P7.

Another payment of tax by K.C. Divakaran is also seen from the Certificate issued by the above said Co-operative Bank which shows that on

23.03.1978, he paid the sum through a cheque drawn on Canara Bank, Mount Road, Chennai, which is marked as Ex. P.9. Likewise, Ex. P.10

issued by the Punjab National Bank evidencing the payment of property tax by Divakaran on 17.09.1979, so also, Ex. P.11 dated 26.12.1979

showing the payment of property tax by him. Ex. P.12 series are the copies of receipts issued by the Madras Co-operative House Construction

Society Limited for the payment of instalments by K.M. Vasudevan. As far as the payment of property tax to the Corporation of Madras is

concerned, since Divakaran is in possession in upstairs, he might have paid in the capacity of the person in possession. That may not be significant.

But the payment of Rs. 8,200/-towards the hire purchase instalment to the Society assumes importance, which is marked as Ex. P.7, which plays

vital role in this case to show that Divakaran also contributed to the sale price of the suit property. The above said certified copies have been

obtained from the exhibits filed by the parties in O.S. No. 5591 of 1979.

11. During the cross-examination D.W.1, the first Defendant, he was confronted with certain portions in the deposition adduced by him before the

City Civil Court in O.S. No. 5591 of 1979. Those portions were elicited to him and were marked on the side of Plaintiffs. Ex. P.13 to P.18 are

the exhibits available in the deposition copy of the deposition of the first Defendant. Ex. P.14 is the portion of evidence that the suit property was

allotted to K.M. Vasudevan and he nominated the first Defendant as per by-law of the Society. Ex. P.13 is the portion of evidence in which he has

stated that he did not know how much he paid for the Society; that he does not know whether his father paid Rs. 8166.56. Ex. P.15 is another

portion of evidence in which he has stated that his brother Ravindran would have paid Rs. 9,000/-to the Society and he was paying to the Society

in the year 1961 and 1962 at the rate of Rs. 60.05 per month and he does not remember whether he has paid in the year 1963 also. In Ex. P.16,

he would say that he does not know whether Ravindran paid Rs. 3,926/-to the Society towards the hire purchase agreement and he does not

know whether there was default in the payment in the year 1960 and 1961 and that he does not know whether Ravindran paid the defaulted

amount. Ex. P.18 is the portion of evidence which is significant in which he has deposed that he cannot state as to how much amount was paid by

him to the Society towards the hire purchase agreement. In order to claim exclusive ownership for the suit property, he should have paid the entire

hire purchase agreement to the Society for the suit property. It is evident from Ex. P.7, Divakaran paid Rs. 8,200/-to the credit of the Madras

House Cooperative House Construction Society Limited, Madras. It is not the evidence of the first Defendant that Ravindran did not pay the hire

purchase instalments at all. He pleads ignorance of the payment of Rs. 3,926/- made by Ravindran. The first Defendant does not know how much amount he paid to the Society.

12. The necessary corollary would be that all the three brothers have contributed to the hire purchase instalments for the suit property. Had the first Defendant paid the entire amount he might have averred in the plaint and stated in the evidence. He has not even pleaded that what is the total amount payable on hire purchase or what was the amount paid by him. The cumulative effect of the above said circumstances would clearly indicate that the first Defendant is not the absolute owner of the suit property and that all the three brothers have got equal share in the property.

13. Another circumstance indicated by the Plaintiffs side is that the father namely late K.M. Vasudevan expressed his desire of his three sons to take the suit property in equal portions, by means of a written, unattested and unregistered Will. The first Defendant in the examination admits to the effect that it is in his handwriting and Ex. B.1 in that suit is a draft of Will drafted by his father. Even in this case, it is admitted. When the Will was sought to be marked on the side of the plaintiffs, the first Defendant objected to mark only on the ground that it is not attested by two witnesses. The contents of the Will are as follows:

This is my last Will and testament and supersedes one or two I have made before. I bequeath all my property, the house mentioned above and cash in the form of cash certificates and invested in the banks equally among my three sons K.C. Radhakrishnan B. Sc.,(Honours), K.C. Divakaran, B. Sc., and K.C. Ravindran B. Sc. All the properties and assets in the form of house and compound and cash are my own self acquired properties.

14. The Learned Counsel for the Plaintiffs Ms. Chitra Sampath would contend that merely because the father has nominated the first Defendant as his nominee, he cannot claim exclusive ownership to the property. In support of her contention, she cited a decision of the Hon'ble Supreme Court in Shri Vishin N. Kanchandani and Another Vs. Vidya Lachmandas Khanchandani and Another, , in which provisions of Insurance Act and Government Savings Certificate Act, 1959 have been discussed. The operative portion of the said judgment is as follows:

10.... The nomination only indicated the hand which was authorised to receive the amount on the payment of which the insurer got a valid discharge of its liability under the policy. The policy holder continued to have an interest in the policy during his lifetime and the nominee acquired no sort of interest in the policy during the lifetime of the policy holder. On the death of the policy holder, the amount payable under the policy became part of his estate which was governed by the law of succession applicable to him. Such succession may be testamentary or intestate. Section 39 did not operate as a third kind of succession which could be styled as a statutory testament. A nominee could not be treated as being equivalent to an heir or legatee. The amount of interest under the policy could, therefore, be claimed by the heirs of the assured in accordance with the law of succession governing them.

15. In *Ram Chander Talwar and Another Vs. Devender Kumar Talwar and Others*, , in para 4, after extracting 45-ZA of Banking Regulation Act, 1949, it is held as follows:

4. Sub-section (2) of Section 45-ZA, reads as follows:

45-ZA (2) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of such deposit, where a nomination made in the prescribed manner purports to confer on any person the right to receive the amount of deposit from the banking company, the nominee shall, on the death of the sole depositor or, as the case may be, on the death of all the depositors, become entitled to all the rights of the sole depositor or, as the case may be, of the depositors, in relation to such deposit to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

(emphasis added)

5. Section 45-ZA(2) merely puts the nominee in the shoes of the depositor after his death and clothes him with the exclusive right to receive the money lying in the account. It gives him all the rights of the depositor so far as the depositor's account is concerned. But it by no stretch of imagination makes the nominee the owner of the money lying in the account. It needs to be remembered that the Banking Regulation Act is enacted to consolidate and amend the law relating to banking. It is in no way concerned

with the question of succession. All the moneys receivable by the nominee by virtue of Section 45-ZA(2) would, therefore, form part of the estate of the deceased depositor and devolve according to the rule of succession to which the depositor may be governed.

In view of the settled position, it has to be observed that the nominee can only collect the money from the Government in which the money was deposited and he cannot appropriate the sum inherited and that the legal heirs of the deceased would be entitled to their respective share as per law governing them.

16. D.W.1, the first Defendant has narrated his contentions in his evidence, besides saying that Ex. P.6 is the true copy of the Will of his father

K.M. Vasudevan and he has written the contents. Since the first Defendant himself admits that the Will was written by him as per the wish of his

father, it needs no proof. The father of the first Defendant K.M. Vasudevan categorically revealed his intention as to the disposition of the suit

property among his sons. The father has expressed that he bequeathed his properties, the house, case certificates and investment in the banks to be

shared equally among his three sons, namely, K.C. Divakaran, K.C. Radhakrishnan and K.C. Ravindran. He also asserted that all the assets in the

form of house and cash are his own self acquired properties.

17. The existence of the will is categorically admitted by the first Defendant. Hence, presumption could be drawn that it has been duly executed

and attested. To stress this proposition, the Learned Counsel for the Plaintiff garnered support from a decision of the Supreme Court reported in

Shipra Sengupta Vs. Mridul Sengupta and Others, in which the following is the law laid down by the Apex Court.

10. During the pendency of the said civil revision, Niharbala Sengupta died and her other son Mridul Sengupta was substituted in her place on the

basis of an alleged will executed by her prior to her death in favour of Mridul Sengupta. The will expressly dealt with the amount which she was

entitled to receive as a consequence of the grant of a succession certificate. Pushpal Sengupta did not challenge the will by which he was affected.

Therefore, the position that emerged was that the Court must presume for the purpose of the revision that the will is validly executed in favour of

Mridul Sengupta.

18. In view of the above said principle, it is held that even though the original will has not been produced and no witness thereto for attestation, it is

valid. It is reiterated that it exposes the intention of the testator in the matter of bequest of the suit property among his three sons. It was the

intention of K.M. Vasudevan that his sons had to take the suit property in equal shares.

19. In view of the above and the contents of the Will in unequivocal terms as reveled by K.M. Vasudevan is more than enough to reach a

conclusion that and he intended the suit property be taken equally by his three sons. He also paid a considerable portion, namely, eight monthly

hire purchase installments, as admitted by the first Defendant. In these circumstances, the contention of the first Defendant that he is the exclusive

owner of the suit property could not be countenanced.

20. In the light of above mentioned circumstances, I answer issue No. 1 in affirmative. As far as issue No. 3 is concerned, it is answered that all the

three brothers have paid instalments for the hire purchase agreement then and there in addition to the payment already made by their father. Hence,

it is held that the Plaintiffs are entitled to one third share in the suit property and preliminary decree for partition as prayed for has to be granted.

Issue No. 5:

21. Since the first Defendant has been in possession and enjoyment of the joint family property, the Plaintiffs are entitled for mense profits to be

determined in a separate petition.

22. In the result, preliminary decree is passed as prayed for. In the circumstances of the case, with reference to the relationship of the parties, there

is no order as to costs.