
(1968) 11 MAD CK 0043
In the Madras High Court

V.C. Desa Bathudu

APPELLANT

Vs

P. Dilli Achari and Others

RESPONDENT

Date of Decision : 13-11-1968

Acts Referred:

Hindu Succession Act, 1956 — Section 12, 15, 15(1), 15(1)(b), 15(1)(d)

Citation : (1968) 2 MLJ 635

Hon'ble Judges : M.M. Ismail, J

Bench : Single Bench

Judgement

M.M. Ismail, J.—This is a suit for a declaration that the plaintiff, as the sole heir of Eswari Ammal, is entitled to her estate consisting of the properties movable and immovable described in plaint " A " and " B " Schedules respectively, for a direction to the defendants to deliver possession of the immovable properties described in plaint " A " schedule, for a direction to defendants 1 to 5 to deliver possession of the movable properties described in plaint " B " schedule and for future mesne profits of the properties described in plaint " A " schedule.

2. The plaintiff is the brother of one Eswari Ammal, who died on 27th December, 1965, intestate and with no children, while defendants 1 to 3 are the sons and daughters of one Purushothama Asari, another brother of Eswari Ammal who died in 1961 and defendants 4 and 5 are the widow and daughter of Doraiswami Asari yet another brother of Eswari Ammal who died in 1950. The other defendants are said to be tenants in possession of the immovable properties described in plaint " A " schedule. Admittedly at the time when Eswari Ammal died, her husband had predeceased her and as stated already she had no children. Consequently, the question of heirship to Eswari Ammal was brought in and the allegation of the plaintiff is that he is the sole heir to Eswari Ammal, not because he happens to be the brother of Eswari Ammal, but because he also happens to be Eswari Ammal's husband's mother's brother's son. His case is that the properties described in plaint " A " and " B " schedules were the properties of Eswari Ammal and they belonged to her absolutely being her self-

acquisitions and after the death of Eswari Ammal, defendants 1 to 5 herein had taken possession of these properties except such part of the immovable properties which is in the occupation of tenants and it is on these allegations the suit has been filed for the reliefs mentioned already.

3. On 28th February, 1967, a written statement was filed on behalf of defendants 1 to 5. I must straightway mention at this stage that defendants 2 and 3 were minors on the date of the institution of the suit and they were represented by the 1st defendant, their elder brother. In the written statement, the said defendants admitted the relationship of the parties as stated in the plaint and also admitted that the properties set out in the schedules to the plaint were the self-acquisitions of the deceased Eswari Ammal. The only claim put forward in the written statement was that the mother's son is not a heir at all to an intestate Hindu under the Hindu Succession Act, and as such the plaintiff would not be a heir to the late Eswari Ammal's husband, Bangaru Achari, and on the other hand the heirs to Eswari Ammal would be those in Clause (d) to Section 15 of the Succession Act, namely, the heirs of the father of Easwari Ammal, Changalvaroya Bathudu and therefore the properties of Eswari Ammal have to be divided into three equal shares and one such share should be allotted to the plaintiff, another share to defendants 1 to 3 and yet another share to the 5th defendant. The defendants' further case put forward in the written statement was that the 1st defendant is living in a portion of item No. 1 of plaint "A" Schedule and the rest of the house is in the occupation of tenants and item No. 2 of the plaint "A" Schedule is wholly in the occupation of tenants and therefore the defendants are not liable to pay mesne profits. It is also averred in the written statement that the defendants were always ready and willing to have the properties divided and therefore the plaintiff should be directed to pay their costs.

4. On these averments on 1st August, 1968, the following issues framed for trial:

1. Is the plaintiff the sole heir of deceased Eswari Ammal entitled to the estate left by her exclusively?

2. Is the plaintiff entitled to only 1/3rd share in the said estate as stated by defendants 1 to 5 in paragraph 2 of their written statement?

3. What is the mesne profits the plaintiff is entitled to 2nd from whom?

4. What is the proper order in regard to the cost of the suit?

5. Subsequently, on 11th September, 1968, application No. 1929 of 1968 was filed for declaring the 2nd defendant as a major on the ground that the 2nd defendant was born on 15th July, 1948 itself. If that be the case, the 2nd defendant should have attained majority even on 15th July, 1966. Consequently, the application itself was belated. Still by an order dated 24th September, 1968. I allowed that application and declared the 2nd defendant as a major. Thereafter, on 25th September, 1968, Mr. R. Muthukumaraswami, filed vakalat on behalf of the 2nd defendant and he requested time for filing a written statement on behalf

of the 2nd defendant. I directed the 2nd defendant to file his written statement on or before 7th October, 1968, and directed the suit itself to be posted for trial on 14th October, 1968. Pursuant to this order of the Court, the 2nd defendant filed a written statement on 7th October, 1968. In this written statement certain new contentions were put forward on behalf of the 2nd defendant. One such contention was that item of plaintiff "A" schedule which was purchased by Eswari Ammal from the father of defendants 1 to 3, namely Purushothama Asari, was only a benami sale. Another contention was that there was ancestral property belonging to the family of Eswari Ammal and her brothers. Eswari Ammal improved the ancestral property and it is out of the income from the ancestral property she purchased all items of plaintiff "A" schedule properties. Yet another contention was that the last wishes of Eswari Ammal, though not in writing, was that the properties item 1 and 2 in the plaintiff schedule would be equally given to her brothers V. C. Desa Bathndu, the plaintiff, Doraiswami and Purushothama Asari and their heirs. In view of these new pleas taken in the written statement of the 2nd defendant, the following additional issues will have to be framed ::

1. Whether the plaintiff "A" schedule properties are the self-acquisitions of the deceased Eswari Ammal?

2. Whether the sale of item 2 of plaintiff "A" Schedule by Purushothama; Asari to Eswari Ammal was a benami transaction?

3. Whether Eswari Ammal had expressed any last wish that plaintiff "A" schedule properties should be equally given to the plaintiff, Doraiswami and Purushothama Asari and their heirs.

6. In view of the fact that neither in the original written statement filed on behalf of defendants 1 to 5 nor in the subsequent written statement filed by the 2nd defendant any question was raised as to the suit properties standing in the name of Eswari. Ammal, no documentary evidence was adduced by the Plaintiff. Consequently the only witness that was examined by the plaintiff was the plaintiff himself as P.W. 1. He has spoken to the fact that the properties belonged to Eswari Ammal and she acquired those properties out of the money earned by her by conducting chit fund transactions among ladies, that she was in enjoyment of the properties till her death and before her death, when Eswari Ammal fell ill, she came to the house of the plaintiff and lived with him and he treated her and ultimately got her admitted into the hospital where she died 4 or 5 days after the admission; and that immediately after the death of Eswari Ammal, defendants 1 to 5 took possession of the portion of the property in item I of plaintiff "A" schedule occupied by Eswari Ammal, when the other portions of item 1 as well as the entirety of item 2 were in the occupation of the tenants. No evidence has been let in on behalf of the defendants and the learned Counsel for the 2nd defendant sought to rely upon only the answers given by the plaintiff in the course of his cross-examination in support of the case of the 2nd defendant.

7. Before dealing with the points in controversy, I shall straightaway mention the

fact that neither in the original written statement filed on behalf of defendants 1 to 5 nor in the subsequent written statement filed by the 2nd defendant there was any denial as to the existence of the immovable properties described in plaint " B " schedule or their being in the possession of defendants 1 to 5. As I pointed out already, even with regard to plaint " A " schedule properties, the original written statement filed on behalf of defendants 1 to 5 admitted that they were the self-acquisitions of Eswari Ammal and the only question that was raised in relation to those properties was as to the person who is entitled to succeed according to the Hindu Succession Act, 1956. It is only in the subsequent written statement filed by the 2nd defendant the question with regard to the character of the properties was raised as well as the benami nature of the transaction by which Eswari Ammal purchased item 2 of plaint " A " schedule from Purushothama Asari, father of defendants 1 to 3, and also that Eswari Ammal expressed a last wish that plaint " A " schedule properties should be given away to the plaintiff, Doraiswami and Purushothama Asari and their heirs. I do not have the slightest doubt whatever that the original written statement filed by defendants 1 to 5 represented the correct state of affairs in relation to the character and ownership of the properties. There is not even a whisper of an explanation in the subsequent written statement filed by the 2nd defendant as to why the self-acquisition character of the suit properties should have been admitted in the written statement filed on behalf of defendants 1 to 5. The admission of defendants 1 to 5 acquires great significance because the 1st defendant is no other than the brother of the 2nd defendant and the 3rd defendant and the said 1st defendant himself will be interested in the suit properties as much as the 2nd defendant. Therefore it cannot be surmised or assumed that the 1st defendant made an admission contrary to the interests of the 2nd defendant who was said to be a minor at that time, when that admission itself will be adverse to the interests of the 1st defendant himself. Consequently, I am fully satisfied that the subsequent case set up by the 2nd defendant in the written statement filed by him later is only an after thought and that it did not represent the correct state of affairs in relation to the character of the suit properties. Even with regard to the evidence of the plaintiff as P.W. 1 I do not see any justification whatever to reject the same. He appears to be a truthful witness giving evidence in a natural and normal way without any attempt to conceal anything from the Court. Consequently, I am accepting the evidence of P.W. 1 more so, in the absence of any evidence contra. Therefore the conclusion is inescapable that the plaint schedule properties are the self acquired properties of Eswari Ammal.

8. The only ground that was urged by the learned Counsel for the 2nd defendant was that P.W. 1 himself admitted that there was ancestral property of 4 1/2 acres in Guduvancheri and out of the income from that property these properties were purchased by Eswari Ammal. For one thing, it is impossible to conjecture as to how the property which belonged to the joint family of the plaintiff and his two brothers Doraiswami and Purushothama Asari came to be in the exclusive

possession of Eswari Ammal, particularly when the plaintiff happened to be the eldest son of the father and also the elder brother of Eswari Ammal. Secondly, P.W. 1 has stated in his evidence that after the death of their father the said property, namely, 4 1/2 acres in Guduvancheri was left in the possession of their mother and she was managing the said property and utilising the income therefrom which was never more than Rs. 150 per annum towards her maintenance. A suggestion was made to the plaintiff, when he was in the witness box, by the learned Counsel for the 2nd defendant that Eswari Ammal lived along with their mother and consequently she would have had a share in the income from the said 4 1/2 acres of land. This suggestion was denied by the plaintiff. I do not see any reason to reject the version of P.W. 1, the plaintiff, and hold that Eswari Ammal lived with her mother and was in enjoyment of the said 4 1/2 acres in Guduvancheri along with her mother and purchased the suit properties only out of the income from the said 4 acres. Hence, I hold that the suit properties were the self-acquisitions of Eswari Ammal and nobody had any interest therein.

9. The second question raised by the 2nd defendant was in relation to the sale of the second item of plaint " A " Schedule property by Purushothama Asari in favour of Eswari Ammal. On the admitted fact that the property was purchased by Eswari Ammal from Purushothama Asari, the burden is on the 2nd defendant to establish that the apparent title does not prevail and the real title remained with Purushothama Asari. As I pointed out already, no evidence was adduced on behalf of the 2nd defendant and no such case was also put forward in the original written statement filed on behalf of defendants 1 to 5. Under these circumstances, I reject this contention summarily.

10. With regard to the third contention that the deceased Eswari Ammal expressed her last wish that the properties in plaint " A " Schedule should be given to the plaintiff, Doraiswami Asari and Purushothama Asari, and their heirs, there was no positive evidence on behalf of the 2nd defendant to establish such a contention. The only thing is, the learned Counsel for the 2nd defendant questioned the plaintiff as to whether the deceased Eswari Ammal expressed any desire to write a will and suggested to him that she had asked the plaintiff himself to write out a will and the plaintiff told her that he would not be unjust to his brothers and he would respect their rights and it is on these assurances, Eswari Ammal did not execute any will. The plaintiff denied the suggestion put to him by the learned Counsel. Even the written statement of the 2nd defendant is not couched in any definite terms that Eswari Ammal testamentarily disposed of the suit properties in plaint.

"A" Schedule in favour of her brothers. The sentence in the written statement is : Her last wishes though not in writing that the properties item one and two in the plaint schedule will be equally given to her brother V. C. Desa Bathudu, C. Doraiswami and C. Purushothama Achari and their heirs.

11. This very sentence is vague and does not give any indication as to what

exactly the definite case of the 2nd defendant is. For one thing, nowhere in the written statement of the 2nd defendant, any expression has been used to show that Eswari Ammal wanted to dispose of the properties testamentarily or did anything to dispose of the same. Secondly, as I pointed out already, Doraiswami died in 1950 and Purushothama Asari died in 1961 and therefore at the time of the death of Eswari Ammal neither of the brothers was alive and it is understandable how she would have in 1965 before her death expressed a wish that the property should be divided equally between her brothers the plaintiff, Doraiswami and Purushothama Asari and their heirs. Therefore, I am definitely of the opinion that there is nothing to show that Eswari Ammal intended to deal with the suit properties testamentarily, as suggested by the learned Counsel for the 2nd defendant.

12. Then, there remains the question of law argued by the learned Counsel for the parties as to who is the heir of Eswari Ammal:

13. Section 15(1) of the Hindu Succession Act, 1956, provides that 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 predeceased 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.

14. Relying on this provision, the contention of the learned Counsel for the plaintiff is that Eswari Ammal not having any sons or daughters and not having been survived by her husband, the plaintiff is the sole heir, as the heir of the husband of the deceased Eswari Ammal u/s 15(1) (b) of the Act. On the other hand, the learned Counsel for defendants 1, and 3 to 5 contended that the plaintiff cannot be considered to be the heir of the husband and therefore the properties will devolve upon the heirs of the father of Eswari Ammal, u/s 15(1) (d) of the Act and in such an event, the plaintiff as well as defendants 1 to 3 and 5 would become heirs, each one of the brothers of Eswari Ammal taking one-third share. The learned Counsel for the defendants 1, and 3 to 5 is not able to convince me as to how the plaintiff is not the heir of the husband of Eswari Ammal. I have already referred to the fact that the plaintiff is Eswari Ammal's husband's mother's brother's son and that relationship was admitted in the written statement and was not disputed before me. If that be the case, the plaintiff will be a cognate of the husband of Eswari Ammal. Except for stating that the plaintiff cannot be considered to be the cognate of the husband of Eswari Ammal and therefore the heir of the husband of Eswari Ammal, the learned Counsel could not invite my attention to any provision , or principle of

law to support such a contention. Therefore, I must hold that the plaintiff is the cognate of the husband of Eswari Ammal. If that be the case Section 8 of the Hindu Succession Act states:

The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter ::

- (a) firstly upon the heirs, being the relatives specified in Class I of the schedule:
- (b) secondly, if there is no heir of Class I, then upon the heirs, being the relatives specified in Class II of the Schedule;
- (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
- (d) lastly, if there is no agnate, then upon the cognates of the deceased.

As I pointed out already, there are no heirs of class I or Class II, in this case of the husband of Eswari Ammal. It is not the case of the defendants that there is any agnate of the husband of Eswari Ammal, with the result the property will have to go to the cognates of the husband of Eswari Ammal, u/s 8 read with Section 15(1)(b) of the Act.

Rule 3 of Section 16 states:

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.

15. Therefore, applying this rule, the heirship should be determined as if the husband of Eswari Ammal died immediately after the death of Eswari Ammal herself. In such a situation the plaintiff is a cognate of the husband of Eswari Ammal. Equally it may be said that defendants 1, and 3 to 5 also are cognates of Eswari Ammal's husband, they themselves being Eswari Ammal's husband's mother's brother's sons' children. Therefore, if the plaintiff and defendants 1 to 3 and 5 are cognates of the husband of the husband of Eswari Ammal, then the question arises, out of these, whether any one of them is entitled to succeed to the property in preference to the others or all of them are entitled to succeed to the property simultaneously. Section 12 of the Act states:

The order of succession among agnates or cognates, as the case may be, shall be determined in accordance with the rules of preference laid down hereunder ::

Rule 1: Of two heirs, the one who has fewer or no degrees of ascent is preferred.

Rule 2: Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent.

Rule 3: Where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2 they take simultaneously.

16. As far as the present case is concerned, the common ascent has to be traced to the parents of Eswari Ammal's husband's mother. Consequently, the degree of ascent is the same both for the plaintiff as well as defendants 1, to 3 and 5. Hence it is only Rule 2 of Section 12 of the Act that will apply to the present case. Under that Rule, though the degree of ascent is the same, as far as the descent is concerned, defendants 1, to 3 and 5 are one degree remote than the plaintiff because defendants 1, to 3 and 5 are the children of the brothers of the plaintiff. Consequently, it is the plaintiff who alone will be exclusively entitled to succeed to the properties of Eswari Ammal as cognate of her husband by application of Rule 2 of Section 12 of the Act. The learned Counsel for the defendants were not able to bring to my notice any other provision of law or any other principle of law which will displace the conclusion that is derived from the application of these statutory provisions. Consequently, I hold that the plaintiff, as cognate of Eswari Ammal's husband, is solely entitled to succeed to the estate of Eswari Ammal.

17. As a result of the above discussion, my findings on the various issues are as follows:

Issue No. 1.--The plaintiff is the sole heir of the deceased Eswari Ammal entitled to the estate left by her exclusively.

Issue No. 2.--In View of my finding on Issue No 1, this issue does not really arise and is answered against the defendants.

Issue No. 3.--On my finding that the plaintiff herein alone is entitled to succeed to the estate of Eswari Ammal and is entitled to recover possession of the said estate, he is also entitled to mesne profits. The plaintiff prays for only future mesne profits and therefore will be entitled to mesne profits from the date of suit till the date of delivery of possession. The plaintiff himself has admitted in his evidence that except for the portion which was originally in the occupation of Eswari Ammal in item 1 of plaint " A " Schedule property, the other portions in that item in plaint " A " Schedule and the entirety of item 2 of plaint " A " Schedule are in the occupation of the tenants and the tenants refused to pay rent to the plaintiff, simply because the defendants had given notice to the tenants, with the result the plaintiff had not been able to realise the rents from the tenants and naturally this will be taken into account in the determination of the mesne profits.

Additional Issue No. 1.--It has not been established that the plaint "A" Schedule properties were not the self-acquisitions of Eswari Ammal and they were the properties of the joint family consisting of the plaintiff and his two brothers. On the other hand, it has been established that the suit properties are the self-acquisitions of Eswari Ammal.

Additional Issue No. 2.--The sale of [item 2 of plaint " A " Schedule by Purushothama Asari to Eswari Ammal has not been proved to be a benami transaction.

Additional Issue No. 3.--No evidence has been let into show that Eswari Ammai expressed any such last wish as contended by the 2nd defendant and my finding is that no such last wish was expressed by Eswari Ammal.

Issue No. 4.--Under these circumstances, the suit is decreed as prayed for, declaring the plaintiff as the sole heir of the deceased Eswari Ammal and as being entitled to immovable and moveable properties described in plaint " A " and " B " Schedules respectively and directing defendants 1 to 5 to deliver possession of the immovable properties described in plaint " A " Schedule and also the moveable properties described in plaint " B " Schedule.

18. The plaintiff himself has stated in his evidence that only the 1st defendant entered into the room in the occupation of Eswari Ammal and occupied it on the death of Eswari Ammal, and the other members of his family, namely, defendants 2 and 3 and the 4th defendant also came to occupy the same. Even on the date when he gave evidence, he stated that only defendants 1 to 4 are living in a room in No. 6, Arimuthu Maistry Street, and the 5th defendant is living at Tirupapuliyur. Consequently, the decree for possession with regard to the Immovable properties will be against the defendants other than the 5th defendant and the decree for possession of moveable properties will be against defendants 1 to 4 only. Equally, the 5th defendant will not be liable for mesne profits, unless it is established that she had recovered any part of the rents from the tenants in the occupation of the suit properties. The plaintiff is entitled to his costs of the suit, to be paid by defendants 1, 3 and 4, one half, and the second defendant, the other half.