
(1987) 03 MAD CK 0031
In the Madras High Court

Visalakshi Ammal

APPELLANT

Vs

Chelliah Pillai and Others

RESPONDENT

Date of Decision : 17-03-1987

Acts Referred:

Citation : (1988) 2 LW 389 : (1988) 2 MLJ 511

Hon'ble Judges : S.A. Kader, J

Bench : Division Bench

Judgement

S.A. Kader, J.—The appeal is against the judgment and decree of the court of the Subordinate Judge, Tiruchirapalli, is O.S.No. 69 of 1977. The plaintiff is the appellant.

2. This is a suit for partition and separate possession and for accounts. The plaint averments are briefly as follows: The A schedule to the plaint is the genealogical table. One Mookka Goundar had two sons by name Perianna Gounder and Arunachala Goundar through his predeceased first wife Chellayeeammal. There was an oral partition among him and his sons in which the B schedule properties were allotted to the father Mookka Goundar. This oral partition was confirmed by a registered deed dated 19-8-1928. Subsequently the said Mookka Goundar wanted to marry one Kamakshi Ammal as his second wife and executed in her favour a premarital settlement on 7-7-1928, settling the B schedule properties on her. She was to enjoy the properties without any power of alienation and if she died issueless then the properties would revert back to the settlor Mookka Gounder and his heirs. Mookka Goundar married Kamakshi Ammal and begot two children both of whom died early in their lives. The C schedule properties were subsequently acquired by Mookka Goundar and were his separate properties. Mookka Gounder died in or about 1939. Of the two sons of Mookka Gounder through his first wife i.e. Perianna and Arunachala, the latter Arunachala died in 1934 leaving behind his widow the plaintiff herein as his sole heir. Perianna Gounder died in 1971. The first defendant is his son, the second defendant is his daughter and the third defendant is another predeceased daughter's daughter.

The second wife of Mookka Goundar died on 22-2-1975. Thereafter, the plaintiff has filed the suit for partition and separate possession of her half share in the B and C schedule properties as heir to her father-in-law Mookka Goundar. According to her, she is entitled to a half share as a heir to her husband Arunachala Goundar while the defendants 1 to 3 are entitled to the other half as heirs to Perianna Goundar. She also claimed accounts from the first defendant.

3. The first defendant resisted the action. He denied that there was any oral partition between Mookka Gounder and his sons or that the B schedule properties were allotted to Mookka Goundar. He also denied and disputed the truth and validity of the premarital settlement deed dated 7-7-1929 in favour of Kamakshi Ammal, the second wife of Mookka Goundar. On the death of Mookka Goundar in 1939, the first defendant claimed that his father was his sole heir and by virtue of the will executed by his father, the first defendant was entitled to all the properties of his father. On the death of Kamakshi Ammal in 1975, the first defendant was the only heir of Mookka Gounder and has become entitled to the B schedule properties. The plaintiff is not his heir and is not entitled to any share. The C schedule properties were not the separate properties of Mookka Goundar. They were joint family properties purchased out of the joint family income. As such Mookka Goundar has no exclusive right. In any event, the C schedule properties were possessed and enjoyed by Mookka Goundar till his death and after his death the said property was possessed and enjoyed by Perianna Goundar, the first defendant's father. As per his will the first defendant has become entitled to these properties. In any event, the first defendant and prior to him his father have been in exclusive possession and enjoyment of the C schedule properties and have perfected title by adverse possession for over the statutory period. The plaintiff has never been in possession and is not entitled to claim any share. According to the first defendant, the suit has not been properly valued and proper court fee has not been paid.

4. The second defendant remained ex parte.

5. The third defendant accepted the plaintiff's claim and contended that on the death of Kamakshi Ammal the plaintiff was entitled to a half share and the other half share of the suit properties belonged to the defendants 1 to 3. She had no objection for the partition in favour of the plaintiff and she also paid court-fee for partitioning her share.

6. On the above pleadings, the following issues were framed for trial:

1. Whether the suit B schedule properties were settled on Kamakshi Ammal by deed dated 7-7-28 and is the same valid and binding on the parties to the suit?
2. Whether the B schedule properties were allotted to the share of Mookka Goundar in the partition deed dated 19-8-1929?
3. Whether the 1st defendant alone is entitled to inherit the property of Mookka Goundar to the exclusion of the plaintiff and other defendants.

4. Whether the C schedule properties are the joint family properties for all or any reasons as contended in para, 6 of the 1st defendant's written statement?
5. Whether the will dated 31-8-1971 of Perianna Goundar is true, valid and binding on the defendants 2 and 3?
6. Whether the 1st defendant has acquired title to the suit properties by adverse possession?
7. Whether the suit is not properly valued and proper court-fees paid?
8. Whether the plaintiff is entitled to the accounting prayed for?
9. To what relief is the plaintiff entitled?

7. The learned Subordinate Judge found issue No. 1 in favour of the plaintiff and held that the deed of settlement executed by Mookka Goundar in favour of Kamakshi Ammal, his second wife, was true, valid and binding on all the parties to the suit. On issue No. 2 it was held that the Schedule properties were allotted to Mookka Gounder in the family partition. On issue 3 it was found that the defendants 1 and 2 were alone entitled to the B schedule properties. On issue 4 it was held to be the separate self-acquired properties of Mookka Gounder. Issue 5 was found in the affirmative and it was held that the will executed by the first defendant's father was valid and binding on defendants 2 and 3. Issue 6 was found in the negative and it was held that the first defendant had not acquired title by adverse possession. On issue 7 it was found that the suit ought to have been valued u/s 37(1) and not u/s 37(2) of the Court-Fees Act as has been done. On issue the learned Subordinate Judge held that the plaintiff was entitled to a half share in the C schedule properties and for accounting only in respect of her share in the C schedule properties. Accordingly a preliminary decree was passed for partition and separate possession of the plaintiff's half share in the C schedule properties and for accounts against the first defendant in respect of the C schedule properties. The third defendant's claim was dismissed. Aggrieved thereby the plaintiff has come in appeal. The defendants have not preferred any cross-appeal or cross objection.

8. The only point that arises for consideration is: Whether the plaintiff/appellant is entitled to a half share in the B schedule properties?

9. POINT: The following pedigree is relevant for a proper appreciation of the facts of this case.

Mookka Goundar | _____ | |
 1st wife 2nd wife Chellayee Ammal Kamakshi Ammal (predeceased her died on
 22-11-1975 husband | | _____ | | | Kunju Pillai
 Chellayee | (died young) (died young) | _____ |
 | Perianna Gounder Arunachala Goundar (died in 1971) (died in 1954) |
 Visalakshi (wife) | (Plaintiff) _____ | | |
 Chelliah Pillai Chellayee Chinna Pillai (1st defendant) (2nd defen- (daughter and)

(died)) | Palaniammal (3rd defendant)

10. The B schedule properties fell to the share of Mookka Goundar in the partition among him and his sons and he settled these properties on his prospective second wife Kamakshi Ammal by means of a pre-marital deed of settlement under ExA-1 dated 7-7-1928. The operative portion of the deed of settlement runs thus:

Under the aforesaid deed of settlement the settlee Kamakshi Ammal was to enjoy the properties settled on her without any power of alienation and should she die issueless, the properties shall revert to the settlor and his heirs Kamakshi Ammal gave birth to two children by name Kunjupillai and Chellayee, but, they died young. Kamakshi Ammal herself died on 22-11-1975 leaving no issues of her body. As per the aforesaid deed of settlement under ExA-1, the property has to revert to the settlor and his heir. The settlor having already died the property has to devolve upon his heirs as on the date of the death of Kamakshi Ammal on 22-11-1975 when succession opened. The learned Subordinate Judge has proceeded on the basis as if the Schedule properties settled up on Kamakshi Ammal belonged to her absolutely and traced heirship to Kamakshi Ammal. This is clearly erroneous. Kamakshi did not have an absolute right and the deed expressly made it clear that should she die issueless, the property should revert to the settlor and his heirs. The settlor having died, the heirs of the settlor have to be decided with reference to the date of death of the limited owner Kamakshi on 22-11-1975. In *Krishnammal v. Ekambaram* AIR 1976 S.C. 1298 the testator under the following provision in Clause (5) of his will:

My third son Nataraja Pillai shall take the income accruing from the properties viz, my cart stand, house and ground situate in the western row of Mint Street bearing municipal Door No. 273, H.S.No. 600, Collector's Certificate No. 750 and the five godowns viz., two godowns situate in varadaraja Mudaliar Street bearing Municipal door Nos. 90 and 91. Three godowns situate in the III North Beach Road bearing Municipal door Nos. 5,6 and 7 to a B.S.Nos. 3158 and 3187, Collector's Certificate No. 2550. After his lifetime, if he leaves any male issues they shall take the aforesaid properties with powers of alienation such as gift, usufructuary mortgage and sale. If there are no male issues as aforesaid my heirs shall take the aforesaid properties.

The Supreme Court pointed out that on a true construction of the Clause (5) of the will it logically and inexplorably followed therefrom that the ascertainment of the heirs of the testator on whom the property was intended to devolve, in the event of Nataraja dying sonless was to be made in accordance with the Hindu Law of intestate succession as in force on the date of Nataraja's death on 31-1-1957 when succession opened out and not in accordance with the orthodox Hindu Law prevailing in 1928 when the testator died. The heirs of the settlor Mookka Goundar have, therefore, to be ascertained with reference to the date of death of the limited owner Kamakshi Ammal on 22-11-1975. u/s 8 of the Hindu Succession Act, 1956 the property of a male Hindu dying intestate shall devolve

firstly upon the heirs, being the relatives specifically in Class 1 of the Schedule. Class I enumerates the following relatives:

Son; daughter; widow: mother; son of a predeceased son; daughter of a predeceased daughter; son of a predeceased daughter; daughter of a predeceased daughter widow of a predeceased son; son of predeceased son; son of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son;

As is seen from the pedigree Mookka Goundar has two sons by his predeceased wife viz., Perianna Goundar and Arunachala Goundar. The plaintiff-Visalakshi is the widow of Arunachala Goundar. She is, therefore, one of the relatives mentioned in class I, being the widow of a predeceased son. The first defendant is son of Perianna Goundar and the second defendant is the daughter of Perianna Goundar. They are also the heir being the relatives mentioned in class I as the son of a predeceased son and the daughter of a predeceased son. The third defendant is only the daughter of a predeceased daughter of a predeceased son. She is not a relative mentioned in class I and she comes only in second entry of class II and cannot, therefore, claim to be an heir when there are class I relatives. It follows that the plaintiff and the defendants 1 and 2 are the heirs of late Mookka Goundar, the settlor, at the time of death of the limited owner Kamakshi on 22-11-1975. Section 10 of the Hindu Succession Act deals with distribution of the properties among the heirs in class I. Rule 3 lays down that the heirs in the branch of each predeceased son or each predeceased daughter of the intestate shall take between them one share. Hence, the plaintiff, as the heir in the branch of one predeceased son viz., Arunachala Goundar takes one share, and defendants 1 and 2 as heirs in the branch of another predeceased son Perianna Goundar take one share. The plaintiff, therefore, becomes entitled to a half share in the B schedule properties and the other half goes to defendants 1 and 2.

11. Even assuming without admitting that the B schedule properties belonged to Kamakshi absolutely, as assumed by the learned Subordinate Judge, the result will be the same and the heirs entitled to take the properties are only the plaintiff and defendants 1 and 2, and not defendants 1 and 2 alone as found by the court below. Section 15 of the Hindu Succession Act, dealing with succession in the case of a female Hindu runs thus:

(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 predeceased son or daughter) and the husband;

(b) second, 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 predeceased 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.

The case on hand falls u/s 15(1) and not u/s 15(2)(a) or (b) as the B schedule properties have not been inherited by late Kamakshi from her father or mother or from her husband. She has got it under a deed of settlement. u/s 15(1) the property shall devolve firstly upon the sons and daughters (including the children of a predeceased son or daughter and the husband) and secondly upon the heirs of the husband. As Kamakshi had not left behind any son or daughter including the children of any predeceased son or daughter and as her husband has predeceased her, the property has to devolve only upon the heirs of the husband. As already found, the heirs of her husband Mookka Goundar as on 22-11-1975 are the plaintiff and defendants 1 and 2, the plaintiff taking one half share and the defendants 1 and 2 the other half.

12. The learned Subordinate Judge has proceeded on the basis that u/s 15(1)(a) the words "sons and daughters" include sons and daughters of the predeceased husband through his first wife i.e., step-son and step-daughter. Since the defendants 1 and 2 are the son and daughter of Kamakshi's step-son Perianna Gounder, they are held entitled to the suit B schedule properties as her heirs to the exclusion of the plaintiff, who is only the widow of a step-son. This conclusion of the learned Subordinate Judge is based upon a Bench decision of the High Court of Allahabad in Ram Kotari v. Prakash Vathi 1968 All.LJ. 464. The learned judges therein have stated that the expression "sons and daughters" as used in Section 15(1)(a) does not refer only to the sons and the daughters of a female Hindu dying intestate but also include the sons and the daughter of her deceased husband. The learned judges have arrived at this decision on the basis of the difference in the words used in Section (1)(a) and in Section 15(2)(a) and (b). In Section 15(1)(a) the words used are "sons and daughters", while in Section "15(2)(a) and (b) the words used are "son or daughter of the deceased". The omission of the words "of the deceased" in Section 15(1)(a), according to the learned judges, was to protect the interest of the children of the husband of the Hindu female dying intestate. With due deference to the learned judges I am unable to agree with the aforesaid interpretation. The words "sons and

daughters" in Section 15(1)(a) can never include step-sons and step-daughters. These words must be given their natural and ordinary meaning that is the issues of her body in the absence of any definition or explanation to the effect that these words would include step-sons and step-daughters. In Mulla's Hindu Law, 15th (1982) edition at page 1001, the learned author has also taken the view that a step-son is not entitled as a son to inherit from his step-mother as one of his heirs u/s 15(1)(a) of the Hindu Succession Act. This is the view of a Bench of the Mysore High Court in Mallappa v. Shivappa AIR 1962 Mys.140. The same view has been taken by the High Court of Punjab and Haryana in Gurnam Singh Vs. Smt. Ass Kaur and Others, . In the aforesaid case before the Allahabad High Court Ram Kotari v. Prakash Vathi 1968 All.L.J. 464, Rani Kali was the second wife of one Chandulal and succeeded to his estate on his death in 1920 as a limited owner. After coming into force of the Hindu Succession Act, 1956 in June, 1956, her limited interest ripened into full ownership. On her death in 1956, her daughter Prakash Vathi claimed the entire estate, inherited by her mother from her father Chandulal while Chandulal's daughter Ram Kotari through his predeceased wife claimed a share therein. The Bench filed that if the words "sons and daughters" in Section 15(1) were to be confined to the sons and daughters of the deceased Hindu female, the result would be excluded from inheriting the interest in the property which originally belonged to her father and the rule would be patently unfair to the children of the husband of the Hindu female through his predeceased wife. This reasoning is not sound. Where a deceased Hindu female leaves behind properties acquired by her by her own exertions, would it be fair to allow her properties to be inherited not only by the issues of her body but also by the issues of her predeceased husband through another wife? Suppose a Hindu female dies leaving a son, her husband and a son of her husband through another wife, will her separate properties be inherited by all of them equally u/s 15(1) of the Act? I am firmly of the view that the absence of the words of the deceased in Section 15(1)(a) does not enlarge the meaning of the words "sons and daughters of her husband through another wife. I therefore hold that in any event, the plaintiff and defendants 1 and 2 are entitled to the B schedule properties, the plaintiff to one half and defendants 1 and 2 to the other half.

13. In the result, the appeal is allowed, the judgment and decree of the Court below so far as the B schedule properties are concerned, are set aside and there will be a preliminary decree for partition and separate possession of the plaintiff's one half share in the B schedule properties also and for accounts as prayed for. The parties are directed to bear their respective costs in this appeal.