

(2013) 06 MAD CK 0262

Madras High Court

Case No: A.S. No. 808 of 2010 and M.P. No. 1 of 2010

S. Thamarai Selvan and Another

APPELLANT

Vs

S. Rajavelu and Another

RESPONDENT

Date of Decision: June 25, 2013

Citation: (2014) 2 MLJ 614

Hon'ble Judges: S. Palanivelu, J

Bench: Single Bench

Final Decision: Allowed

Judgement

S. Palanivelu, J.

Appeal Suit is filed against the Judgment and Decree dated 05.01.2009 in O.S. No. 156 of 2004 on the file of the Additional District Judge (Fast Track Court No. II) at Salem to pass a preliminary decree for partition and separate possession and decree for permanent injunction. The following are the averments contained in the plaint filed in O.S. No. 156 of 2004.

1(a) The plaintiffs are the sons of the 2nd defendant born through Lakshmi. The 1st defendant is also a son of the 2nd defendant born through Padmavathi, the 3rd defendant herein. The 2nd defendant is the son of Ramalingam Pillai. The said Ramalingam and the 2nd defendant were working as contractors in Railway Good Shed at Shevapet and earned enormous income and from such joint income, they have purchased enormous properties. There was no ancestral properties belonged to Ramalingam. All the properties were purchased some in the name of the said Ramalingam, some in the name of the 2nd defendant, some in the name of Ramalingam's 1st wife and 2nd wife, some in the name of the 3rd defendant and some in the name of the 1st defendant also. The defendants alongwith plaintiffs duly represented by the 2nd defendant as their guardian executed a registered partition deed on 29.06.1995 in respect of some properties alone. In the said partition, the plaintiffs have been shown as Hindu Joint Family undivided members alongwith the defendants 1 and 3 and the said Ramalingam Pillai. The properties

comprised in the said partition deed stood in the name of Arukkaniammal, the mother of the 2nd defendant through a registered sale deed dated 09.09.1948, in the name of Ramalingam and his 2nd wife Kaveriammal through two sale deeds dated 14.05.1953 and 27.04.1955. In the said partition deed, the plaintiffs, defendants 1 and 2 were given certain properties in separate schedules. But there are several items belonging to the Joint Family of the said Ramalingam, which were left undivided.

1(b) On 04.07.1995, the said Ramalingam and the defendants have executed a Koor chit again divided such properties among themselves. The execution of koor chit dt. 04.07.95 again would by itself would prove that the partition effected through the partition deed dt. 29.06.1995 is only a partial partition. They have not included the plaintiffs in the koor chit nor given any property in the same. When once the plaintiffs have been admitted as members of Joint Hindu Family, they should be included in all the partition, whether orally made or in writing. Without including the plaintiffs and without allotting the properties to the plaintiffs, the said partition koor chit dt.04.07.1995 is not valid in law and will not bind the plaintiffs in any manner. The said Ramalingam Pillai had executed a Registered will dt.07.04.1995 and registered on 21.04.95, thereby bequeathing the properties comprised therein to the 1st defendant, after the death of the said Ramalingam Pillai. Such Will was not executed while he was in a sound disposing state of mind. Even though the properties mentioned in the Will stood in the name of Ramalingam Pillai through several sale deeds, they were not his absolute properties. They are also joint family properties earned out of the joint efforts of the said Ramalingam and the 2nd defendant and out of the income from the properties comprised in the partition deed dt.29.06.1995. There was absolutely no difference shown between the self acquired properties and joint family properties, that a Will cannot be executed prior to the execution of the partition deed and only absolute properties can be bequeathed by way of Will.

1(c) The said Ramalingam Pillai had absolutely no right to execute any Will before effecting a partition between the parties. Hence the said Will dt. 07.04.1995, alleged to have been executed before the registered partition deed is invalid in law. More over the execution of the said Will is also tainted with suspicious circumstances, as there were disputes and dissensions between the 2nd defendant and the 3rd defendant being his first wife Padmavathy, who were living separately. In order to betray the 2nd defendant and the plaintiffs only such a Will has been designed and fabricated at this instance of the defendants 1 and 3, as if the properties are the self acquired one. That the 1st defendant cannot have any exclusive right over the said properties on the basis of the said Will dt. 07.04.95 and hence the plaintiffs are also entitled to 2/4th share in the properties comprised under the said Will dt. 07.04.95. Likewise, the 1st defendant cannot also make any exclusive claim over the properties alleged to have been allotted to him through the said koor chit dt. 04.07.1995. Since the said Will dt. 07.04.1995 and the partition koor chit dt.

04.07.1995 are invalid in law, they are ignored by the plaintiffs.

1(d) Ramalingam Pillai died on 05.09.99 and it should be presumed that he died intestate. His only daughter by name Seethalakshmi had already released from the family, accepting a share in the joint family properties and that she has no right in the other joint family property by executing a family koor chit dt.30.11.91. Hence the entire properties of Ramalingam Pillai devolved on his only son the 2nd defendant. The Plaintiffs and the defendants 1 and 2 being the joint family members are each entitled to 1/4th share in the suit properties. Hence in all the said properties the plaintiffs have got 2/4th share. The suit properties are let for lease to various tenants. Now the 1st defendant is stealthily receiving rents from such tenants and appropriating for himself, without sharing with the plaintiff and that the 1st defendant has no right to appropriate the rents for himself. The 1st defendant is liable to account for the rent received by him and liable to share with the plaintiffs.

1(e) The 2nd defendant is also acting against the interest of the plaintiffs, by entering into koor chit dt. 04.07.95 by not including the plaintiffs. Hence he is added as 2nd defendant in the suit who has also got a share in the suit properties. The plaintiffs have issued a legal notice dt. 05.11.99 to the 1st defendant, with a copy sent to all the tenants. At first the 1st defendant sent a reply dt. 04.12.1999 requesting time for giving reply to the notice. Then on 10.01.2000, the 1st defendant sent a reply with all false and vexatious allegations denying the right for partition itself. All the allegations made in the reply notice of the 1st defendant are false and are denied. Having admitted the plaintiffs as joint family members in the partition deed dt. 29.06.95, the 1st defendant has no right now to deny their lawful share in the suit properties. It is submitted that the plaintiffs are entitled to 2/4th share in the suit properties. The Plaintiffs are in joint and constructive possession of the suit properties. The 1st defendant is bent upon creating all sorts of encumbrance over the suit properties and is trying to alienate the same to 3rd parties. Hence it has become necessary for the plaintiffs to file the suit for partition and separate possession and also for other reliefs.

2. In the written statement filed by the defendant it is alleged as under:

2(a) It is falsehood to aver that the plaintiff brought up this defendant by attending his needs. It is a misnomer to aver that the suit properties are the separate and self acquired properties of Kaliappa Gounder and that the plaintiff is not entitled to any share. It is falsehood to aver that this defendant obtained signatures in blank papers. It is another concoction to say in the plaint that the plaintiff is not aware of the fate of the claim. Plaintiff is not entitled to any amount in the motor accident claim. It is a mis-conception of fact and law to aver that the partition deed dt. 13.9.91 is a fraudulent one and not binding upon the plaintiff and that the plaintiff cannot ignore the same.

2(b) The said Kaliappa had considerable productive ancestral properties at Thingalur in Perundurai taluk and out of the productive nucleus and out of the sale-proceeds of the said properties, the said Kaliappa purchased the suit properties; that apart in a family arrangement on 2.6.1991 between the plaintiff and this defendant, the entire suit properties had been allotted to this defendant and the plaintiff had taken a cash of one lakh in the presence of junior paternal uncle Chenniappa gounder towards her claim. The said oral family arrangement was reduced into writing on 9.6.91 and the parties signed and marked her thumb impression and this defendant. The xerox copy of the said written family arrangement was reduced into writing on 09.06.1991. Similarly, in a registered partition dt.13.09.1991, the suit properties were given to this defendant and the 2nd defendant had no subsisting interest therein as she had taken the property covered under registered will dt. 18.12.1985 executed by father Kaliappa who subsequently died on 16.4.1989. That apart, father Kaliappa while he was in a sound disposing state of mind executed his last will by deed dt.10.2.1989. Therefore, it is falsehood to aver that father Kaliappa died intestate and plaintiff is not entitled to claim any share. After the death of father on 16.4.1989, the said will Dated 10.2.1989 came into force and this defendant is entitled to the properties mentioned therein as a legatee under the will and no one else including the plaintiff has got any right title or interest in the said properties. There are debts to the family to be discharged by this defendant and plaintiff has no cause of action and that the suit may be dismissed with costs.

3. In the reply statement filed by the plaintiff, it is averred as follows:

3(a) The allegations that the father of the plaintiff Kaliappa had ancestral properties at Thingalur and out of the sale proceeds, the said ancestral properties were purchased is false. The allegation that in a family arrangement on 2.6.1991 between the plaintiff and the first defendant the entire suit properties were allotted to the first defendant and the plaintiff had taken a cash of rupees one lakh in the presence of Junior paternal uncle Chenniappa gounder towards her claim and that the said family arrangement was reduced to writing on 9.6.1991 and the parties signed and marked their thumb impression and the first defendant had one copy and the plaintiff is having the other is false. The plaintiff did not affix her thumb impression in any document on 9.6.1991, that the alleged document dated 9.6.91 should be either a forged document or fabricated one and that the plaintiff is an illiterate lady who does not even know to write her name.

3(b) The alleged wills dated 18.12.1985 and 10.12.1989 are not true, genuine and executed by the father of the plaintiff Kaliappa out of his own free will and volition in a sound and disposing state of mind. The plaintiff denies the signature found in the alleged wills that of her father. The plaintiff, therefore, prays that this Court may be pleased to decree the suit as prayed for.

4. After analysing the pleadings and evidence on record, the learned Fast Track Judge No. 2, Salem has dismissed the suit with costs refusing to grant decree for

partition. Hence, the plaintiffs have come forward with this appeal. The following points have arisen for consideration in this appeal.

- (1) Whether the suit properties are joint family properties as pleaded by the plaintiffs?
- (2) Whether the division in status of the parties to the suit was effected?
- (3) To what relief are the plaintiffs entitled to?

Point No. 1 & 2:

5. It is the first and foremost contention of the plaintiffs that the suit properties were purchased in the names of family members that the funds earned jointly by Ramalingam Pillai and his son the second defendant. The plaintiffs are the sons of second defendant born through one Lakshmi whereas the first defendant was son to second defendant born through one Padmavathi. It is the definite version of the plaintiffs in the plaint that the plaintiffs, first and second defendants and Ramalingam Pillai are members of joint undivided family. It is also pleaded that Ramalingam Pillai and Subramaniam were earning money from Forwarding & Clearing work in Salem Railway Forwarding & Clearing and by means of the said business, they were able to purchase various properties and that Ramalingam Pillai did not possess any ancestral property. It is also stated by the plaintiffs that some properties were purchased in the name of first and second wives of Ramalingam Pillai and some other properties were purchased in the names of first and third defendants and that even though they were purchased in individual names, they were enjoyed in common.

6. PW 2 is the member of the above said Association. His membership card is Ex. B15. He would say that both Ramalingam Pillai and Subramaniam earned money from the said Clearing & Forwarding Agency and purchased properties. He also submit that except the above said agency business, both of them did not have any other income yielding business. PW 3 says in support of the plaintiffs by deposing that both Ramalingam Pillai and Subramaniam earned from the above said agency and acquired properties and that first and third defendants are not having any independent income. In the cross, he says that he alongwith second defendant and some other persons were engaged in Real Estate business and that he does know what business the first defendant is doing.

7. Ex. A. 6 is the copy of registered will executed by Ramalingam Pillai in favour of the first defendant on 07.04.1995 bequeathing the properties of Ramalingam Pillai in favour of first defendant. In this document, Ramalingam Pillai has specifically stated that he got the properties by his own income and he acquired some other properties in the names of his two wives Arukkaniammal and Kaveriammal and that all the properties covered by the will are his self-acquired properties. Ex. A. 7 the list of partition an unregistered one came into existence on 04.07.1995, on the same

day of registration of the above said will. In this document, both the plaintiffs were committed . It was executed by Ramalingam Pillai to 1 to 3 defendants.

8. The plaintiffs have furnished as many as nine items in the schedule. Items 1 to 6 are mentioned as the properties contained in the will dated 04.07.1995. Item No. 7 is found in the partition koor chit. Item No. 8 is the property covered by sale deed dated 25.01.1999. Item No. 9 is another property which was purchased by means of sale deed dated 04.12.1995. In Exs. A.5 and A. 7 documents, Ramalingam Pillai and Subramaniam have admitted that they remain as Joint Hindu Undivided family and the properties contained in the respective deeds also remain as undivided. As far as Ex. A. 6 will is concerned, Ramalingam Pillai appears to have mentioned that the properties mentioned in the will belong to him exclusively. When Ramalingam Pillai, Subramaniam and the first defendant unanimously admitted in Exs. A. 5 and A. 7 documents that they remain as joint undivided family, the properties shows therein shall partake character of Hindu Undivided properties.

9. The plaintiffs have produced Ex. A8, sale deed dated 04.12.1995 in which plaintiff item 9 is shown. But even though it has been mentioned in the plaint, still item No. 8 is found in sale deed dated 25.01.1999 they have not produced the sale deed. Hence, this court is at loss to find out the salient features in the document. Ex. A. 8 is the sale deed by means of which first and third defendants purchased property for Rs. 1,87,000/- from one Revathy. Since Padmavathi has also participated in the sale deed as a purchaser, it is doubtful whether this property could be treated as Hindu Undivided Family property. In the partition koor chit, it is categorically recited that even though the third defendant is a party to the document, she is not entitled to any family property. Even though the third defendant is a party to Ex. A. 7, koor chit, she was not allotted with any immovable property. Hence at the most, the plaintiffs would claim partition. So the plaintiffs would not claim share in plaintiff 8 and 9 items.

10. As far as Item No. 7 is concerned, in the partition koor chit itself, parties have categorically admitted that the properties belong to Hindu Undivided Family but in the koor chit, the plaintiffs have been ignored. They were not included as parties to Ex. A. 7 but in Ex. A. 5, registered partition deed, even though the plaintiffs happened to be minors, at the time of the document, the parties specifically admitted that they remain as Hindu Undivided Family Members. If so, the same situation would be existing at the time of existence of Ex. A. 7, koor chit also. Hence, it has to be necessarily held that for the purpose of execution of partition koor chit also the plaintiffs should have been treated as Hindu Joint Family members. Hence, in Item No. 7 of the plaint which is one of the properties contained in koor chit, the plaintiffs can claim partition.

11. As regards plaintiff items 1 to 6, they are stated to be covered by the will. The will was executed by Ramalingam Pillai in which he has stated that the properties shown in the will were his self-acquired properties. The plaintiffs have categorically disputed the genuineness of the will. They have pleaded that in order to betray the

plaintiffs the will has been designed and fabricated at the instance of the defendants 1 to 3. Para. 8 of the plaint is fully devoted for making objections to the will. In this context, it is incumbent upon the propounder, the first defendant, to establish the execution, attestation of the will and also he has to dispel the suspicious circumstances surrounding the execution of the will. But he did not examine any attesting witness to the will. As per Section 68 of the Indian Evidence Act, any one of the attesting witness has to be examined to prove the execution of the will but in this case, it is significantly absent. In this context, the learned counsel for the plaintiffs places reliance upon a decision of the Hon'ble Supreme Court reported in [Bharpur Singh and Others Vs. Shamsheer Singh](#), wherein their Lordships have observed thus:

A will must be proved having regard to the provisions contained in clause (c) of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act. The propounder of a will must prove its execution by examining one or more attesting witnesses. The burden of proof is on the propounder. If such proof u/s 68 of the Evidence Act is not possible, the proof u/s 69 and 70 of the Evidence Act has to be held. The presumptions regarding old documents u/s 90 of the Evidence Act, keeping in view the nature of proof required for proving the Will, have no application. Where, fraud, coercion or undue influence, the burden of proof would be on the caveator. If the Will is surrounded by suspicious circumstances, it would not be treated as the last testamentary disposition of the testator. The suspicious circumstances may be; state of mind of the testator, unnatural dispositions, propounder taking a prominent part in the execution of the Will which confers on him substantial benefit.

12. In the absence of such evidence on record, the will remains unproved and the contents there on have also to be treated as not established. In this context, it is not believable that the properties shown in the will are self-acquired properties of Ramalingam Pillai.

13. The learned counsel for the plaintiffs also relies upon a decision of the Apex Court reported in [Bhagwan Dayal Vs. Mst. Reoti Devi](#), wherein the observations are as follows:

The general principle's that every Hindu family is presumed to be joint unless the contrary is proved; but this presumption can be rebutted by direct evidence or by course of conduct. It is also settled that there is no presumption that when one member separates from others that the latter remain united; whether the latter remain united or not must be decided on the facts of each case.

14. In [G. Narayana Raju Vs. G. Chamaraju and Others](#), (their Lordships have held as follows:

It is a well established doctrine of Hindu law that property which was originally self-acquire may become joint property if it has been voluntarily thrown by the

coparcener into the joint stock with the intention of abandoning all separate claims upon it. The doctrine has been repeatedly recognised by the Judicial Committee (See *Hurpurshad v. Sheo Dayal* and *Lal Bahadur v. Kanhaya Lal*). But the question whether the coparcener has done so or not is entirely a question of fact to be decided in the light of all the circumstances of the case.

15. In view of the above said decisions, every Hindu Family is presumed to be joint unless the contrary is proved but in this case, there are categorical admissions on the part of defendants 1 to 3 that the properties belong to Hindu Undivided Family. The totality of the above said circumstances would show that the plaint items 1 to 7 are Joint Hindu Family Properties in which the plaintiffs can claim partition. This point is answered as above.

Point No. 3:

16. As found in the discussions under Point Nos. 1 & 2, the plaintiffs are able to show that they have joint right in plaint items 1 to 7. As far as plaint items 8 and 9 are concerned, they have no right. Hence, preliminary decree for partition has to be passed as far as suit item Nos. 1 to 7 are concerned as prayed for. In such view of this matter, the judgment and decree of the trial court have to be modified. This point is answered accordingly. In fine, the Appeal Suit is allowed in part passing a preliminary decree for partition in the suit as regards plaint items 1 to 7. With respect to plaint items 8 and 9, the suit is dismissed. The plaintiffs are also entitled for permanent injunction and for the due share in rent received by the first defendant from the tenants, as prayed for in columns (ii) & (iii). No costs.