

K.S. Palanisami Vs K.S. Pongulappan (died) and Others

Court: Madras High Court

Date of Decision: Oct. 9, 2013

Citation: (2014) 1 LW 233

Hon'ble Judges: R.S. Ramanathan, J

Bench: Single Bench

Advocate: S. Venkateswaran, for the Appellant;

Final Decision: Dismissed

Judgement

R.S. Ramanathan, J.

First defendant in O.S. No. 103 of 1989 on the file of the Sub Court, Gobichettipalayam is the appellant. The

deceased first respondent filed the suit for partition of his half share and for separate possession. The Trial Court granted the preliminary decree

holding that the first respondent was entitled to 4/9 share and the appellant is entitled to 4/9 and the second respondent is entitled to 1/9 share.

Aggrieved by the same, this appeal is filed.

2. The plaintiff and the defendants are the children of Chellianna Gounder and their mother was Nallammal. Chellianna Gounder died in the year

1948 and he was in possession of ancestral properties and after his death, those properties were managed by the mother as the plaintiff and the

first defendant were minors and the mother sold some properties during the minority of the plaintiff and the first defendant and also purchased

certain properties and therefore, all the properties mentioned in the suit schedule are the joint family properties of the plaintiff and the first defendant

and item 7 was purchased in the name of the mother and the sale consideration for the purchase was provided from the income of the joint family

properties and therefore, she was not the owner of that property. The plaintiff was a graduate and he went for employment and after the first

defendant became major, he was looking after the properties and the plaintiff was employed in the Chintamani Co-operative Store at Coimbatore

and he was there for 15 years and thereafter, he was doing business and the first defendant, the brother of the plaintiff was enjoying the income

from the suit properties and when the plaintiff demanded partition, the first defendant refused to divide the properties and therefore, the suit was

filed for partition of the plaintiff's half share in the suit properties.

3. The first defendant filed a statement stating that the sister of the plaintiff and the first defendant was a necessary party and she was not

impleaded. He also contended that item 7 was the separate property of the mother and it was purchased from her own income and therefore, the

plaintiff cannot claim partition in respect of item 7. He has also stated that in respect of item 7, the mother Nallammal executed a Will while she

was in a sound and disposing state of mind on 14.9.1988 and the Will was also registered and therefore, under that Will, he became the absolute

owner of item 7. He also stated that except item 7, all the other properties are joint family properties. He also contended that the property

purchased by the plaintiff at Ganapathy, Coimbatore also belongs to the joint family property and the property was purchased from and out of the

income from the joint family properties and the salary earned by the plaintiff was not sufficient to maintain his family and he also stated that the

plaintiff has obtained gas agency and the money was also provided by the joint family income and the plaintiff was doing money lending business

from the income he got from the joint family and he has not given any share from his income to the first defendant and therefore, the house in which

the plaintiff is residing and the gas agency also belong to the joint family and they are also liable for partition. He also stated that the plaintiff was

managing the suit property till the year 1984 and he has not rendered any account and item 3 was already sold and therefore, the suit is bad for

partial partition.

4. The plaintiff filed reply statement denying the allegation that item 7 was purchased by the mother from her own funds and has stated that it was

purchased from the income of the joint family property. He also stated that the Will dated 14.9.1988 was not a genuine one and Nallammal was

not in sound and disposing state of mind at the time of execution of the alleged Will and she was unconscious from February 1988 and therefore,

the Will must have been fabricated by the first defendant with the help of attesting witnesses and he also denied the allegation that the house was

purchased by him from and out of the joint family income and he has stated that the house was purchased from the income he earned from the Co-

operative Society and also the part time job he was doing and he also obtained loan for the construction and the business was also started by him

from and out of the income he got from his job and therefore, the business and the houses cannot be brought into joint family and the defendant is

not entitled to claim share in those properties.

5. The first defendant filed additional statement stating that on the date of execution of the Will, the mother Nallammal was conscious and that was

also known to the sister, the second defendant and the second defendant did not object to the Will and there was no necessity to get a declaration

for the Will and as per the Will, he became the absolute owner of the suit property and therefore, item 7 is not liable for partition.

6. On the basis of the above pleadings, the following issues were framed:--

1. Whether the suit properties are joint family properties?
2. Whether the suit is not maintainable for not impleading the sister of the parties?
3. Whether item 7 is a separate property of the mother?
4. Whether the mother bequeathed the 7th item to the first defendant under the Will dated 14.9.1988?
5. Whether the first defendant was managing the suit properties from 1984?
6. Whether the court fee paid is correct?
7. Whether the house constructed by the plaintiff in Coimbatore also belongs to the joint family?
8. Whether the business run by the family is a joint family business?
9. Whether the suit is bad for partial partition for not including the house and business owned by the plaintiff?
10. To what share the plaintiff is entitled?
11. To what relief the parties are entitled?

7. The additional issues framed are as follows:--

1. Whether the Will dated 14.9.1988 was a true and valid one?
2. Whether the debts and expenses stated by the first defendant are true and binding on the plaintiff?
8. On the side of the plaintiff, two witnesses were examined and 25 exhibits were marked and on the side of the defendants, three witnesses were

examined and 54 exhibits were marked.

9. The Trial Court answered issue No. 2 holding that the sister of the parties was impleaded and therefore, the suit is maintainable. Issue No. 3

was answered holding that the suit property was not a separate property of Nallammal and item 7 belonged to the joint family. Issue No. 4 and

additional issue No. 1 were answered together holding that the Will was not true and valid and the first defendant will not get any right or title in

respect of item No. 7 under the Will. Issue No. 6 was answered holding that the suit was properly valid. Issue Nos. 7 and 8 were answered in

favour of the plaintiff holding that those properties were separate properties of the plaintiff. Accordingly, issue No. 9 was also answered holding

that the suit is not bad for partial partition. Issue No. 5 was answered in favour of the first defendant holding that the plaintiff failed to prove the

properties are managed by the first defendant from 1984. Additional issue No. 2 was answered holding that the debts are not binding on the

plaintiff and the defendant also failed to prove the expenses alleged to have been incurred by him. Issue No. 1 was answered holding that item 3

was already sold and therefore, items 1, 2 and 4 to 10 are the joint family properties. Issue No. 10 was answered holding that the properties are

joint family properties and therefore, the father had 1/3 share and the remaining 2/3 share belonged to the plaintiff and the father's 1/3 share

devolved upon the three children and the daughter the second defendant and each one is also entitled to get 1/9 share and the plaintiff and the first

defendant are entitled to 4/9 share each and passed the preliminary decree allotting 4/9 share to the plaintiff.

10. It is submitted by the learned counsel for the appellant that in respect of items 1, 2, 4, 5, 6 and 8 to 10, the Trial Court has rightly held that the

properties are the joint family properties and that was also admitted by the first defendant in the written statement and therefore, that finding is not

challenged, but, unfortunately, the Trial Court erred in holding that item 7 also belongs to the joint family and the Trial Court also erred in

disbelieving the Will. The learned counsel for the appellant submitted that when the property stands in the name of the female member, normally,

the presumption is that the female member is the owner of the property and any member of the joint family claims that property stating that the

property in question also belongs to the joint family, the burden is on him to prove the same and in this case, the appellant has proved the means of

the mother and the mother was doing money lending business. Ex.B40 is the notice issued to her by Tahsildar for doing money lending business

without licence and Exs.B20 to B24 would also prove that the case was conducted by the mother in respect of loans advanced by her and without

considering all these aspects, the Trial Court erred in holding that the property was not the separate property of Nallammal. He also submitted that

the mother also executed a registered Will, Ex.B34 and that was proved through DW2 scribe and DW3 attesting witnesses and the evidence of

D.Ws.2 and 3 are natural and they have spoken about the sound disposing and state of mind of the mother and there was no unnaturalness in

giving the property in favour of the appellant as the appellant was taking care of the mother during her last days and therefore, the Trial Court ought

to have held that under the Will, Ex.B34, the property was bequeathed to the appellant and the Will was a valid one and hence, the Trial Court

ought to have excluded item No. 7 from the suit. He also relied upon the following judgments in support of his contention that the Will was proved

in accordance with law:--

1. P.P.K. Gopalan Nambiar Vs. P.P.K. Balakrishnan Nambiar and others, .
2. Govindan Chettiar (Died) Vs. Akilandam alias Seethalakshmi and 24 others .
3. J. Mathew (died) and Others Vs. Leela Joseph, .
4. Muniammal Vs. Annadurai (Deceased) and others .

11. On the basis of the above submissions, the following points for consideration arises in this appeal:--

1. Whether item 7 of the suit properties was the separate property of the mother?

2. Whether the Will, Ex.B34 was proved to have been executed by the mother while in a sound and disposing state of mind?

12. There are ten items of suit properties including item 7 and it is admitted by the appellant/defendant that except item 7, all the properties are

joint family properties. Therefore, it is admitted that the joint family consisting of the plaintiff and the first defendant possessed of properties and it is

not the case of the appellant that those properties did not yield any income. As a matter of fact, it is the case of the appellant that from and out of

the joint family income, the plaintiff purchased houses at Coimbatore and also started business. Therefore, it is not in dispute that the joint family

properties yielded income. Therefore, we will have to see whether item 7 was purchased in the name of mother was her private property or the

property belonged to the joint family.

13. Under the Hindu Law, when a property stands in the name of a female member, the presumption is that the female member is the owner of the

property and the burden is on the person who alleges that the property belongs to the joint family. In this case, it is alleged by the plaintiff that the

property purchased in the name of the mother under Ex.A5 was not her separate property and it also belonged to the joint family. The plaintiff let

in evidence to the effect that the mother was not possessed of any other property and she was managing the joint family properties after the death

of the father and from and out of the income, the properties were purchased and item 7 was purchased in the name of the mother. The appellant

disputed the same. The appellant examined himself as DW1 and he admitted in cross-examination that he did not know for many years, how the

mother was managing the joint family properties after the death of the father and he was aged 11 years when his father died and his mother told

that she was having separate income and he was not aware whether the mother was owning any other properties at the time of father's death and

his mother told that the consideration paid for purchasing item 7 was her separate money and he has no personal knowledge about the same. He

also admitted that 15 years prior to the death of his mother, she was doing money lending business. He also admitted that he was not aware

whether the consideration for purchasing item 7 was paid from the income from the joint family or from the mother's separate income and only his

mother told that it was her separate income. He also was not aware as to what was the income from the joint family properties. He admitted that at

the time of his mother's death, she left certain debts.

14. The evidence of the first defendant/appellant would make it clear that he was not aware of any separate income of his mother and he was also

not aware whether the mother was owning any property or doing any business and the money lending business alleged to have been also done by

the mother was also done by her fifteen years prior to her death. Admittedly, item 7 was purchased under Ex.A5 dated 11.10.1956. The sale

consideration was Rs. 2000/-. Further under Ex.A3, the joint family property was sold for Rs. 500/- on 22.11.1959 to meet the family expenses

and if really the mother was having sufficient income on her own and joint family properties were also yielding income, there was no necessity for

the mother to sell the property as the guardian of the appellant in the year 1959.

15. Therefore, having regard to the fact that the joint family possessed of properties which were yielding income and in the absence of any

evidence to prove that mother was having any separate property or was having separate income, the Trial Court has rightly held that though item

No. 7 was purchased in the name of the mother, it belonged to the joint family and answered the issues accordingly.

16. It is the contention of the appellant that the Trial Court ought to have believed the evidence of D.Ws.2 and 3 and held that the Will executed by

the mother is a valid one. Having regard to the finding that the property was not a separate property of the mother and it belonged to the joint

family consisting of the plaintiff and the first defendant and the plaintiff's father also died in the year 1945, the mother had no right over the property

and therefore, even assuming that the Will was valid, no right can be claimed under the Will as the property was the joint family property and the

mother had no right to write a Will in respect of that property.

17. Nevertheless, the Trial Court held that the Will was not proved by the first defendant/appellant. It is the specific case of the plaintiff/first

respondent that from February 1988, the mother became unconscious and therefore, she could not have executed the Will on 14.9.1988 as

alleged by the first defendant/appellant. It is admitted by the appellant that in the year 1983, the mother was not able to speak and he did not say

that after sometime, the mother was able to talk. He admitted that in February 1983, the mother was not able to talk and she also sustained a

fracture and she underwent an operation for her fracture. She also admitted that her mother was bedridden for two or three years prior to her

death and she was not able to sit. Nevertheless, the witnesses have spoken that the mother Nallammal came to Registrar's Office in a Car

alongwith witnesses and she admitted the execution of the Will before the Sub Registrar. It is also admitted by DW2 and 3 that the first defendant

was present at the time of execution of the Will and he also accompanied the mother to the Sub Registrar's office and DW2 and 3 deposed that

the mother instructed the scribe DW2 to write the Will and as per her oral instructions, the Will was written. DW2 the scribe has deposed that

prior to Ex.B34, the Will, he has not seen Nallammal and he has also not seen the first defendant and the first defendant did not accompany

Nallammal to write Ex.B34 and Ex.B34 was executed as per the dictates of the mother. DW3 deposed that Nallammal informed him twice or

thrice that she is going to execute a Will in favour of the first defendant and only the first defendant, he and other witness went to Sathiamangalam

and he has not stated anything about the physical condition of the mother Nallammal when it was admitted by DW1 that the mother was bedridden

and she was not able to sit.

18. Therefore, considering the fact that the mother was bedridden for two years and was not able to sit, it cannot be believed that she went to the

Registrar's Office in a car and executed the Will in favour of the first defendant/appellant. The Trial Court considered all these aspects and rightly

held that the Will was not proved and I do not find any infirmity in the findings of the Trial Court. Further, having regard to the finding that the

property was not a separate property of Nallammal, she has no right to execute the Will and therefore, the appellant cannot claim any right under

the Will. Point No. 2 is also answered against the defendant.

19. The judgments relied upon by the learned counsel for the petitioner regarding the proof of Will cannot be applied to the facts of this case. In

those judgments, the principles were laid down regarding the proof of Will and having regard to the reasons stated above, it could not be believed

that Nallammal would have executed the Will as alleged by the appellant on that date. Hence, the Trial Court has rightly rejected the case of the

appellant that the Will was executed by Nallammal. Therefore, I do not find any infirmity in the judgment and decree of the Trial Court and they are

confirmed. The appeal is dismissed. No costs.