

Arulayi Nadachi Selvi Ammal Nadachi (dead) by Lrs.

Vs

Selvi Ammal Nadachi Maria Arulayi Nadachi (dead) by Lrs.

Civil Appeal No. 1553 of 1968

(P.N. Bhagwati, A.C. Gupta, Syed M. Fazal Ali JJ)

06.05.1976

JUDGMENT

GUPTA, J. -

1. This appeal by special leave arises out of a suit for partition and mesne profits. The suit was instituted by the predecessor-in-interest of the first respondent in the court of the District Munsif, Padmanabhapuram on June, 13, 1960 seeking a decree for partition and recovery of her share in the properties mentioned in the plaint and a decree for mesne profits from the date of the suit till recovery of possession. The first and second defendants were respectively the mother and younger sister of the plaintiff. According to the plaintiff she had 1/2 share in the properties. The claim was based on a deed of settlement (Ex. A-1) executed on November 11, 1943 by Devashayam, husband of the first defendant and father of plaintiff and the second defendant who died on April 1, 1953. The trial Court on a construction of the settlement deed held that the plaintiff and the two defendants had each 1/3 share in the properties and the plaintiff's claim of 1/2 share in the properties was untenable; some of the properties mentioned in the plaint were however excluded which were found to belong to either strangers or to the first defendant absolutely. As regards mesne profits, the trial Court found that the plaintiff was entitled to 1/3 share in the mesne profits from June 1958 but left the amount to be considered at the time of passing the final decree. A preliminary decree was made accordingly. The plaintiff preferred an appeal against this decision. The Subordinate Judge, Nagercoil, who heard the appeal affirmed the trial Court's finding that the plaintiff was entitled only to 1/3 share in the properties, and not 1/2, and that she was entitled to recover possession of her share. On the question of mesne profits also the Subordinate Judge agreed with the trial Court. The plaintiff carried a second appeal to the High Court and the first defendant also preferred a cross-objection contending that she was entitled to remain in possession of all the properties during her lifetime in terms of the settlement deed and the plaintiff could not therefore ask for partition or recovery of possession during her lifetime. The High Court construing the deed of settlement held that the deed conferred only a life interest on the first defendant in respect of her 1/3 share and the remaining 2/3 belonged in equal shares to the plaintiff and the second defendant so that on the death of the first defendant the other two would be entitled also to their mother's 1/3 share thus enlarging the share of each to 1/2. Overruling the first defendant's case that in terms of the deed of settlement she was to be in management of all the properties so long she was alive and the suit for possession was therefore not maintainable, the High Court held :

It is quite possible that the settler when he directed that the property should be managed by his wife had in view the status of his daughters as unmarried and therefore unprotected young women at the time. But it was not his intention to give his life powers of management for all time, irrespective of future developments like

marriage of the daughters.

As regards mesne profits, the High Court modified the decree appealed from by directed that mesne profits should be calculated only from the date of the decree of the trial Court on the view that as the first defendant was entitled to be in management of the properties, no question of past mesne profits could arise until the court decided that it was proper to give possession to the daughters who had grown up and were able to look after their own interest. The High Court accordingly allowed the appeal and the cross objection in part. The appeal to this Court was preferred by the first defendant. The first defendant and the plaintiff both died during the pendency of this appeal and were substituted by their heirs and legal representatives.

2. It is no longer in dispute that the first defendant was entitled to 1/3 share in the properties, the dispute is whether she held it absolutely or had only a life interest. The appellant contends should be held to have been given an absolute right over her own 1/3 share and also the right to manage and enjoy the properties in the shares of her daughters so long she was alive so that there could be no question of her having to pay mesne profits to either of her daughters. On this interpretation the prayer for recovery of possession also would not be maintainable, the appellant however prefers not to contest the claim for partition and recovery of possession. The appeal thus turns on the construction of the deed of settlement. The original deed is in Malyalam, an English translation of the document which was relied on both by the trial Court and the first court of appeal, Ex. A-1, reads as follows :

SETTLEMENT DEED

Settlement Deed executed on 25th Thulam 1119 M.E. (11-11-1943) in favour of (1) Selvi Ammal Nadachi daughter of Arulayee, aged 49 years, Christian, Makkarazhi Woman, Housewife of Mavilakathuvaliya Veedu, Kurunthankattu Oor, Mallangode, Desom, Talakulam Pakuthy, (2) Maria Arulayee Nadachi, aged 23 years, and (3) Rosammal Nadachi aged 21 years, daughters of Selvi Ammal Nadachi, Do. Women Housewives of Do Veedu by Devashayam Nadar son of Micheal Nadar, aged 57 years, Do. Agriculturist of Do Veedu. Among you, party No. 1 is my wife and party Nos. 2 and 3 are daughters born to me and party No. 1. Party No. 1 and I have no other issues besides Party Nos. 2 and 3. Party Nos. 2 and 3 are not married. On account of my affection towards them and on account of our (party No. 1 and I) sincerity towards them and in view of your welfare I have hereby given you absolutely, the properties and buildings mentioned in the schedule hereunder belonging to me for the foregoing reasons subject to the terms provided for herein below you shall occupy those properties and buildings subject to each of the terms provided for hereunder and by obeying those terms.

TERMS

1. You shall enjoy item No. 1 of the schedule absolutely with the right of alienation from this day onwards. I shall be in possession and enjoyment of all the remaining properties and buildings during my lifetime without effecting any alienation thereof.
2. I have executed an othi dead in respect of certain items of the schedule properties. I shall redeem that othi with the income derived out of the schedule properties during my lifetime. If I fail to do so, you shall redeem the same after my death. Besides the

abovementioned othi, a transfer deed has been obtained executed, in respect of the othi deed which I have executed in respect of certain items of the schedule properties, in favour of party No. 1 among you and it remain so.

3. You shall obtain transfer of patta in respect of the entire schedule properties and pay tax therefore from his day onwards.

4. You shall take possession of all the remaining properties excluding property item No. 1 which has been delivered to you absolutely from this day onwards and the buildings. After my death party No. 1 shall manage and enjoy the same till her lifetime and after the death of party No. 1, party Nos. 2 and 3 shall take over the same absolutely with the right of alienation thereto.

5. The property item Nos. 1 to 14 and 16 to 22 of the schedule are my family properties. In the year 1092 M.E. (1916-1917) I and my elder brother Vyakappan Nadar Avergal effected an oral partition in the presence of arbitrators in respect of the entire movable and immovable properties belonging to out family. Accordingly those properties were allotted to my share absolutely. So I am in possession and enjoyment thereof absolutely and I am having transactions regarding the same. The remaining properties are my self-acquired properties.

The High Court spelt out from the terms of Clause 4 of the settlement deed that what was given to the first defendant was only a life interest in respect of her 1/3 share, and not absolute ownership. The learned Judge in the course of his judgment referred to his "familiarity" with Malyalam, the language in which the deed was written, and set out the "gist of the deed" in his own words. He translated Clause 4 a little differently from the translation relied on by the two courts below. The learned Judge's translation of Clause 1 and 4 which are relevant for the present purpose is as follows :

Clause 1. Item 1 will be enjoyed by you from today with full rights (absolute rights) and with powers of alienation. The remaining properties and buildings will be enjoyed by him life time without making any alienation.

Clause 4. In regard to the other items excluding 1 (which I have given to you today with full rights), after my lifetime you can take possession of No. 1 above, she should be in management of them and enjoy them in that capacity. After her lifetime, Nos. 2 and 3 above will take those properties with full rights including powers of alienation (with absolute rights including powers of alienation).

"You" in Clause 1 includes the wife of the settlor and their two daughter, Arulayi Nadachi and Rosammal Nadachi, who have been referred to as No. 1, No. 2 and No. 3 respectively in Clause 4. Even proceeding on the translation made by the learned Judge we do not see how it can be said that the first defendant was given only a life interest. It is said that the expression "full rights" or "absolute rights" in the first sentence of Clause 4 should be contrasted with the same expression used in last sentence of the clause with the words "including powers of alienation" added. According to the learned Judge, these words were added to indicate that when the settlor said that "after my lifetime you can take possession of them with 'full rights', he did not mean to grant absolute ownership to any of the three. The translation of

the last sentence of Clause 4 in Ex. A-1 is not materially different, ". . . after the death of party No. 1, parties Nos. 2 and 3 shall take over the same absolutely with right of alienation thereto". The learned Judge's view is that the settlor's intention was that the first defendant should manage all the properties including those in the shares of the daughters but after her lifetime the daughters would become absolute owners. This means that after the death of the first defendant her daughters would each become owner of half share in all the properties including those in their mother's share. We do not think that the words "full rights" can be read in this restricted sense as the High Court has done. Clause 1 provides that item No. 1 of the properties mentioned in the schedule to the settlement deed would be enjoyed by all the three from the date the deed was executed with "full rights and with powers of alienation". It will be useful here to refer to Clause 5 of the deed which has not been translated by the learned Judge. Clause 5 says that certain properties were allotted to the settlor "absolutely" on partition and that he was in possession and enjoyment thereof "absolutely" and, further, that he was "having transactions regarding the same". It is clear beyond doubt that the settlor held the properties referred to in Clause 5 as absolute owner though the words "with the right of alienation" are absent here. It seems plain to us that the words "with the right of alienation" were added in the last sentence of Clause 4 only to emphasise that during the lifetime of the mother she would remain in management and enjoyment of all the properties and the daughters would have no right of alienation in respect of the properties in their shares so long as she was alive.

3. On the question of mesne profits, Counsel for the appellant pointed out that Clause 4 of the deed permitted the first defendant to "manage and enjoy" the properties given by the settlor to her daughter so long as she was alive, and therefore she could not be made liable for mesne profits. Counsel for the first respondent drew out attention to the relevant portion of Clause 4 as translated by the learned Judge which according to her was more accurate. Clause 4 provides inter alia that during the lifetime of the first defendant "she should be in management" of the properties and "enjoy them in that capacity". It was submitted that the words "in that capacity" indicated that the first defendant was to be in possession of her daughters' properties as manager only and therefore accountable to them for mesne profits. We do not think that this contention is correct even on the translation as made by the learned Judge. The first defendant was given the right not only to manage but also "to enjoy". This means in our opinion that she was to remain in possession of the properties in her daughters' shares not as owner, but having a right to enjoy the profits thereof so long she was alive which is similar to the right reserved by the settlor for himself in Clause 1 in respect of the properties other than item 1 of the properties mentioned in the schedule to the deed.

4. Counsel for the first respondent also sought to read Clause 4 as giving the first defendant a right of management over all the properties which implied, the argument proceeded, that she had only a life interest in respect of her own share, because there was no point in giving her a right of management over properties of which she was the absolute owner. We do not think that Clause 4 can be read in the way suggested by the learned Counsel for the first respondent. The opening paragraph of the settlement deed makes it quite clear that the properties were given to the first defendant and her two daughters absolutely subject to the terms set out in the five clauses that followed. Clause 4 does not limit the first defendant's rights in her own share but imposes a limitation on the rights of her daughters as long as she was alive.

5. The High Court in decreeing the claim for mesne profits observed :

It is quite possible that the settlor when he directed that the property should be managed by his wife had in view the status of his daughters as unmarried and therefore unprotected young women at that time.

This is an unwarranted conjecture, contrary to the plain words of the deed, and this is also not the case of any of the parties.

6. In the result this appeal is allowed, the judgment and decree passed by the High Court are set aside and the decree of the trial Court in so far as it directs the plaintiff's 1/3 share in the suit properties to be partitioned by metes and bounds is affirmed but the claim for mesne profits is dismissed. This is an appeal from the preliminary decree. Counsel for the parties have no information if a final decree has been passed during the pendency of the appeal in the Court. We therefore, direct that if a final decree has been passed in the suit, it will stand varied in accordance with our judgment in this appeal. In the circumstances of the case we direct the parties to bear their own costs throughout.

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