

Neelavathi and Others

Vs

N. Natarajan and Others

Civil Appeal No. 3530 of 1979

(Syed M. Fazal Ali, P.S. Kailasam, A.D. Koshal JJ)

30.11.1979

JUGDMENT

KAILASAM, J. -

1. The appellants in this appeal by special leave are plaintiffs 1 to 5 in the suit. The plaintiffs 1 to 5 are sisters and defendants 1 and 2 are their brothers. The third defendant is their unmarried sister. They are the children of the late Muthukumaraswamy Gounder who died intestate on December 20, 1962 leaving his father Vanavaraya Gounder who was managing all the ancestral joint family property as the head of the Hindu undivided joint family till his death on March 5, 1972. The plaintiffs claimed that on the death of Muthukumaraswamy Gounder his 1/3rd share in the joint family property devolved on his sons and daughters. His sons, defendants 1 and 2 taking 1/3rd share each in 1/3rd share of the family property by birth and in the balance all the sons and daughters of Muthukumaraswamy Gounder taking an equal share each. The plaintiffs claimed to have been in joint possession of the properties along with Vanavaraya Gounder and his other sons. Similarly, on the death of Vanavaraya Gounder, his 1/3rd share in the family properties devolved upon his heirs, the plaintiffs and defendants 1 to 3 being entitled to certain shares. The claim in the plaint is that each of the plaintiffs is entitled to a share in the suit properties as heirs to Late Muthukumaraswamy Gounder and also as heirs to late Vanavaraya Gounder, their grand-father. Each plaintiff claimed that she was entitled to 1/72 share in the suit properties as heirs to their father Muthukumaraswamy Gounder and also to 1/96 share as heirs to their grandfather Vanavaraya Gounder. It was alleged in the plaint that since the death of Vanavaraya Gounder, defendants 1 to 6 failed to give the plaintiffs their share of income and the plaintiffs could not remain in joint possession. The plaintiffs repeatedly demanded partition and the defendants 1 to 6 were evading. The plaintiffs claimed that each of the plaintiffs as co-owners are in joint possession of the suit properties and this action was laid to convert the joint possession into separate possession so far as the shares of the plaintiffs are concerned. For the purposes of court fee and jurisdiction, the plaintiffs valued their share of the property and paid court fee of Rs. 200 under Section 37(2) of the Tamil Nadu Court Fees and Suits Valuation Act. The relief prayed for was for partition of the properties and for allotment of their separate share, for accounts and for other reliefs.

2. In the written statement, the defendants 1 and 2, the brothers, contended that the properties were divided in the year 1946 during the lifetime of Muthukumaraswamy Gounder and that Muthukumaraswamy was enjoying the properties separately. Regarding possession of the plaintiffs, defendants 1 to 3, the contesting defendants, alleged in paragraph 18 of the written statement as follows :

The suit as framed is not maintainable in law. The plaintiffs have framed the suit as

though they are in joint possession and enjoyment of the suit properties. The plaintiffs are out of possession and they are living in different villages. While it is so the allegation that they are in joint possession of the suit properties is not correct. The plaintiffs ought to have paid court fee under Section 37(1) of the Court Fees Act and not under Section 37(2) of the Act. They ought to have paid the court fee at the market value of the suit properties and unless the court fee at the market rate is paid they are not entitled to claim any share.

3. The Subordinate Judge who tried the suit did not frame any preliminary issue regarding court fee as required under Section 12 of the Court Fees Act but proceeded to try all the issues together. The Subordinate Judge granted preliminary decree for partition and possession of the plaintiffs' 1/72 share in B. Schedule properties, and to certain shares in deposit in State Bank of India at Pollachi, and to the share in the Gnanambika Mills, on payment of court fees by the plaintiffs under Section 37(1) of the Court Fees Act. The Court granted time for payment of court fee till February 15, 1973. As the court fee was not paid, the trial Court dismissed the suit, by its judgment dated February, 7, 1974.

4. The plaintiffs filed two appeals - A.S. No. 811 of 1975 against the decision of the Subordinate Judge holding that the plaintiffs are liable to pay court fee on the market value of the property under Section 37(1) of the Court Fees Act and A.S. No. 924 of 1974 against the decree dismissing the suit.

5. The High Court heard both the appeals together and disposed them of by a common judgment. When the appeal were taken up, the defendants/respondents contended that the court fee ought to have been paid on the plaint under Section 37(1) and also on the memorandum of appeal before the High Court and as the proper court fee has not been paid, the appeals ought to be dismissed. The High Court accepted the contention raised by the defendants and held that the plaintiffs are liable to pay court fee under Section 37(1) of the Tamil Nadu Court Fees Act. In coming to its conclusion, the High Court mainly relied on paragraph 12 of the plaint which reads as follows :

Since the death of Vanavaraya Gounder the defendants 1 to 6 failed to give the plaintiffs their share of income and the plaintiffs could not remain in joint possession. Therefore, the plaintiffs repeatedly demanded partition and the defendants 1 to 6 were evading. Plaintiff 3 sent a notice through her counsel to defendants 1, 2 and 5 to which plaintiff 3 received replies containing false and untenable allegations.

The High Court proceeded to observe that while the statement that the plaintiffs were in joint possession with the defendants occurring in other paragraphs of the plaint is merely a formal statement repeating the statutory language, the statement contained in paragraph 12 of the plaint constitutes a statement of fact in the context in which paragraph 12 occurs and consequently paragraph 12 of the plaint contains a clear averment that the plaintiffs could not remain in joint possession and that was the reason why they repeatedly demanded partition. If so, on the date of the suit, the plaintiffs were not in possession. The High Court held that court fee is payable under Section 37(1) of the Court Fees Act.

6. On reading of the plaint as a whole, we are unable to agree with the view taken by the High Court. It is settled law that the question of court fee must be considered in the light of the allegation made in the plaint and its decision cannot be influenced either by the pleas in the written statement; or by the final decision of the suit on merits. All the material allegations contained in the plaint should be construed and taken as a whole vide *S. Rm. Ar. S. Sp. Sathappa Chettiar v. S. Rm. Ar.*

Rm. Ramanathan Chettiar (1958 SCR 1021, 1031-32 : AIR 1958 SC 245 : 1958 SCJ 407). The plaint in paragraph 5 states that Muthukumaraswamy Gounder died intestate and undivided and Muthukumaraswamy's father Vanavaraya Gounder was managing all the ancestral joint family property as the head of the Hindu undivided joint family till his death. In paragraph 8 the plaintiffs stated that on the death of Muthukumaraswamy Gounder his 1/3rd share in the joint family properties devolved upon his sons and daughters. It further alleged that the plaintiffs were in joint possession of the properties along with Vanavaraya Gounder and his other sons. In paragraph 9, it is stated that each of the plaintiffs is entitled to a share in the suit properties as heirs of the late Muthukumaraswamy Gounder and also as heirs of the late Vanavaraya Gounder. In paragraph 11, it is stated that since the death of Vanavaraya Gounder defendants 1 to 6 are receiving the income from the properties and are liable to account to the plaintiffs. In paragraph 12, it is stated that since the death of Vanavaraya Gounder defendants 1 to 6 failed to give the plaintiffs their share of income and the plaintiffs could not remain in joint possession. Therefore the plaintiffs demanded partition and the defendants 1 to 6 were evading. Again in paragraph 13, it is claimed that each of the plaintiffs as co-owners is in joint possession of the suit properties, and this action is laid to convert the joint possession into separate possession so far as the shares of the plaintiffs are concerned. Throughout the plaint, the plaintiffs have asserted that they are in joint possession. We are unable to agree with the High Court that recitals in all the paragraphs is merely a formal statement repeating the statutory language. The plea in paragraph 12 which was relied on by the High Court states that the defendants 1 to 6 failed to give the plaintiffs their share of the income and the plaintiffs could not remain in joint possession. The plea that they were not given their due share would not amount to dispossession. Reading the plaint at its worst against the plaintiffs, all that could be discerned is that as the plaintiffs, were not given their share of the income, they could not remain in joint possession. The statement that they are not being paid their income, would not amount to having been excluded from possession. The averment in the plaint cannot be understood as stating that the plaintiffs were not in possession. In fact, the defendants understood the plaint as stating that the plaintiffs are in joint possession of the suit properties. In paragraph 18 of the written statement the defendants pleaded that the plaintiffs have framed the suit as though they are in joint possession and enjoyment of the suit properties. Asserting that the plaintiffs were out of possession, the defendants stated : "While it is so, the allegation that they are in joint possession of the suit properties, is not correct".

7. The trial Court has not placed any reliance on the recitals in para 12 of the plaint on which the judgment of the High Court is based. The trial Court found on evidence that the plaintiffs never enjoyed the suit properties at any time. This finding is not enough for, the mere fact that the plaintiffs were not paid their share of the income or were not in actual physical possession, would not amount to the plaintiffs having been excluded from joint possession to which they are in law entitled. On a consideration of the plaint as a whole and giving it its natural meaning, we are unable to agree with the conclusion arrived at by the High Court.

8. Section 37 of the Tamil Nadu Court Fees and Suits Valuation Act relates to partition suits. Section 37 provides as follows :

37. (1) In a suit for partition and separate possession of a share of joint family property or of property owned, jointly or in common, by a plaintiff who has been excluded from possession of such property, fee shall be computed on the market value of the plaintiff's share.

(2) In a suit for partition and separate possession of joint family property or property

owned, jointly or in common, by a plaintiff who is in joint possession of such property, fee shall be paid at the rates prescribed.

It will be seen that the court fee is payable under Section 37(1) if the plaintiff is "excluded" from possession of the property. The plaintiffs who are sisters of the defendants, claimed to be members of the joint family, and prayed for partition alleging that they are in joint possession. Under the proviso to Section 6 of the Hindu Succession Act, 1956 (Act 30 of 1956) the plaintiffs being the daughters of the make Hindu who died after the commencement of the Act, having at the time of the death an interest in the Mitakshara coparcenary property, acquired an interest by devolution under the Act. It is not in dispute that the plaintiffs are entitled to a share. The property to which the plaintiffs are entitled is undivided 'joint family property' though not in the strict sense of the term. The general principle of law is that in the case of co-owners, the possession of one is in law possession of all, unless ouster or exclusion is proved. To continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. Equally it is not necessary that he should be getting a share or some income from the property. So long as his right to a share and the nature of the property as joint is not disputed the law presumes that he is in joint possession unless he is excluded from such possession. Before the plaintiffs could be called upon to pay court fee under Section 37(1) of the Act on the ground that they had been excluded from possession, it is necessary that on a reading of the plaint, there should be a clear and specific averment in the plaint that they had been "excluded" from joint possession to which they are entitled in law. The averments in the plaint that the plaintiffs could not remain in joint possession as they were not given any income from the joint family property would not amount to their exclusion from possession. We are unable to read into the plaint a clear and specific admission that the plaintiffs had been excluded from possession.

9. In the result both the appeals are allowed. As we have found that the trial Court was in error in directing the plaintiffs to pay the court fee under Section 37(1), the preliminary decree for partition and possession of 1/72 share in the B. Schedule properties and the shares in deposit in State Bank of India at Pollachi, and in the share in the Gnanambika Mills, is confirmed. The direction by the trial Court as to payment of court fee under Section 37(1) of the Court Fees Act and the judgment of the High Court in A.S. No. 924 of 1974 and A.S 811 of 1975 are set aside. The appeal is allowed with costs.

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