P.Periasami (Dead) By Lrs vs P. Periathambi And Others on 11 October, 1995

Equivalent citations: 1995 SCC (6) 523, 1995 SCALE (6)50

Author: M.M. Punchhi

Bench: M.M. Punchhi

PETITIONER:
P.PERIASAMI (DEAD) BY LRS.

Vs.

RESPONDENT:
P. PERIATHAMBI AND OTHERS

DATE OF JUDGMENT11/10/1995

BENCH:
PUNCHHI, M.M.
BENCH:
PUNCHHI, M.M.
MANOHAR SUJATA V. (J)

CITATION:
1995 SCC (6) 523 1995 SCALE (6)50

ACT:

HEADNOTE:

JUDGMENT:

WITH CIVIL APPEAL NO.667 OF 1989 P.A. Periasami Muthiriar & Ors.

V. P. Periasami Muthiriar and others O R D E R These are cross appeals against the judgment and decree dated January 11, 1979 of the High Court of Madras passed in Appeals Nos.141 and of 142 of 1972 and the cross objections.

It was a suit for partition between two branches of the same family. The properties involved were entirely agricultural. The facts as depicted in the judgment of the High Court are so interwoven with so many details that we have thought it expedient to resort to tremendous shrinking. For our

purpose, we condense them to say, sufficiently, that there was an elder, high in the line, who owned these properties. These were self acquired. When he died years ago, he left behind three sons. He had by then no grand-sons born from the loins of those three sons. The property on his death thus came in possession of the three sons. When eventually sons were born to those sons and thereafter grand-sons, there came a day when they sought to effect a partition. In this spell of time certain properties allegedly stood purchased out of the income derived from those properties and they were also brought in, being within the nucleus and hence claimed to be partible. It is in this manner that the dispute was spread within the two branches of the family representing lines of two brothers. The plaintiffs claimed partition on the basis that the properties received from the family elder and the accretions made thereto from the income derived from the said property, were both joint Hindu family properties and out of which they were entitled to their defined shares. On the other hand, the defendants joined issue with the plaintiffs, on the question of the descended properties being joint Hindu family properties, taking the plea that the properties had come from the elder to his three sons by way of inheritance and not on basis of supervisorship. The assumption that those three sons and the elder were members of a joint Hindu family was refuted. As a consequence, it was pleaded that the so-called accretion to the properties could not be related to the nucleus factually, as also because unless it could be proved that the nucleus was owned by the joint Hindu family, the accretions could not partake the same character. Further, it was pleaded that these accretions were personal accumulations of the defendants and in case it was not so proved, they were in adverse possession thereof, for which they sought a declaration. This in nutshell is the dispute which is before us; other disputes having been settled in the courts below and others not being put to challenge before us.

The pristinely legal question, as discernible hereinbefore, is whether under Hindu law self-acquired property of a father goes on his death to his sons (in the absence of grand-sons) in a joint Hindu family way, in joint tenancy, or does it descend by inheritance to them in well defined shares as tenants-in-common. On this question there has been grave conflict of opinion in the High Court and a lot many precedents of binding value are available. In Madras, however, the law in this respect bears a strain, settled way back by a Full Bench in a decision reported in [AIR 1921 (Vol.8) Madras 168] Viravan Chettiar vs. Srinivasachariar, wherein the following passage of relevance appears in the opinion expressed by Kumaraswami Sastri, J.

> "So far as the text of the Mitakshara dealing with the rights of the sons in their father's self-acquisitions it has been decided by their Lordships of the Privy Council in Balwant Singh vs. Rani Kishore (1898) 20 All. 267=25 I.A. 54=2 C.W.N. 273=7 Sar. 279 (P.C) that the text, "though immoveables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born and they who are yet unbegotten and they who are still in the womb, require the means of support. No gift or sale should therefore be made".

is only a moral precept and not a rule of law capable of being enforced. As pointed out in Madan Gopal vs. Ram Buksh (1863) 6 W.R. 71 and Jugmohandas Mangaladas vs. Sir Mangaldoss Nathubhoy (1889) 10 Bom. 528 the son acquires no legal rights over his father's self-

acquisitions by reason of the text of the Mitakshara (Ch.I, Ss1, 27) but that his right is imperfect one incapable of being enforced at law.

It is difficult to see how there can be any co-parcenary between the father and the sons as regards self-

acquired property over which the sons have no legal claim or enforceable rights. Co-parcenary and supervisorship imply the existence of co-ownership and of rights of partition enforceable at law and a mere moral injunction can hardly be the foundation of a legal right. As observed by the Privy Council in Rani sartaj Kuari vs. Deoraj Kuari (1888) 10 All. 272=15 I.A. 51=5 Sar. 139 (P.C.) the property in the paternal or ancestral estate acquired by birth under the Mitakshara Law is so connected with a right to partition that it does not exist where there is no right to it. A contention was raised during the course of the argument before the Privy Council in Raja Chelikant Venkayamma vs. Raja Chelikani Venkataramanayamma (1902) 25 Mad. 678=29 I.A. 156=12 M.L.J. 299=8 Sar. 286 (P.C.) that sons acquire a right by birth in the father's self-

acquired property. Lord Macnaghten observed that he did not quite understand what that right was and observed "He is his father's son and if his father does not dispose of, it will come to him; but is it anything more than a Spes?" So far as a father's self-

acquisitions are concerned, the son, though undivided, has only spes succession is and he stands in relation to that property in the same position as heir under Hindu Law. The very essence of the distinction between Apratibandha and sapratibandha daya is the existence of an interest in the son in respect of properties got by his father. As observed by West and Buhler in a passage (Book 2 Introduction page 19) which was approved in Nand Kumar Lata vs. Moulvi Reazuddeen Hussain 10 B.L.R.183.

ancestral property may be said to be co-

> extensive with the objects of apratibandha daya or unobstructed inheritance.
>
> (Emphasis supplied by us)

Contrary views have been expressed in Mst. Ram Dei Vs. Mst. Gyarsi I.L.R. 1949 Allahabad 150 =A.I.R. 1949 Allahabad 545 (F.B.) and many other cases to which reference need not be made. In A.I.R. 1959 Madras 253, however, occasion arose to reconsider the above-referred to view of the Full Bench of the Madras High Court, but the learned Judges refrained from doing so for by then the Full Bench case of 1921 had been treated as stare decisis. Likewise after a lapse of more than half a century, we would not consider it prudent, just for the sake of uniformity to resolve the conflict raging in the High Courts on this question, more so when the orthodox Hindu Law on the subject is itself now in tumble because of the enactment of the Hindu Succession Act, 1956 and in particular of Section 19 thereof, which says that if two or more heirs succeed together to the property of an intestate they shall take the property -

(a) save as otherwise expressly provided in this Act, per capita a and not per stripes; and

(b) as tenants-in-common and not as joint tenants.

In view of the interpretation put by the Full Bench of the Madras High Court that the sons in such a situation would get self acquired property of their father by inheritance, having the status as tenants-in-common, they could not thus treat such properties in their hands, even though joint in enjoyment, as joint Hindu family properties. Likewise the income derived therefrom, if employed to purchase other property, would not cloak the new acquisition with the character of joint Hindu family property but may otherwise be joint properties. We would rather decide this matter on this principle, and we do so accordingly, to hold that the properties which came from the elder, self acquired as they were, and there being no grandsons, cannot be held by the parties to be joint Hindu family properties but as joint properties simpliciter, capable of partition on that basis.

With regard to the accreted property, there is a reference in the judgment under appeal relating to some accounting; after recording the finding that the defendants have failed to prove that that property was in their adverse possession. This is a finding of fact which need not be disturbed, as it has been sought to, in the cross appeal. Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property. The failure of the plea has obvious results. If the parties herein were co-owners of that property and the said property had been purchased from the income derived from joint property, then obviously the same has to be accounted for as joint property and not as joint Hindu family property. It was like property jointly purchased by co-owners without attracting the rule of succession by way of supervisorship. On this clarification, the judgment of the High Court is cleansed of the little vagueness about this particular which accidentally seems to have crept in while dealing with this aspect of the case.

For what we have said above, it is plain that the property in possession of these two branches of the family, sought to be partitioned, was not joint Hindu family property because the three sons obtained it by inheritance from their father, the last elder, and their status was that of tenants-in-common, and if the accretions to the property had been made out of the income of the joint property then these were accountable, as held by the High Court but that aspect would have to be decided before the passing of the final decree.

For the foregoing reasons, we dismiss all these three appeals but without any order as to costs.