IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.03.2015

Delivered on : 02.07.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

A.S.No.198 of 2010
and
M.P.No.1 of 2010

S.Laxmi Kumari ... Appellant/Plaintiff.

Vs

1.L.V.Boopal @ Siddheswaran
2.L.B.Padmavathi
3.L.B.Subramaniyam
4.L.B.Sathyanarayanan
5.D.Vimala Rani ... Respondents

(R5 impleaded as party respondent vide
Court order dated 10.12.2013 in M.P.No.1 of 2013)

Appeal filed under Section 96 of the Civil Procedure Code and Order 43 Rule 1 of CPC against the judgement and decree of the Additional District Judge (Fast Track Court No.2), Salem dated 30.09.2009 made in O.S.No.46 of 2006.

For Appellant : Mr.S.Kalayanaraman

For Respondents : Mr.D.Shivakumaran
for R1, R2 and R4
Mr.Subbiah for R5

R3 - Notice served
(No Appearance)

JUDGMENT

The plaintiff in the original suit is the appellant in the Appeal Suit. O.S.No.46 of 2006 was filed by the appellant herein against respondents 1 to 4 herein for partition and separate possession claiming 3/12 share, for a permanent injunction restraining the respondents/defendants from in anyway alienating the suit properties till the disposal of the suit, a permanent injunction restraining the respondents/defendants from disturbing the joint possession and enjoyment of the appellant/plaintiff in respect of the suit properties and for costs. The learned trial Judge, namely Additional District Judge (Fast Track Court No.2), Salem, after trial, dismissed the suit without costs by a judgment and decree dated 30.09.2009. It is as against the said decree of the trial Court dated 30.09.2009 made in O.S.No.46 of 2006, the present appeal has been filed.

2. The appellant herein/plaintiff filed the original suit for the relief of partition and other reliefs, based on the plaint averments, which are in brief, as follows:

i) S.Laxmi Kumari, the appellant herein/plaintiff is the only daughter of L.B.Subramaniyam, the third respondent/third defendant. L.V.Boopal @ Siddheswaran and L.B.Padmavathi (respondents 1 and 2/defendants 1 and 2) are the grandparents of the appellant/plaintiff. The third respondent/third defendant and L.B.Sathyanarayanan, the fourth respondent/fourth defendant are the sons of respondents 1 and 2. All of them are living in separate portions of the first item of the suit properties. Being members of a Hindu Undivided Family, the appellant/plaintiff and the respondents/defendants are in joint possession of the suit properties belonging to the Hindu Undivided Family. In his capacity as Kartha of the family, the first respondent/first defendant purchased two tiled houses bearing Door Nos.71 and 72, described as the suit first item, by way of a registered sale deed dated 20.07.1975 bearing Document No.2567/1975 from one S.R.Panchanathan Chettiar and others. The second and third items of the suit properties were also purchased under the registered sale deeds bearing Document Nos.2794/1983 and 2796/1983 for Rs.30,760/- and Rs.28,760/- respectively. The sale deeds were obtained in the names of the first and fourth respondents/first and fourth defendants. All those properties were purchased using the joint family income derived from the joint family business run in the name of "Shivaji Book Shop". The first and fourth respondents/first and fourth defendants were looking after the bookshop in which binding works were also undertaken. The first respondent/first defendant had also invested considerable amount of the joint family income in Shivaji Finance and Sivapriya Traders, both started in the year 1983 -1984. In addition, during the year 1980 -1982, the first respondent/first defendant also started the business in film distribution in the name of Shivaji Film Distribution investing huge amounts of joint family income. Between 1975 to 1980, the old tiled houses situated in the first item of the suit properties were demolished and a four storied building with an underground floor with shops facing S.V.K.Street was constructed. Shops constructed in the ground floor of the building have been rented out to various persons. The entire investment for the construction was also made from the joint family income derived from Shivaji Book Shop and Binding Works.

ii) During the year 1997, due to misunderstanding among the members of the joint family, the third respondent/third defendant was directed to start his own business and he started his own business in the name and style of "New Shivaji Book Shop" at No.2, Longly Road, Shevapet, Salem - 636 002. It was started in a rented building investing more than one lakh rupees which he obtained from his wife through P.M.R.Y. loan from Tamil Nadu Mercantile Bank, Salem 2. The said business of the third respondent/third defendant is not connected with the joint family business. However, the fourth respondent/fourth defendant was permitted by the respondents 1 and 2/defendants 1 to 2 to occupy the entire ground floor and the first floor of the first item of the suit properties for running his binding works and for the maintenance of his family. He is also in joint possession of the underground floor along with third respondent/third defendant. The third respondent/third defendant was not provided with any money by the other respondents/other defendants to start his book shop business in the year 1997, whereas the fourth respondent/fourth defendant had been provided with machineries etc., worth more than Rs.5,00,000/- to start his own binding works. Now the first respondent/first defendant has no avocation and he is getting the monthly rent from the shops of the first item of the suit properties. Taxes, electricity charges, water charges for the suit properties are being paid by the 3rd and 4th respondents/3rd and 4th defendants alternatively.

iii) The appellant/plaintiff is residing with her parents in the third floor of the first item of the suit properties. The third respondent/third defendant is also in occupation of the open terrace and half portion of the underground floor. The second and third items of the suit properties are vacant lands and they are in the possession and enjoyment of the joint family as such. The third and fourth floors and half portion of the underground floor of the suit first item are in the occupation and enjoyment of the plaintiff and the third respondent/third defendant. The household articles, account books, valuable gold ornaments and other things are kept in the portion of the first item of the suit property in the occupation of the appellant/plaintiff, third respondent/third defendant and his wife.

iv) While so, the respondents/defendants started making hectic efforts from 2005 to dispose of the suit properties to third parties in order to prevent the appellant/plaintiff from getting her lawful share in the suit properties. The respondents/defendants have also decided to dispose the suit properties for a throw away price. The appellant/plaintiff is the only daughter of third respondent/third defendant. The respondents/defendants have not paid money for her education and for other purposes. She had been provided with meager amounts by her maternal uncle for continuing her studies. Her parents and grandparents have proclaimed that they would not spend any money for her marriage and further studies. A number of Panchayats held at the instance of the appellant/plaintiff to have her shares separated and allotted to her also proved ineffective due to the adamant attitude of the respondents/defendants. In their attempt to sell away the suit properties, they also showed the properties to the intending purchasers on 01.04.2005. When the appellant/plaintiff questioned the propriety of the said act, the respondents/defendants proclaimed that the appellant/plaintiff would not be allowed to have any share in the suit properties. Hence, it became necessary for the appellant/plaintiff to seek not only the relief of partition, but also an injunction not to alienate the suit properties till the disposal of the suit and for an injunction not to exclude her from joint possession of the suit properties. Hence, the suit came to be filed for the above said reliefs.

3. The third and fourth respondents/third and fourth defendants did not contest the suit and they remained ex-parte. The written statement filed by the first respondent/first defendant was adopted by the second respondent/second defendant. The averments made in the said written statement, in brief, are as follows:

i) The claim of the appellant/plaintiff that the suit properties are the joint family properties cannot be sustained. The appellant/plaintiff, her father, namely the third respondent/third defendant, are not living in a separate portion of the first item of the suit properties as averred in the plaint. The further averment made in the plaint that the appellant/plaintiff and the respondents/defendants are members of a Hindu Undivided Family and that the plaintiff is in actual joint possession and enjoyment of the suit properties along with the respondents/defendants is also false. The third respondent/third defendant left the house of the first respondent/first defendant in the year 1989 itself along with his family members and thereafter he was residing at Madhavarayan Street, Shevapet, Salem - 2 and then at Solapadi Subramaniya Pillai Street, Shevapet, Salem - 3 till the year 1999. The marriage of the third respondent/third defendant was performed in the year 1982. In the year 1989, he left the family. In the year 1999, since the third respondent/third defendant and his wife were unable to be in their house to look after the child, namely the appellant/plaintiff and they had to bestow their attention in the business of the third respondent/third defendant, they requested the second respondent/second defendant to lease out a portion of the first item of the suit property to him. Pursuant to such request alone, the second respondent/second defendant leased out a portion of the first item of the suit properties to the third respondent/third defendant to have his family set up there as a tenant under the second respondent/second defendant till the year 2005. Thereafter, he vacated the same and went to Door No.23, Venkataraman Street, Shevapet, Salem 2. Hence, the claim of the appellant/plaintiff that she is in actual joint possession of the suit properties along with the respondents/defendants is totally false.

ii) The claim of the appellant/plaintiff that the suit properties were purchased out of the joint family income derived from Shivaji Book Shop, a joint family business is also untenable. Shivaji Book Shop cannot be contended to be a joint family concern consisting of book shop and binding works. It was a sole proprietary concern and the second respondent/second defendant was its sole proprietrix. The said business was commenced on 01.10.1971 and it was closed on 31.03.1999. The plaint allegations as if the joint family income had been invested in Keerthi finance, Shivaji Finance and Sivapriya Traders are also false. The said finance business were started during the year 1980-1981 and 1983-1984 respectively. However, it is false to contend that Shivaji Film Distribution was started in the year 1980-1982. On the other hand, it was started only in the year 1983 and the first respondent/first defendant was only a partner in it. The four storeyed building in suit first item was not constructed using the joint family funds as contended by the appellant/plaintiff in her plaint. On the other hand, the second respondent/second defendant using her own funds, savings and her streedhanas alone constructed the said building and except the second respondent/second defendant, no other person contributed any money for the construction of the said building. At that point of time, the third respondent/third defendant was studying at Thiruparaithurai.

iii) Out of the shops constructed in the first item of the suit properties, one was leased out to the fourth respondent/fourth defendant to run Shivaji Binding Works. The first floor portion of the building has been leased out by the second respondent/second defendant to the fourth respondent/fourth defendant for residential purpose. The second floor portion of the building is in the use and occupation of the respondents 1 and 2/ defendants 1 and 2. The third floor portion is in the possession and enjoyment of the second respondent/second defendant. The Shivaji Book Shop was run as a Proprietary concern by its sole Proprietor, namely the second respondent/second defendant till it was closed. At the time of closure, the goods worth Rs.3,50,000/- in the said shop were given to the third respondent/third defendant along with the goodwill and the place wherein it was run. In the very same shop, previously the third respondent/third defendant was running a business in the name and style of Boopal Book Centre. After taking the goods and goodwill from Shivaji Book shop, it was merged with Boopal Book Centre and the name was changed as New Shivaji Book Shop. When Shivaji Book Shop was closed in the year 1999, it was given to third respondent/third defendant and the binding works was also given to the fourth respondent/fourth defendant who afterwards named the said binding works as Shivaji Binding works. It is false to state that the third and fourth respondents/third and fourth defendants were jointly looking after the business Shivaji Book Shop and Binding Works from 1980. Both the business were looked after and run by the second respondent/second defendant alone till their closure in the year 1999.

iv)It is also false to contend that the first respondent is getting the monthly rent from the shops in the first item of the suit properties. The second respondent/second defendant is the absolute owner of the first item of the suit properties and she alone is receiving rent from the tenants. The third respondent/third defendant for the rental portion occupied by him in the basement was not paying the rent. When the third respondent/third defendant went out of the third floor portion of the first item of the suit properties, he was not able to raise funds for securing a house for rent and hence, the first respondent/first defendant paid a sum of Rs.1,25,000/- for that purpose. For the second and third floors of the first item of the suit properties electricity is supplied through a common matter. Hence, the electricity consumption charges for the second and third floors used by the first respondent/first defendant and the third defendant respectively were shared by the second and third respondents/second and third defendants equally. Since the respondents 1 and 2/defendants 1 and 2 are aged persons, they also used to pay their share of electricity consumption charges to the third respondent/third defendant who would pay the same along with his own share. The property tax came to be paid through the third respondent/third defendant or fourth respondent/fourth defendant. The third respondent/third defendant was residing in the third floor of the first item of the suit properties not as a co-owner, but only as a tenant. The third respondent/third defendant is not in occupation of the open terrace of the first item of the suit property as pleaded in the plaint. The half portion in the basement floor and first floor of the suit property in the occupation of the third respondent/third defendant only in his capacity as a tenant under the second respondent/second defendant who is taking steps to evict him following due process of law.

v)The vacant sites, namely the second and third items of the suit properties are vacant lands not in the joint possession and enjoyment of the joint family as claimed by the appellant/plaintiff. The second and third items items of suit properties are the separate properties of the first respondent/first defendant and the fourth respondent/fourth defendant. Since the first item of the suit properties is the self acquired property of the second respondent/second defendant and the second item of the suit properties is the separate property of the fourth respondent/fourth defendant whereas the third item of the suit properties is the absolute property of the first respondent/first defendant, the said respondents/defendants have got every right to deal with the same. The appellant/plaintiff has got no right or interest or share in respect of the suit properties. If at all the appellant/plaintiff has not been maintained by her parents, she should have proceeded against her parents for maintenance. Defendants 1 and 2 are not liable to maintain the appellant/plaintiff. The plaint averments regarding the alleged proclamation made by the defendants 1 and 2 that they would not spend any money for the studies of the appellant/plaintiff or for her marriage are also false. The alleged payment and convening of panchayats are also denied. Even if the contention of the appellant/plaintiff shall be accepted, since the fourth respondent/fourth defendant had got two children and those children of the fourth respondent/fourth defendant have not been impleaded as parties to the suit, the suit is bad for non-joinder of necessary parties. The share claimed by the appellant/plaintiff, namely 3/12 is not correct. The appellant/plaintiff is not entitled to any of the reliefs sought for in the suit.

4. Based on the above said pleadings, three issues and two additional issues were framed by the trial Court. They are as follows:

Issues:

1) Whether the plaintiff is entitled to 3/12 share in the suit properties?

2) Whether the plaintiff is entitled to preliminary decree as prayed for?

3) To what relief?

Additional Issues:

1) Whether Shivaji book shop is the joint family business of the parties?

2) Whether the suit properties were properties from the income of the joint family business?

5. The parties went for trial based on the framing of the above said issues and additional issues. Four witnesses were examined as Pws 1 to 4 and 39 documents were marked as Exs.A1 to A39 on the side of the appellant/plaintiff. Three witnesses were examined as Dws 1 to 3 and 40 documents were marked Exs.B1 to B40 on the side of the contesting respondents/defendants 1 to 2.

6. The learned trial Judge, at the conclusion of trial, heard the arguments advanced on both sides and considered the pleadings and evidence in the light of the points urged in the arguments submitted on behalf of the parties. On an appreciation of evidence, the learned trial Judge answered all the issues against the appellant herein/plaintiff and dismissed the suit without costs by a judgment and decree dated 30.09.2009. Questioning the correctness of the decree passed by the trial Court dismissing the suit filed by the appellant/plaintiff, the present appeal has been filed on various grounds set out in the memorandum of grounds of appeal.

7. During the pendency of the appeal, D.Vimala Rani filed a petition in M.P.No.1 of 2013 to get her impleaded as a party respondent on the premise that she had purchased 2878 sq.ft of land, a portion of third item of the suit property comprised in T.S.No.28/5 and 28/6 in Erumapalayam Village, Salem City from the first respondent/first defendant (Boopal @ Siddeswaran) under a sale deed

dated 13.09.2010 registered as Document No.6020 of 2010 on the file of the Sub-Registrar, Thadagapatti, Salem. By order dated 10.12.2013, the said petition was allowed and the said Vimala Rani was impleaded as the fifth respondent in the appeal.

8. The points that arise for consideration in the appeal are:

"1. Whether Shivaji Book Shop was a joint family business as contended by the appellant/plaintiff?

2. Whether the suit first item of the properties as a land with two old houses was purchased using the joint family income?

3. Whether the present building in the first item of the suit properties was constructed using the joint family funds?

4. Whether the items 1 to 3 of the suit properties are the joint family properties in which the plaintiff has got a share as a coparcener?

5. Whether the plaintiff is entitled to the relief of partition?

6.Whether the appellant/plaintiff is entitled to the reliefs of permanent injunction and costs as prayed for?"

9. The arguments advanced by Mr.S.Kalyanaraman, learned counsel for the appellant, Mr.D.Shivakumaran, learned counsel for the respondents 1 , 2 and 4 and Mr.S.Subbiah, learned counsel for the fifth respondent are. The materials available on record are also perused.

Point No.1

10. L.B.Padmavathi, the second defendant is the wife of L.V.Boopal @ Siddheswaran, the first defendant. L.B.Subramaniyam and L.B.Sathyanarayanan (3rd and 4th defendants) are the sons of defendants 1 and 2. The plaintiff is the daughter of the third defendant. The simple case of the plaintiff is that the defendants 1 to 4 and the plaintiff constituted a Hindu Undivided Family of which the first defendant was the Kartha. By virtue of the amendment to Hindu Succession Act by Tamil Nadu Act 1 of 1990 and also by the Central Act 39 of 2005, the plaintiff became a coparcener along with defendants 1, 3 and 4. According to the plaintiff, the Hindu Undivided Family headed by the first defendant was running a joint family business in the name and style of Shivaji Book Shop and with the income derived from the said business, the first defendant, as Kartha of the family, purchased a property consisting of two tiled

houses bearing door Nos.71 and 72 under a sale deed dated 20.07.1975 and the same was a joint family acquisition. It is the further contention of the plaintiff that the old houses were demolished and a four storey building with a basement floor came to be constructed during the period 1975 to 1980 using the joint family income. The said property has been shown as the first item of the suit properties. Thus the plaintiff bases her claim to a share in the first item of the suit properties.

11. The second and third items of suit properties are admittedly compounded vacant sites and they were purchased under two sale deeds dated 06.09.1983 bearing document Nos.2794/1983 and 2796/1983. The second item of the suit properties was purchased in the name of the fourth respondent, whereas the third item of the suit properties was purchased in the name of the first defendant. Contending that they were also the properties purchased using joint family income, the plaintiff claimed a share in those items also.

12. Per contra, it is the case of the contesting defendants (defendants 1 and 2) that Shivaji Book Shop was not a joint family business and on the other hand, it was the separate business of the second defendant run by her as its sole proprietrix. It is their further contention that the first item of the suit properties was purchased by the second defendant with her own funds and she herself put up the present structure after demolishing the old houses that stood therein with her own funds raised in a number of ways. So far as items 2 and 3 of the suit properties are concerned, it is their contention that those were the self-acquisitions of the 4th defendant and the first defendant respectively as they purchased them with their own funds without using any of the joint family funds.

13.It is an admitted fact that the land comprised in the first item of the suit properties along with two old houses that stood therein bearing door Nos.71 and 72 was purchased in the name of the second defendant under a sale deed dated 20.07.1975. A certified coy of the said sale deed has been produced and marked as Ex.A1 and the original sale deed has been produced by the contesting defendants and marked as Ex.B5. The contention of the plaintiff that Shivaji Book Shop was a joint family business should be proved by plaintiff. Even such a proof shall not be enough to sustain the claim of the appellant/plaintiff that the first item of the suit properties was purchased using the joint family income as a house site having an extent of 1073.50 sq.ft. along with two old houses which stood therein. Even if the plaintiff proves that the property was purchased using the joint family income, since the purchase was not made in the name of any one of the coparceners, section 4 of the Benami Transaction (Prohibition) Act, 1988 shall get attracted to bar such a plea of the plaintiff. By now it is a settled proposition that a purchase made in the name of the wife of a coparcener is not exempted from the purview of section 4 of the Benami Transaction (Prohibition) Act, 1988. Hence, as rightly pointed out by the learned counsel for the contesting defendants, the contention of the plaintiff that the purchase of the site along with two tiled houses that stood thereon was made on behalf of the joint family cannot be sustained since the bar provided under Section 4 of the Benami Transaction (Prohibition) Act gets attracted. Factually also the plaintiff has failed to prove that the said property was purchased using joint family funds.

14. In an attempt to prove her case that Shivaji Book Shop was the joint family business and the income derived from the said business was used for purchasing the first item of the suit properties as a land with two old houses, the plaintiff herself figured as the first witness on her side and the proof affidavit produced by her was accepted as her evidence in chief examination as PW1. But unfortunately she did not turn up for subjecting herself to be cross examined. Since she failed to turn up for subjecting her to cross examination, the learned trial judge chose to eschew the proof affidavit and the proceedings recorded as the testimony of PW1. Meanwhile, two more witnesses were examined as PWs.2 and 3. Thereafter, the plaintiff once again figured as a witness and her evidence was recorded by the learned trial judge showing her as PW4. The procedure adopted by the trial court exhibits irregularity. However the defendants have not chosen to challenge the proceedings by which the evidence of the plaintiff was recorded showing her as PW4. As such there are only three witnesses examined on the side of the plaintiff and they have been ranked as PWs.2 to 4 one Suseendran figured as PW2. He has spoken about the investments made by the first defendant in Shivaji Finance (a partnership firm), Keerthi Finance and film distribution business in the name of Shivaji Films. PW2's evidence is confined to the activities of the first defendant from 1986 onwards. However during cross examination he ventured to state that Shivaji Book Shop was the business of the first defendant and the said business was carried on from 1975. Though PW2 would have ventured to state that property bearing old door No.71 and 72 was not the separate property of the second defendant, during cross examination, he pleaded absence of knowledge as to who purchased the said property. It is PW2's assertion that he knew the first defendant from 1985. As PW2 admitted that the first defendant was known to him only from 1985. Though he ventured to state that it was not the second defendant's separate property, PW2 also pleaded absence of knowledge as to who purchased the above said property. As such the evidence of PW2 is not capable of helping the case of the plaintiff that the purchase made under Ex.B5-sale deed was made using the joint family funds.

15. One P.K.Chandrasekaran, examined as PW3, has not spoken about investment of the joint family funds for the purchase made under Ex.B5. He simply spoke about the period during which the building in the first item of the suit properties was constructed and also regarding the portions in the occupation of various persons. However, he was not able to state the year in which the first item of the suit properties was purchased. It is his clear admission that the

first item of the suit properties was purchased in the name of the second defendant. It is also his further admission that the electricity service connection and property tax assessment are in the name of the second defendant alone. He also made a clear admission that the first defendant was running a cycle shop from 1947 to 1975. It is his further statement that only after 1975, he started the book shop and a printing press (mr;rhgP!;)/ It is no one's case that the first defendant was running a printing press. In the latter part of his evidence in cross examination, PW3 made a clear admission that "Shivaji Book Shop" was started 08.10.1971 and closed on 01.04.1999 and that it was run as a proprietary concern having the second defendant as its proprietrix. He has also made a clear admission that the Commercial Tax Registration for Shivaji Book Shop was in the name of the second defendant and she was an income tax assessee as an individual.

16. The plaintiff, who deposed as PW4 during, her cross examination, made a categorical admission that the property bearing old door Nos.71 and 72 was the property belonging to the second defendant. Even though the plaintiff, as PW4, made an attempt to state that Shivaji Book Shop and Boopal Binding Works were the joint family business, at the latter part of her evidence in cross examination, she admitted that the second defendant Padmavathi started "Shivaji Book Shop" on 08.10.1971 and closed it on 01.04.1999. It is also the admission of the plaintiff that she did not know in whose name "Boopal Binding Works" was started. The plaintiff, as PW4, made a clear admission that the property bearing old door Nos.71 and 72 was the property belonging to the second defendant. Even though she made an attempt to state that "Shivaji Book Shop" and "Boopal Binding Works" were the joint family business, in the latter part of her evidence she admitted that the second defendant Padmavathi started the book shop on 08.10.1977 and closed it on 01.04.1999. It is also her admission that she did not know in whose name "Boopal Binding Works" was started.

17. On the other hand, on the side of the contesting defendants, the second defendant Padmavathi deposed as DW1. She made a clear assertion that she was the sole proprietrix of Shivaji Book Shop; that the same was opened on 01.10.1971 and closed on 31.03.1999. It is her clear testimony that the third defendant L.B.Subramaniyam started a business concern named Boopal Book Centre in the very same place where the separate business of the second defendant "Shivaji Book Shop" was being run; that Boopal Book Centre was started as a separate business of the third defendant with the funds provided by the first defendant; that the third defendant kept the income derived from Boopal Book Centre for himself and with the same, he purchased a vacant site in Salem Azhagapurampudur Village in the year 1981 and sold it to one Janardhanan in 1992 and that the plaintiff did not take any action in respect of the said property. It is the further statement of DW1 that the 4th defendant L.B.Sathyanarayanan was working in Shivaji Book Shop and Binding

Works run by the second defendant; that out of the salary paid to him and the funds provided by the second defendant on various occasions, he purchased the second item of the suit properties and that hence the same was the separate property of the 4th defendant. It is her further statement that there was no joint family business run by the members of her family and there was no joint family property capable of yielding income for the purchase of the disputed properties and that the third item of the suit properties was the separate self-acquisition of the first defendant. Apart from the fact that there are admissions made by the witnesses examined on the side of the plaintiff that Shivaji Book Shop was the separate business of the second defendant, the plaintiff was also not able to produce any document to show that Shivaji Book Shop was the joint family business of the defendants 1, 3 and 4. On the other hand, Exs.B13-copy of the Profit and Loss Account of Shivaji Book Shop for the year ending with 31.03.1976 makes it clear that Shivaji Book Shop was run as a proprietary concern and the second defendant Padmavathi was its proprietrix. Ex.B38-letter addressed to the Commercial Taxes Department with regard to the Registration Certificate for the Book Shop and Ex.B39-Attendance Register show that Shivaji Book Shop was the separate business of the second defendant. In fact Ex.B38 was marked through an official from the Commercial Taxes Department, Salem, who deposed as DW2. It relates to the business of Shivaji Book Shop run at No.2 Longly Road, Shevvapet, Salem. It is also obvious from the same that the business was registered with the Commercial Taxes Department on 08.10.1971 and it was cancelled on 01.10.1999.

18. The contention of the plaintiff that her father, namely the third defendant was also looking after the business before the purchase of the first item of the suit properties is belied by the facts revealed by Ex.B40-certificate issued by school authorities showing that the third defendant was studying in the school at Tirrupparaitturai between 1974-1978. He joined as a student in 7th standard in 1974-1975 and studied 10th standard in the year 1977-1978 at Sri Vivekananda Vidyavanam High School, Tirupparaitturai, Trichirappalli District. Therefore, it shall be obvious that the third defendant L.B.Subramaniyam should have been studying in the elementary school when Shivaji Book Shop was started in the year 1971. As against such oral and documentary evidence in support of the case of the contesting defendants that Shivaji Book Shop was the separate business of the second defendant L.B.Padmavathi, besides there being absence of any documentary evidence on the side of the plaintiff to support her case that the said business was the joint family business, the witnesses examined on the side of the plaintiff, including the plaintiff made certain clinching admissions as indicated supra. Therefore, the necessary conclusion on preponderance of probabilities that can be arrived at is that the plaintiff miserably failed to prove her contention that Shivaji Book Shop was the joint family business. The finding of the court below regarding the said aspect is not defective or infirm. This court also, on an

re-appreciation of evidence comes to an independent conclusion that the plaintiff has not proved her contention that Shivaji Book Shop was the joint family business of the defendants 1, 3 and 4 that and on other hand, the contesting defendants were able to prove that the said Book Shop was run as a separate business of the second defendant and it was run as a proprietary concern. Hence Point No.1 is answered accordingly.

Point No.2:-

19. First item of the suit properties was purchased in the name of the second defendant under a sale deed dated 20.07.1975 and the sale deed has been marked as Ex.B5. A certified copy of the same has been produced by the plaintiff as Ex.A1. From the said documents it shall be obvious that a land measuring East-West - 38' and North-South-28¼' together with two old houses bearing door Nos.71 and 72 was purchased for a sum of Rs.20,000/-. It was purchased in the name of the second defendant Padmavathi. It is the claim of the plaintiff that the said purchase was made by the first defendant in the name of the second defendant using the income derived from Shivaji Book Shop. In addition, it is a clear admission made by PW1 that there was no other business and no other joint family property yielding income to the joint family. It is her contention that the income derived from Shivaji Book Shop alone was used for purchasing the suit first item as a land with two old houses. We have seen in the discussions regarding Point No.1 that Shivaji Book Shop was the separate business of the second defendant Padmavathi. As it is admitted by the plaintiff that the income derived from the said business alone was used for the purchase of the land with two old houses under Ex.B5, it is quite obvious that no joint family fund was used for the purchase of the property under Ex.B5. Even otherwise, in view of Section 4 of the Benami Transaction (Prohibition) Act, 1988, the plaintiff cannot contend that the property purchased in the name of the second defendant, who was not a coparcener and was only the wife of a coparcener, is the property of the Hindu Undivided Family. As indicated supra, now the legal position has been made quite clear: what is exempted under Section 4 of the Benami Transaction (Prohibition) Act, 1988 is a claim that the property purchased in the name of a coparcener is a purchase made by Hindu Undivided Family and such an exemption is not available in respect of a purchase made in the name of the wife of a coparcener. Hence even if it is assumed for argument sake that any part of the joint family funds could have been used for the purchase of the property under Ex.B5, it is not open to anybody to contend that the same is not the separate property of the second defendant as there is a legal bar under Section 4 of the Binami Transaction Prohibition Act, 1988, for making such a claim. Hence, this court holds that the property purchased under Ex.B5-Sale deed was the self-acquisition of the second defendant in which either the other defendants nor the plaintiff can make any claim against her

during her life time. The finding of the court below in this regard does not deserve any interference and on the other hand, it deserves to be confirmed.

Point No.3:-

20.The claim of the plaintiff for partition was made based on her contention that not only the land in the first item of suit properties was purchased using the joint family funds, but also the present structure standing thereon came to be erected using the joint family income. Admittedly, after the purchase made under Ex.B5, the old buildings were demolished and a new four storey building with a basement floor was constructed. As pointed out above, the plaintiff failed to prove her case that Shivaji Book Shop was the joint family business. It is her admission that apart from Shivaji Book Shop, there was no joint family business or joint family property yielding income. The second defendant was able to prove that the entire income derived from Shivaji Book Shop was her separate income. It is her further evidence that besides the income derived from Shivaji Book Shop, she used her savings and the amounts raised by selling some of her jewels and the amount paid by her brothers as streedhana formed a corpus of the fund for the construction of the building, which now stands in the first item of the suit properties.

21.In this regard, the plaintiff, while deposing as PW1 made a clinching admission to the effect that it was the second defendant who constructed the building. However she made an attempt to contend that the building was constructed after her birth. Thereafter realising the mistake she changed her version by stating that the construction was completed before she was born and after her birth certain alterations in the building were made. It must be borne in mind that till 1978, the third defendant was a student and only in March/April 1978 he appeared for the 10^{th} standard examination, he would have been a minor even on the date of completion of the construction of the building in the year 1980. In 1980, the plaintiff would not have been born. That is the reason why she changed her version and stated that the construction of the building was completed before her birth and certain alterations were made after her birth. However she has admitted in clear terms that the property tax assessment, electricity service connection and drinking water connection are all in the name of the second defendant. Therefore it is quite obvious that the plaintiff was not able to prove that the building was constructed using joint family income as claimed by her and on other hand, the contesting defendants were able to prove that the building in item No.1 of the suit properties was constructed by the second defendant with her own funds.

Point Nos. 4 to 6:-

22.Clear evidence has been adduced through DW1 that the third defendant started a separate business in the name of Boopal Book Centre in 1980 and that after the closure of the Shivaji Book Shop, the goods worth Rs.3,50,000/- available in the book shop were given to the third defendant and that the third defendant clubbed the same with his book shop called Boopal Book Centre and continued the business with a change of name as "New Shivaji Book Shop". It is the further evidence of DW1 that the basement floor of the first item of the suit properties was divided into two and one part was rented out to the third defendant for his business "New Shivaji Book Shop", whereas the other part was rented out to the 4th defendant for his business "Shivaji Binding Works". The mere fact that the second defendant was not able to produce any lease deed, rental receipt or advance receipt will not be enough to show that the third defendant is also a co-owner of the first item of the suit properties and in such capacity alone he is doing business in the basement floor. It is the clear case of the second defendant and it has been substantiated by the evidence of DW1 that the third defendant, who was residing with his wife and daughter at some other place was allowed to reside as a tenant in the third floor of the first item of the suit properties in order to enable him and his wife to look after his business "New Shivaji Book Shop" and during the said period, he had alternatively paid the electricity charges. The same provide an explanation as to how the plaintiff was able to produce a number of electricity bills/receipts as Exs.A7 to A12 and Exs.A22 to A32. It is the further contention of the second defendant that before the filing of the suit, the third defendant vacated the said residential portion in the third floor of the first item of the suit properties, but he continues as a tenant in respect of the non-residential portion in the basement floor. The case being one for partition based on the contention of the plaintiff that the first item of the suit properties is a joint family property, it is unnecessary to go into the question whether the third defendant is a tenant or a permissive occupant in respect of portions of the property. Suffice to state that the entire first item of the suit properties is the separate property of the second defendant and that neither the plaintiff nor the other defendants did have any right to share in the said property as against the second defendant.

23. Admittedly, the third item of the suit properties was purchased by the first defendant. The plaintiff who claims the said purchase to be made with the help of the joint family income, has not substantiated her case that there was any joint family property capable of yielding surplus income and such surplus income should have been used for the acquisition of the third item of the suit properties in the name of the first defendant. Similarly, the second item of the suit properties purchased in the name of the 4th defendant has not been proved to be a purchase made using the joint

family income/fund. It is pertinent to note that the only ancestral property that came to the share of the first defendant in a partition with his brother's came to be disposed of by defendants 1, 3 and 4 by a sale deed dated 19.09.1994. A certified copy of the said sale deed has been marked as Ex.B1. The third defendant joined in the execution of the said sale deed on his behalf and on behalf of his daughter, namely the plaintiff Laxmi Kumari.

24. The third defendant Subramaniyam purchased a property under a sale deed dated 09.11.1981 registered as Document No.7186/1981. A certified copy of the same has been marked as Ex.B2. The said property was sold by him in parts under two different sale deeds dated 28.02.1992 registered as Document Nos.698/1992 and 701/1992. It is pertinent to note that while co-opting the plaintiff as a vendor under Ex.B1, when the ancestral property the first defendant had got in a partition with his brothers, the third defendant did not do so while alienating the property under the originals of Exs.B3 and B4, which have been purchased by him under the original of Ex.B2. Hence it is quite obvious that the ancestral property was treated differently and the properties acquired by the defendants, including the third defendant, in their names were treated separately. The plaintiff, who claims the purchases made in the names of first and 4th defendant under the sale deeds registered as document Nos..2794/1983 and 2796/1983 to be the joint family acquisitions has not chosen to make such a claim in respect of the property purchased by her father under the original of Ex.B2 and she has not challenged the sale deeds executed by her father under the originals of Exs.B3 and B4. It is also pertinent to note that neither the third defendant nor the fourth defendant chose to make any claim in respect of the first item of the suit properties standing in the name of the second defendant.

25. Even the plaintiff who deposed as PW1, did admit that the only ancestral property which came to the first defendant in a partition between himself and his brothers was sold by the first defendant and his sons, namely the third and fourth defendants. She also did not deny that the sale proceeds of the properties sold under the original of Ex.B1 was divided among the defendants 3 and 4. It is also her clear admission that except the said property sold under the original of Ex.B1, there was no other ancestral property belonging to the family. It is also an admitted fact that all the suit schedule properties were purchased prior to the sale of the ancestral property under the original of Ex.B1. In addition, the other witnesses examined on the side of the plaintiff, namely PWs.2 and 3 also have made admission that the properties purchased in the names of the first defendant and the 4th defendant were their separate properties. Likewise the property purchased by the third defendant was treated only his separate property. If the evidence adduced on both sides, both oral and documentary are marshalled, it shall lead to the only

conclusion that all the three items of the suit properties claimed by the plaintiff to be the joint family properties are proved to be the separate properties of the second defendant, 4th defendant and the first defendant respectively and that on the other hand, the plaintiff failed to prove them to be the joint family properties in which she can claim a share equal to that of her father.

26. The plaintiff has miserably failed to prove her entitlement to a share in any of the suit properties. Hence she is not entitled to the relief of partition. The same shall be revealed from the fact that the plaintiff has made a wrong calculation in respect of her share in the joint family property, if any. She claimed 3/12 = 1/4th share. Defendants 1, 3 and 4 would have been the original coparceners in respect of the joint family properties. Each one would have been entitled to 1/3rd share. After the amendment made to the Hindu Succession Act by Tamil Nadu Act 1 of 1990, the plaintiff would have been added as a coparcener to claim equal share with his father in the 1/3rd share referable to her father. Hence she would be entitled to 1/6th share alone and not 1/4 share as claimed by her. The said mistake will show that the suit itself came to be filed as a gambling. It is also pertinent to note that the third defendant, who is the father of the plaintiff has not chosen to contest the suit and he has not chosen to appear as a witness on either side. The said fact will show that it is the third defendant who has instigated his daughter, namely the plaintiff to file the suit making a false claim.

27. In view of the finding that the plaintiff is not entitled to any share in the suit property, as a corollary to such finding, this court hereby holds that the plaintiff is not entitled to the relief of partition and the injunctions as prayed for by her in the plaint. The learned trial judge, on a proper appreciation of law and applying proper statutory provisions and principles of law, arrived at a correct conclusion and non-suited the plaintiff for the reliefs sought for by her. There is no defect or infirmity in the judgment and decree of the trial court. This court finds no reason to interfere with the decree passed by the trial court dismissing the suit filed by the plaintiff without cost. There is no merit in the appeal and the same deserves to be dismissed. However, considering the relationship of the parties, this court chooses not to pass any order regarding cost.

In the result, the appeal suit is dismissed without cost and the decree of the trial court dated 30.09.2009 made in O.S.No.46 of 2006 is confirmed. Consequently, the connected miscellaneous petition is closed. : Yes

asr/-

s/d-
Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

To

1. The Additional District Judge
   (Fast Track Court No.2), Salem

2. The Section Officer,
   V.R.Section, High Court, Madras

+ 1 cc to M/s.D.Shivakumaran, Advocate SR 33228

+ 1 cc to M/s.S.Kalyanaraman, Advocate SR 33129

+ 1 cc to M/s.S.Subbiah, Advocate SR 33035

sai(co)
prk21/7

Judgment
in A.S.No.198 of 2010