

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.12.2015

CORAM

THE HON'BLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No.340 of 2012

Arukkaniammal

.. Appellant

Vs.

1. Rakkiya Gounder
2. Janaki
3. Manojgowri
4. Kumutham

.. Respondents

Appeal under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 29.11.2012 made in A.S.No.35 of 2011 on the file of Principal Sub Court, Erode, confirming the judgment and decree dated 26.3.2011 made in O.S.No.817 of 2005 on the file of Principal District Munsif, Erode.

For Appellant : Mr.S.V.Jayaraman, S.C.
For Mr.I.C.Vasudevan

For Respondents 1 to 3 : Mr.V.Bharathidasan

For Respondent-4 : Served. No appearance

J U D G M E N T

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The plaintiff in O.S.No.817 of 2005 on the file of the learned District Munsif, Erode, is the appellant. The respondents are defendants in the suit. The said suit was filed for partition and for separate possession of the 1/6th share of the plaintiff. The trial Court, by decree and judgment dated 26.3.2011 dismissed the suit. As against the same, the appellant filed an appeal in A.S.No.35 of 2011. The learned Principal Subordinate Judge, by decree and judgment dated 29.11.2011, dismissed the appeal, thereby confirming the decree and judgment of the trial Court. As against the

concurrent judgments, the appellant has come up with this second appeal.

2. During the pendency of this second appeal, the first defendant Rakkiya Gounder died on 27.5.2014. The counsel for the appellant has filed a memo seeking to record the other parties to the case as the legal representatives of the deceased. The said memo is recorded on 24.11.2014.

3. When this appeal originally came up for hearing on 15.3.2012, this Court ordered notice to the respondents. Accordingly, respondents 1 to 3 have made appearance through their counsel. The fourth respondent has not made appearance, despite service of notice. Today, the second appeal has come up for admission.

4. I have heard Mr.S.V.Jayaraman, learned senior counsel for the appellant and Mr.V.Bharathidasan, learned counsel for the respondents 2 and 3. There is no representation for the fourth respondent. I have also perused the records carefully.

5. The case of the appellant/plaintiff is as follows:

The first defendant Rakkiya Gounder was the husband of the plaintiff. They had a son by name Subramanian and daughter by name Kumutha. Kumutha is the fourth defendant in the suit. Subramanian died on 14.10.1998. The second defendant is the wife of Subramanian and the third defendant is the daughter of Subramanian.

6. According to the case of the plaintiff, the first defendant Rakkiya Gounder and his brother had partitioned their joint family properties, out of which a vast extent of properties were allotted to the share of Rakkiya Gounder (first defendant). Rakkiya Gounder and his son Subramanian constituted a joint family. The said joint family had sufficient income from the joint family properties. Till the demise of Subramanian on 14.10.1998, there was no partition effected between the first defendant and Subramanian. During the lifetime of Subramanian, Rakkiya Gounder and Subramanian had dealt with the joint family properties. After the demise of Subramanian, a partition was effected in the year 2004 between the defendants 1 to 3. Thus, according to the plaintiff, the joint family status still continues.

7. It is the further case of the plaintiff that while so, the suit property herein was purchased in the name of the first defendant on 21.4.1994, from out of the joint family nucleus and the income derived from the same. The said property has been all along in the joint possession of the joint family members. There was no partition effected. When the plaintiff demanded for partition, the defendants 1 to 3

declined for partition. It is further stated that in respect of her 1/6th undivided share in the suit property, the plaintiff has executed a Settlement Deed in favour of the fourth defendant on 27.8.2004. Since the defendants 1 to 3 did not come forward for partition of the suit property, the plaintiff filed the present suit for partition.

8. According to the defendants 1 to 3, the suit property herein was not at all purchased out of the joint family income, as alleged by the plaintiff. The first defendant was doing business in firewood from the year 1970 onwards, earned a sumptuous amount and out of the same, he purchased the suit property. Thus, the suit property is a separate property in which Subramanian had no right to have any share. It is further stated by the first defendant that on 29.11.2004, he had executed a Settlement Deed in favour of his granddaughter, namely the third defendant, thereby settling the suit property in her favour. Thus, from 29.11.2004, the suit property has been possessed by the third defendant as its absolute owner. Thus, according to the defendants, since Subramanian himself had no right to have any share in the suit property, the plaintiff has got no share in the suit property and therefore, the suit is liable to be dismissed.

9. Based on the above pleadings, the trial Court framed appropriate issues. On the side of the plaintiff, she was examined as PW1 and as many as six documents were exhibited and on the side of the defendants, four witnesses including the defendants 1, 3 and 4 were examined and as many as eight documents were exhibited. The fourth defendant supported the case of the plaintiff. Having considered all the above evidence, the trial Court dismissed the suit holding that the suit property is a separate property of the first defendant and the lower Appellate Court also confirmed the same. That is how the plaintiff is before this Court with this second appeal.

10. The learned senior counsel for the appellant would submit that it has been clearly established that there was joint family nucleus, in which the first defendant and his son Subramanian were members. It is further submitted by the learned senior counsel that the said joint family had properties with sufficient income. The learned senior counsel would further submit that the joint family status continued until Subramanian died on 14.10.1998. The suit property, which was purchased on 21.4.1994, is purely out of the joint family income. The learned senior counsel would further submit that the Court below have committed serious error in casting the burden upon the plaintiff to prove that the suit property was purchased out of the joint family income. It is the contention of the learned senior counsel that since the plaintiff had

discharged her initial burden of proving that there was joint family nucleus and from out of the joint family property, there was also sufficient income, the burden to prove that the first defendant had separate income and out of the same only he purchased the suit property should have been discharged. But, in this case, according to the learned senior counsel, the Court below have applied the law erroneously expecting the plaintiff to prove that the suit property was purchased out of the joint family income. The learned senior counsel would submit that there is a presumption in favour of the plaintiff that the suit property purchased in the name of the karta of the joint family, was purchased only out of the joint family income and absolutely there is no rebuttal to the said presumption. Thus, according to the learned senior counsel, the Court below have seriously erred in dismissing the suit.

11. Mr. Bharathidasan, learned counsel appearing for the respondents 2 and 3 would vehemently oppose this appeal. According to him, there is no question of law involved in this second appeal. Two Courts below, appreciating oral and documentary evidence, have come to the conclusion that the first defendant had sufficient separate income and from out of the said income, he had purchased the suit property. The learned counsel would further submit that even the plaintiff, during evidence, had admitted that the income from the joint family properties were hardly sufficient to meet out the family needs. Thus, according to the learned counsel, the first defendant had clearly proved that he had separate income from out of his business and the suit property was purchased out of the said income. Thus, absolutely, there is no merit in this second appeal.

12. I have considered the above submissions.

13. At the outset, I should say that in this case, I do not find any question of law much less a substantial question of law warranting admission of this second appeal. The dispute is only in respect of the questions of fact. There is no dispute that Rakkiya Gounder (first defendant) had acquired certain properties in the partition of the joint family properties between him and his brother. There is no dispute that Rakkiya Gounder and Subramanian constituted a separate joint family. The properties, which were secured by Rakkiya Gounder in the year 1994, were enjoyed by Rakkiya Gounder and Subramanian jointly. There is no controversy or dispute over this fact also. There is also no dispute that there was some income out of this joint family properties. It is also not in dispute that the first defendant Rakkiya Gounder was the karta of the joint family and he was managing the joint family properties including the income.

14. Admittedly, Subramanian died on 14.10.1998. Whereas the suit property was purchased on 21.4.1994 during the lifetime of Subramanian. The suit property has been purchased in the name of the first defendant Rakkiya Gounder. As rightly submitted by the learned counsel for the appellant, since the plaintiff has proved that there was joint family nucleus and since the plaintiff has proved that there was some income out of the joint family properties, there arises a presumption in favour of the plaintiff that the suit property would have been purchased out of the joint family income.

15. If once this burden is discharged by the plaintiff, as rightly submitted by the learned senior counsel for the appellant, the onus shifts on the first defendant to prove that the suit property was not purchased out of the joint family income and that it was purchased out of his own separate income. For that, the first defendant has to prove that he had separate income outside the joint family income.

16. In this regard, I may state that the presumption in favour of the plaintiff that the suit property would have been purchased from out of the joint family income is after all rebuttable. Such presumption will not amount to conclusive proof. It is too well settled that a rebuttable presumption can be rebutted by the opposite party either by means of positive evidence, namely oral or documentary, or by means of circumstances. Here, in this case, according to the learned senior counsel for the appellant, the said presumption in favour of the plaintiff has not been rebutted at all by the first defendant. But, the contention of the learned counsel for the respondents is that the said burden has been discharged. Here, I would like to say that this question is also only a question of fact and there is no question of law involved.

17. Now, the question is whether the presumption has been rebutted or not by the first defendant. In my considered view, the presumption has been rebutted. First of all, the plaintiff, during her cross examination, has tacitly admitted that though there was some income from out of the joint family properties, that income was not sufficient to meet out the joint family needs. This positive admission by the plaintiff, in my considered view, would certainly be sufficient to rebut the presumption raised in her favour. Not only this, there are other circumstances also. The first defendant, in his written statement, has stated that he was doing business in firewood. In his evidence, he has stated that he was doing the said business by owning a bullock cart. It is the contention of the learned senior counsel for the appellant that the first defendant has not produced any document to show that he was doing firewood business such as license, account book, etc. He

has further stated that the first defendant has admitted that he was owning only a bullock cart and nothing else. In my considered view, for a poor villager, who is doing a small firewood business, one cannot expect him to maintain an account and get it audited. It is a normal practice in villages for the small farmers and villagers to do firewood business without maintaining any record. Such presumption, in my considered view, is possible under Section 114 of the Evidence Act, by normal human conduct of the villagers in this State. Therefore, non production of account book or non production of any license for doing firewood business would not in any manner go adverse to the claim made by the first defendant that he was doing firewood business. It is also common knowledge that for doing firewood business in a small size, it is enough for a person to own a bullock cart to carry firewood from a village and sell it in a nearby town. This evidence of the first defendant would also further strengthen the admission made by the plaintiff, as dealt with herein above, which would go to rebut the presumption raised in favour of the plaintiff. Therefore, I hold that the first defendant has rebutted presumption raised in favour of the plaintiff and thus, he has proved that the joint family had no sufficient income and that the suit property would not have been purchased from out of the joint family income.

18. The learned senior counsel for the appellant would admit that it is the law that the burden is upon the joint family manager to prove that he has sufficient income and that the suit property was purchased out of his own separate income. Regarding this legal proposition, I have got no quarrel. But, factually, in this case, two Courts, on appreciating evidence, both oral and documentary, have come to the conclusion that the first defendant had separate income and that out of the same only he has purchased the suit property.

19. As I have concluded herein above, it is also in evidence that the first defendant has settled the suit property in favour of his granddaughter, namely the third defendant. Thus, as of now, the suit property remains to be the separate property of the third defendant. As rightly held by the Courts below, the plaintiff has got no right whatsoever to have a partition of the said property in her favour. To repeat, I should say that all the questions raised in this second appeal are only questions of fact and there is no question of law much less a substantial question of law, even warranting admission of the second appeal. Thus, I do not find any merit at all in this second appeal. Accordingly, the appeal fails and the same is dismissed and the decree and judgment of the trial Court and confirmed by the lower Appellate Court is hereby confirmed. No costs. Consequently,

M.P.No.1 of 2009 is also dismissed.

kpl

Sd/-
Asst.Registrar

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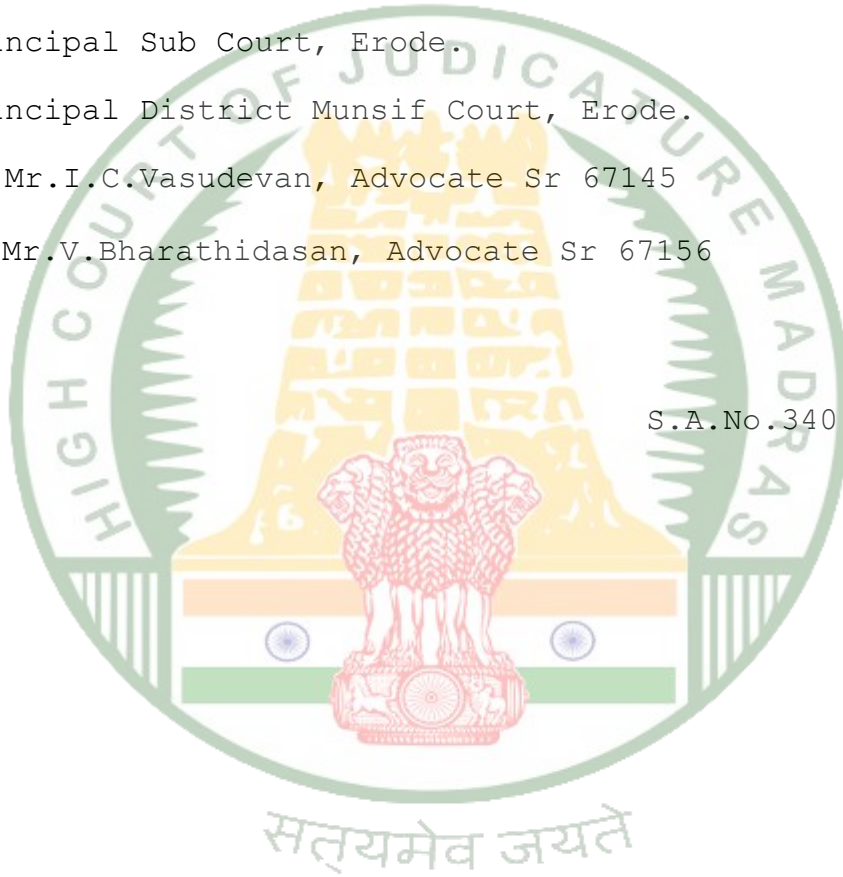
Sub Asst. Registrar

To

1. The Principal Sub Court, Erode.
 2. The Principal District Munsif Court, Erode.
- + 1 cc to Mr.I.C.Vasudevan, Advocate Sr 67145
+ 1 cc to Mr.V.Bharathidasan, Advocate Sr 67156

KR/2/2/16

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