

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.08.2015

CORAM

THE HONOURABLE MR.JUSTICE P.R.SHIVAKUMAR

Second Appeal No.2031 of 2004

1. Kovi Manisekaran @ Mani
S/o Idumban
 2. Sundarambal @ Logeswari
W/o Kovi Manisekaran @ Mani
 3. Kaliammal
W/o Periannan ... Appellants/Defendants
- vs-
- S.Periannan .. Respondent/Plaintiff.

Memorandum of Grounds of Second Appeal under Section 100 of the Civil Procedure Code, against the judgment and decree dated 30.10.2003 made in A.S.No.98 of 2003 passed by the learned Principal District Judge, Salem, reversing the judgment and decree dated 25.03.2003 made in O.S.No.845 of 2000 passed by the learned Principal District Munsif, Salem.

For Appellants :: Mr.P.Jagadeesan

For Respondent :: Mr.S.Kalyanaraman

JUDGMENT

The defendants 1 to 3 in the original suit are the appellants in the second appeal. The plaintiff in the original suit is the respondent in the second appeal. For the sake of convenience, the parties are referred to in accordance with their rankings in the suit.

2. The plaintiff-S.Periannan filed the suit, O.S.No.845 of 2000 on the file of the learned Principal District Munsif, Salem for permanent injunction restraining the defendants from causing disturbance to his peaceful possession and enjoyment of the suit properties. The third defendant is the wife of the plaintiff. The second defendant is the daughter of the plaintiff. The first defendant is the husband of the second defendant, hence, he is the son-in-law of the plaintiff. The said prayer was made on the basis

of his contention that the suit properties were his self-acquired properties, in which none of the defendants did have any interest or title. But due to the fact that the third defendant, who is none other than the wife of the plaintiff, is living separately, all the three defendants joined together and made attempts to trespass into the suit properties and take forcible possession from the plaintiff.

3. The suit was resisted by all the three defendants based on the written statement filed by the third defendant, which was adopted by the defendants 1 & 2. In the written statement, they contended that the plaintiff had an extent of 30 cents of ancestral property; that the same was a fertile land yielding copious income; that the said income was more than sufficient for the maintenance of the family and that using the surplus income and also the joint earnings made by the plaintiff and the third defendant, the suit properties in question were purchased by the plaintiff in his name. Based on the above said pleadings, the defendants contended that the suit properties, being the acquisitions made using the income derived from the joint family nucleus, were an accretion to the joint family properties, in which the second defendant got a share by virtue of the Hindu Succession (Tamil Nadu Amendment) Act, 1989 (Act 1 of 1990), which made her a co-parcener along with her father.

4. After framing necessary issues, a trial was conducted, in which the plaintiff figured as the sole witness (P.W.1) and produced four documents as Exhibits A-1 to A-4 on his side. On the side of the defendants including the third defendant, who figured as D.W.1, three witnesses were examined, but no document was produced. The learned trial Judge, at the conclusion of trial, accepted the defence case of the defendants and dismissed the suit filed by the plaintiff, by a judgment and decree dated 25.3.2003.

5. Aggrieved by the same, the plaintiff preferred an appeal before the learned Principal District Judge, Salem in A.S.No.98 of 2003. The learned lower appellate Judge, on a re-appreciation of evidence, allowed the appeal, reversed the findings of the trial Court, set aside the decree passed by the trial Court and ultimately decreed the suit filed by the plaintiff for the relief of permanent injunction as prayed for. However, the decree was passed without costs. It is as against the said decree of the lower appellate Court dated 30.10.2003, the defendants have approached this Court with the present second appeal.

6. The second appeal came to be admitted on 10.11.2004, identifying the following to be the substantial questions of law involved in the second appeal:-

- (1) "Whether the lower appellate Court was right in holding that the suit properties are the self acquired properties of the plaintiff, ignoring the fact that the suit properties were purchased from the income derived from the ancestral property

and also from the income earned by the plaintiff and defendants 2 and 3?

(2) Whether the lower appellate Court was right in shifting the burden of proof on the defendants to prove that the suit properties are joint family properties?

(3) Whether the lower appellate Court was right in granting a decree for permanent injunction in favour of the plaintiff in the absence of any evidence to show that the plaintiff is in exclusive possession of the suit properties?"

7. The arguments advanced by Mr.P.Jagadeesan, learned counsel for the appellants and by Mr.S.Kalyanaraman, learned counsel for the respondent are heard. The judgments of the Courts below and the original records sent for from the Courts below are also perused and taken into consideration.

8. The case of the plaintiff is very simple. He purchased the suit properties with his own earnings and he treated the properties all along as his separate properties and that due to the fact that he and his wife, namely, the third defendant are living separately, the defendants 1 to 3 joined together and attempted to cause disturbance to the peaceful possession and enjoyment of the suit properties by the plaintiff. The case of the defendants is not that the suit properties were the ancestral properties and hence they became the properties of the co-parcenary consisting of the plaintiff and the second defendant, by virtue of the Hindu Succession (Tamil Nadu Amendment) Act, 1989 (Act 1 of 1990). On the other hand, it is the contention of the defendants that the plaintiff had ancestral properties yielding income, which was more than sufficient for the maintenance of the family and that the surplus income was used for the acquisition of the properties in question. In short, the case of the defendants is that the disputed properties having been acquired using the surplus income derived from the joint family nucleus, they are the accretion to the joint family properties and they form part of the properties of the co-parcenary.

9. The learned trial Judge, without considering the fact as to whether the ancestral properties which were available with the plaintiff was yielding income which was more than enough for the maintenance of the family and whether there was any surplus from the income derived from the joint family nucleus which could have been used for the acquisition of the properties in question, simply found fault with the plaintiff by pointing out the fact that he had not chosen to file the suit in respect of another land with an extent of 30 cents comprised in Survey No.79/3 and that even in respect of that land, he had chosen to deny the character of the said land by projecting it to be his absolute property rather than the ancestral property, in which his daughter (second defendant) has got a right to share.

10. Of course, it is true that he had not chosen to include the said property as one of the suit items. Simply because he omitted to include the said property in the suit seeking a relief of permanent injunction on the basis that he is the absolute owner of the suit properties, one cannot jump to the conclusion that the non-inclusion of the said property was with a view to suppress the joint family nucleus. From the evidence adduced on both sides, it is quite obvious that the said property was an Inam land, in respect of which patta came to be issued on the abolition of Inam tenure. But there is no document produced on either side to show that patta had been issued in the name of the father of the plaintiff, which came to be transferred to the plaintiff later on. However, the preponderance of probabilities show that the properties were held by the ancestors of the plaintiff from time immemorial and that was the reason why, out of the total extent of 60 cents available in that particular survey number, the junior paternal uncle of the plaintiff got 30 cents and the plaintiff got 30 cents. Hence, there shall be no difficulty in arriving at a conclusion that the 30 cents, which is not the subject matter of the suit, is an ancestral property in the hands of the plaintiff, in which not only the second defendant by virtue of the Hindu Succession (Tamil Nadu Amendment) Act, 1989 (Act 1 of 1990), but also another daughter of the plaintiff, who is not a party in the suit, by virtue of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), have become co-parceners. It is not a suit for partition; nor is it a suit for declaration in respect of the above said property, which is an ancestral property of the plaintiff. Hence, the non-impleadment of the other daughter of the plaintiff in the present suit shall be of no consequence.

11. So far as the suit properties are concerned, admittedly, they were purchased by the plaintiff under Exhibits A-1 & A-2 for a sum of Rs.5,000/- and Rs.4,000/- respectively. It is a well established principle of law that there shall be no presumption of existence of a co-parcenary and even the fact that two or more persons constituted a joint family by operation of law, will not give rise to a presumption that the joint family possessed properties. Even if it is proved that the joint family possessed properties, there cannot be any presumption that they yielded income, which would have been more than sufficient for the maintenance of the family, by virtue of which the properties in question would have been purchased. Unless the initial burden of showing that the family had got a joint family property and it was capable of yielding income which would have been more than sufficient and that the surplus amount was available with the person in question in whose name the property was purchased, there cannot be any presumption that the purchase was made out of the income derived from the joint family nucleus to hold the property to be a joint family property.

12. In the case on hand, it is the contention of the defendants that the extent of ancestral property was only 30 cents. Even out of 30 cents, a portion is occupied by the house in which the parties were residing. There is no evidence to show how much extent was occupied by the house. In the absence of any evidence, we can assume that at least a minimum extent of 5 cents could have been used to locate the house and appurtenant vacant site for convenient enjoyment of the house. Hence, the balance extent available for cultivation would be only 25 cents. According to the defendants, paddy, maize and cotton were the crops raised in the land. Though the defendants in their written statement have taken a plea that there are 20 yielding coconut trees, the third defendant, who figured as D.W.1, did not speak about the number of yielding coconut trees. However, D.W.2, a neighbour, in his evidence, has stated that there are 15 coconut trees. There is no evidence as to how much income is derived from the coconut trees. Admittedly, it is not a wet land and it is only a dry garden land having a well as the source of irrigation. Even assuming that with the help of the water lifted from the well, double crops can be raised, the maximum income that can be derived from the 25 cents of land cannot exceed Rs.15,000/- per year. If we divide it by 12, it will be Rs.1,250/- per month. It shall be hardly sufficient to maintain the family consisting of four persons. Though D.W.1 would have ventured to contend that they were rearing cattle and funds were raised by selling the milch buffalos and goats and that the same were used for the purchase of the suit properties, the said evidence cannot be looked into, as there is no plea to that effect made in the written statement. The specific plea taken in the written statement reads as follows:-

"This defendant submits that the plaintiff has inherited land from his father. He has raised commercial crops in that land with the help of this defendant, acquired funds and out of the income from the joint family properties, the plaintiff had purchased the suit properties."

Having taken such a plea in the written statement and having not chosen to take a plea that the family had milch buffalos and herd of goats and funds were raised for the purchase of the properties in question by selling them, the third defendant made an improvement during the trial of the suit by deposing that buffalos and sheep/goats were sold for raising funds for the purchase of the properties in question. Yet another attempt was made by the defendants through the third defendant by contending that all the family members worked together and the earnings thus made formed the corpus of the fund used for the purchase of the properties in question. The earnings made by family members working together to eke their livelihood normally cannot be taken as a joint family fund. It can be taken as the contribution of every member for the maintenance of the family. It is also obvious from the evidence adduced on the side of the defendants that the plaintiff and the third defendant

alone were earning by doing coolie works. There is absence of evidence that the daughters of the plaintiff contributed by doing coolie works. If at all the ancestral property was yielding surplus income, there would have been no necessity for the plaintiff and his wife to go for coolie works. The witnesses examined on the defendants' side have made clear admissions to the effect that the plaintiff was earning by doing coolie works. The same will be enough to hold that the separate earnings of the plaintiff alone were used for the purchase of the properties in question which are shown in the plaint schedule. On the other hand, the defendants miserably failed to show that the family had ancestral properties yielding sufficient income; that the income thus derived from the joint family properties was surplus and that the surplus income could have been used for the purchase of the properties in question. The first substantial question of law has been formulated on the assumption that the suit properties were proved to have been purchased from the income derived from the ancestral property and also from the income earned by the plaintiff and the second and third defendants. It has been pointed out supra that there is no evidence to show that the second defendant was earning and contributing the same to the family. Hence, the first substantial question of law deserves to be answered in the negative, that is against the defendants (appellants) and in favour of the plaintiff (respondent).

13. So far as the second substantial question of law is concerned, the above said discussions will show that there is nothing wrong in casting the burden on the defendants to show that the family had ancestral properties and such properties were capable of yielding income, which would have been surplus. When there is no proof of surplus income derived from the ancestral properties, the burden shall not be shifted on the person claiming to be the owner of the properties on the basis of his purchase to prove his ownership. The very admitted fact that the properties were purchased by the plaintiff in his own name shall be enough to cast the burden on others, who claim them to be the acquisitions made out of the joint family income, to prove the existence of the joint family properties capable of yielding income and that such income was surplus which could have been used for the purchase of the properties in question. Hence, the second substantial question of law formulated at the time of admission is also answered as against the defendants (appellants) and in favour of the plaintiff (respondent).

14. The third substantial question of law seems to have been formulated on misconception of the pleadings. Admittedly, the plaintiff alone is in occupation and possession of the suit properties. There is a clear admission that even the third defendant is living separately and she is not living with the plaintiff. The daughter of the plaintiff, namely, the second defendant is living with her husband, namely, the first defendant at some other place and she is not depending upon the income derived either from the suit

properties or from the ancestral properties. This is clear from the admission made by the defendants' side witnesses. The patta for the suit properties stands in the name of the plaintiff and revenue assessments have been made in his name. Two of the kist receipts have been produced by the plaintiff as Exhibits A-3 & A-4. As against the same, there is no contra evidence adduced on the side of the defendants. Hence, the third question formulated as substantial question of law cannot be held to be a substantial question of law that has arisen for consideration in the second appeal. Even if it could be construed to be a substantial question of law, the answer shall be in favour of the plaintiff (respondent). In view of the answers given to the substantial questions of law 1 to 3, the second appeal fails and the same deserves to be dismissed, as there is no merit in it.

15. In the result, the second appeal is dismissed. However, considering the close relationship of the parties, this Court refrains from passing any order as to costs.

ss

s/d-
Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

To

1. The Principal District Judge
Salem
2. The Principal District Munsif
Salem

+ 1 cc to Mr.S.Kalyanaraman, Advocate SR 40765

+ 1 cc to Mr.P.Jagadeesan, Advocate SR 40885

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