

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 05.01.2015

Coram:

THE HONOURABLE Ms. JUSTICE K.B.K.VASUKI

S.A.Nos.866 and 867 of 2006

1.K.V.Anandha Narayanan
2.A.Krishnan

.. Appellants/Appellants/Defendants
1 ans 2 in both SAs.

vs.

1. A.Natarajan

..1st Respondent/1st Respondent/
Plaintiff

2. Sivagami

3. Ashwini

4. Kirthana

to

.. Respondents 2 to 4/Respondents 2
4/Defendants 4 to 6 in both SAs.

Second Appeals are filed under section 100 of Civil Procedure Code against the judgment and decree dated 30.11.2005 made in AS Nos.61 and 62/2004 on the file of the Ist Additional District Judge, Krishnagiri confirming the judgment and decree dated 24.9.2004 in O.S.Nos.123 of 2000 and 310/1995 on the file of the Principal Sub Court, Krishnagiri.

For Appellants : Mr.V.Raghavachari

For Respondents : Mr.V.Nicholas - R1
No representation - R2 to R4

COMMON JUDGMENT

The unsuccessful defendants 1 and 2 are the appellants herein. Both the suits in O.S.310/1995 and 123/2000 arising out of which are the present two second appeals, were filed by the first respondent/plaintiff by name Natarajan. While OS.310/1995 came to be filed for declaring the possessory right of the plaintiff in respect of suit A schedule property and for granting permanent injunction restraining the defendants from in any manner interfering with such possessory right of the plaintiff in suit A schedule property until division by metes and bounds is effected and permanent injunction restraining the first defendant from creating documents in respect of B schedule property and partition of A and B schedule properties, O.S.123/2000 came to be filed for permanent injunction restraining the defendants 1 to 3 from dispossessing the plaintiff by force or in any manner interfering with his peaceful possession and enjoyment of the suit properties. Out of two suits, OS.123 of 2000 injunction suit was earlier in point of time and the plaint was filed on 18.8.1995 and was numbered as O.S.No.271 of 1995 on the file of the District Munsif Court, Krishnagiri and was thereafter transferred to Sub Court, Krishnagiri by the order of the High Court and renumbered as O.S.123/2000.

2.The suit properties in respect of which the reliefs sought for in both the suits are vacant sites bearing D.No.5 west Link Road, Co-operative colony, Boganapalli Revenue Village, Krishnagiri Town, Krishnagiri Taluk, Dharmapuri District, including two storied terraced building having one Nursing Home under the name and style of Rangachari Nursing Home, which includes operation theatre, devices and equipments, apparatus, bed, etc. and the adjacent house bearing Door No.6 within four boundaries more fully described as A and B schedule properties respectively and movables more fully described as items 1 to 27 in O.S.No.310/1995.

3.The parties in support of their respective claims, adduced oral and documentary evidence. Both the suits were by common judgment dated 24.9.2004 decreed in favour of the plaintiff by accepting the plaintiff's case that the registered partition deed effected between the parties on 23.4.1970 was only in respect of the properties mentioned therein and Rangachari Nursing Home at Door No.5 and adjoining residential house at Door No.6 was purchased and developed from and out of the ancestral nucleus and the income jointly derived from the plaintiff and the defendants 2 and 3 in the nursing home through medical profession and are the properties belonging to joint family consisting of the first defendant/father and the plaintiff and other defendants 2 and 3/sons. Aggrieved against the same, the defendants 1 and 2 filed AS Nos.61 and 62/2004. The lower Appellate court on due analysis of the facts and the evidence, dismissed the appeals, thereby confirming the judgment and decree of the trial court. Hence, these two second appeals by the defendants 1 and 2 before this court.

4.Both the second appeals are admitted on the following substantial questions of law:

SA.866/2006:

(a)Is there a presumption that all purchases made by the Karta are through the joint family income, when it is an admitted fact that the 1st appellant is a successful medical practitioner?

(b)In the absence of proof as regards income from the ancestral property, are the courts below justified in holding the suit properties as joint family properties?

SA.867/2006:

Is the suit for injunction maintainable as against the true owner?

5.At the time of hearing, this Court framed the following additional substantial questions of law, for determination in SA.866/2006:

(i)Whether a second partition action is maintainable in view of the judgment of the Supreme Court in AIR 1976 SC 1?

(ii)Whether Ex.A4 will not bar the present suit for partition, when the plaintiff had not even pleaded and proved that the said partition is inequitable and fails to reflect equal distribution?

7. Both the suits are decreed in favour of the plaintiff in respect of the suit properties by ignoring the earlier 1970 partition and by treating the Nursing Home and adjoining residential house as ancestral properties. Such findings are rendered by casting the burden of proving the self acquired nature of the properties on the first defendant. In order to appreciate the correctness of the findings so rendered by the courts below, few facts, which are relevant for consideration herein are as follows : It is not in dispute that the joint family consisting of the first defendant/father and the plaintiff and the defendants 2 and 3/sons own ancestral properties. The first defendant was the medical practitioner by profession. The vacant site, over which two storied terraced building, having the nursing home, was admittedly purchased in the name of the first defendant during 1962. It is the specific case of the first defendant that the construction of the above mentioned building over the vacant site was completed between 1960 and 1963. The case of the first defendant as stated above regarding the date of purchase and period during which the construction was completed, is nowhere denied by the plaintiff. If that is so, it is for the plaintiff to prove that the income derived from the ancestral properties was such and the surplus was used for purchase of other items.

8. Such legal position as argued on the side of the appellant is fortified in the decision of this Court reported in 1999-2-LW.713 (Amirthalingam v. Uthayathamma and 15 others), wherein, the learned single judge referred to the following decisions: (i) AIR 1954 SC 379 = 67 LW 513 (Srinivas Krishnarao Kanungo v. Narayan Devji Kango) following the decision of the Privy Council in AIR 1947 PC 189 = 60 LW 412 (Appalaswami v. Suryanarayanamurthy); (ii) AIR 1959 SC 906 (Mallappa Girimallappa Betgeri and others v. Yellappagouda); (iii) 1964 (1) SCWR 856 (K.V. Narayanaswami Iyer v. K.V. Ramakrishna Iyer and others); (iv) AIR 1969 SC 1076 (Mudigowda Gowdappa Sankh and others v. Ramachandra Revgowda Sankh); (v) (1996) 2 SCC 491 (Surendra Kumar v. Phoolchand); (vi) AIR 1957 Madras 86 = (1956) 69 LW 795 (Ramakrishna v. Vishnumoorthi) and (vii) 1975-II-MLJ.184 (Kandaswami Chettiar v. Gopal). In all these cases, the legal position reiterated is that mere existence of joint family nucleus alone is not enough and it must be proved that there was surplus income for purchase of other properties and the same must be in the hands of the Managing Member. The proof required is very strict and the burden is on the person who sets up a case that the property in the name of a female member of the family or in the name of the manager or any other co-parcener is to be treated as joint family property. The presumption that such acquisitions are attributable to the joint family nucleus and its income would not automatically arise, but would depend upon proof of the availability of such surplus income or joint family nucleus on the date of such acquisition or purchases.

9. Here is the case, wherein, there is absolutely no such evidence adduced on the side of the plaintiff, as such, the presumption to be drawn is that acquisitions made by the first defendant/father or purchases made by him should be deemed to be from and out of his own income. In order to prove the plea of the plaintiff that the nursing home is the joint family property, the only evidence adduced on his side is Ex.A3 Sale deed dated 22.8.1964, which is admittedly in

respect of one of the ancestral properties. It is true that the first defendant/father under Ex.A3 sale deed sold one of the ancestral properties for Rs.15,000/- for development of business. But as the sale is of the year 1964 and as the purchase of vacant site and putting up of construction in the vacant site was completed much before 1964, the sale will not lead to a presumption that the sale amount was utilised for purchase and construction of the property accommodating the nursing home. In this context, the legal principle laid down by the Division Bench of our High court in the authorities reported in (i)AIR 1953 Madras 723 = 66 LW 298 (Venkataramayya v. Venkataramappa) and (ii)AIR 1957 Madras 86 = (1956) 69 LW 795 (Ramakrishna v. Vishnumoorthi) is necessarily to be considered. In the first case, the Division Bench was pleased to hold that "if a member of a joint Hindu family is inclined to start a trade and for that purpose, he gets assistance by way of a contribution from the joint family funds without any further assistance from the joint family and goes and starts a business of his own individually or in partnership and acquires properties by his own exertions, it will not be justifiable to hold that either the business or his properties would be joint family properties". In the second judgment cited above, similar legal proposition was reiterated. It is observed therein that "it is necessary that the nucleus must be such as to leave sufficient income therefrom after meeting the expenses as would enable the manager to acquire properties with that". In yet another judgment reported in (2010) 1 MLJ 1019 (K.V.Ramasamy and another v. K.V.Rahgavan and others), it is held in para 34 as follows:

"34.From the conjoint reading of the decisions referred to supra, the following aspects can be culled out easily:

(a)The joint family nucleus must have left sufficient surplus income so as to enable acquisition.

(b)Initially, burden lies upon a member, who alleges that a particular property is a joint family property to the extent that the alleged joint family nucleus must have left sufficient surplus income and by utilizing the same, the property in question could have been acquired.

(c)If the initial burden as referred to above is proved, then the burden shifts to the member of the joint family setting up claim that it is his personal property and the same has been acquired without any assistance from the joint family property.

(d)Failure to prove existence of nucleus, the inevitable presumption is that the acquisition in question is nothing but self acquisition.

(e)Mere fact of existence of a joint family does not lead to presumption that a property held by any of its member is joint family property unless the above aspects are proved.

and

(f)If the property acquired is standing in the name of the female member of a joint family, she need not prove as to how she acquired it."

existence of sufficient ancestral nucleus of joint family property, so as to form the source of funds for subsequent acquisitions made by the first defendant, the question of treating the nursing home and residential house which are standing in the name of the first defendant, as joint family properties does not arise herein.

11. In this context alone, Ex.A4 partition deed dated 2.4.1970 effected between the parties is to be necessarily looked to. It is the specific case of the first defendant that the earlier partition was effected in respect of all ancestral joint family properties and after 1970, there was no joint family status and the family was divided by meals, worship and status. Though it is sought to be argued on the side of the plaintiff that the earlier partition was only in respect of few properties and the other properties, which were also available for partition as on 1970, are kept by the parties, the same is not duly established before this court. Further, there is no such clause in Ex.A4 partition deed indicating consensus arrived at between the parties to keep few common properties for further partition. As a matter of fact, Ex.A4 partition deed is effected as demanded by the plaintiff, after he attained majority. The father and three sons are duly allotted properties in Ex.A4 partition deed. It is nobody's case that the partition was obtained by fraud, coercion and undue influence. It is also nobody's case that it was unjust, unfair and unequal inadequate in terms of extent of allotment and also detrimental to the interest of two of the minor sons. Further, the plaintiff became the doctor only during 1988 i.e., much after the second defendant became the doctor and both of them joined the business of their father. By the time of the sons came and joined with the father in the medical profession, the Nursing Home in question was an established one and has been functioning in full fledged manner. It is nothing unusual for the sons, who completed medical course to join the Nursing Home run by the father and the permission given by the father to use the portion of the same belonging to him to the sons for business purpose cannot be construed as to treat the properties standing in the name of the father as joint family properties without any proof to indicate the intention on the part of the father to throw the properties standing in his name in the common pool which is not shown to be in existence after 1970.

12. Even otherwise, there is absolutely no evidence to show that the first defendant has improved his asset through the income derived from the Nursing Home with considerable contribution from the sons. As a matter of fact, the loan was obtained in the name of the second defendant for putting up construction and for purchase of machinery. It is nobody's case that the loan so obtained was discharged from and out of the joint family properties belonging to the first defendant/father and the plaintiff and the defendants 2 and 3/sons. The case of the defendants that the loan was discharged by the second defendant is not seriously denied by the plaintiff. What is sought to be highlighted before this court is that the joint accounts standing in the name of father and two sons was operated by either of the account holders. That by itself will not go to prove the joint family nature of the business so as to treat the properties in question, which were acquired from and out of the income derived from the same, as joint family properties.

13.As a matter of fact, the plaintiff got married in 1995 and he was with the father in the nursing home only for few years and left the father and settled down along with his family elsewhere. No proof is made available herein to show that the joint family status continued even after 1970. If that is so, the defendants' case that the joint family status was divided after 1970 and there was no joint family properties available for partition and no action was maintainable for second partition in respect of the properties belonging to the individual and by virtue of the earlier partition under Ex.A4, the present partition suit is not maintainable, deserves merits and acceptance. In that event, the properties standing in the name of the individual are held to be self acquisitions without the aids of joint family funds and to be treated as self acquired properties, as such, the question of granting any injunction against the true owner does not arise herein. Further had the claim made by the plaintiff been true, the plaintiff becomes the co-owner of the properties and his possession, if any is along with others is in his capacity as co-owner. As such, no claims for declaration of his possessory right in respect of suit 'A' schedule, which is item 1 of 'B' Schedule and for consequential injunction are maintainable. However, both the courts below, by highlighting the minor aspects and on misconception of facts and by overlooking the legal principles laid down in the decisions cited above, accepted the plea of the plaintiff and granted the suit reliefs and the findings so rendered by the courts below hence warrant interference by this court and the substantial questions of law and additional substantial questions of law are accordingly answered in favour of the appellants.

14.In the result, both the second appeals are allowed by setting aside the judgment and decree of the courts below. No costs.

Sd/-

Assistant Registrar(CS IV)

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Sub Assistant Registrar

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To

- 1.The Ist Additional District Judge, Krishnagiri.
- 2.The Principal Sub Court, Krishnagiri.
3. The Section Officer, VR Section, High Court, Madras.

+ 1 cc to Mr.V. Nicholas, Advocate Sr.419

+ 1 cc to Mr.V. Raghavachari, Advocate Sr.317

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