

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.10.2016

PRONOUNCED ON :

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.55 of 2011

& MP.No.1 of 2011

1.Majiha Beevi
2.Mohamed Dawood
3.Minor Mohamed Azharudeen
4.Minor Shamira Banu
5.Minor Haleema Begum
Respondents 3 to 5 are rep. by
their father & natural guardian
2nd appellant herein.

...

Appellants

Vs.

1.Noorul Ayisha
2.Mohamed Suhood

... Respondents

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 05.10.2010 made in A.S.No.1 of 2008 on the file of the District Court, Nagapattinam by reversing the Judgment and Decree dated 12.10.2007 made in O.S.No.242 of 2003 on the file of the Additional Subordinate Judge, Mayiladuthurai.

For Appellants : M/s.V.Raghavachari

For Respondents : No Appearance

JUDGMENT

Challenge in this Appeal is made by the plaintiffs against the judgment and decree dated 05.10.2010 made in A.S.No.1 of 2008 on the file of the District Court, Nagapattinam, reversing the judgment and decree dated 12.10.2007 made in O.S.No.242 of 2003 on the file of the Additional Subordinate Judge, Mayiladuthurai with reference to 'C' schedule properties.

2.Suit for partition.

3.The averments contained in the plaint as regards the 'C' schedule properties are briefly stated as follows:

The suit properties including the 'C' schedule properties belonged to Abdul Haleem. The plaintiffs and the first defendant are the daughters of Abdul Haleem. The third defendant is the wife of Abdul Haleem and the mother of the plaintiffs and the first defendant. The second defendant is the husband of the first defendant. Abdul Haleem died intestate on 01.12.2000 leaving the plaintiffs 1 & 2 and the defendants 1 & 3 as his legal heirs to inherit the suit properties left by him. As regards the "C" Schedule properties, Abdul Haleem had acquired various properties and in respect of the properties

described in the "B" schedule and also the "C" schedule he has taken agreements of sales from various persons and also paid the entire sale consideration and took possession of the same and only the sale deeds were to be executed in his name and taking advantage of the fact that Abdul Haleem had placed full faith on the second defendant and entrusted the administration of the suit properties with the second defendant and as Abdul Haleem was most of his life time engaged in business at Malaysia, the second defendant taking advantage of the above situation had gone to the extreme extent of getting the sale deeds from the agreement holders in his name as if he had purchased those properties. However, the fact remains that the entire sale consideration was already paid by Abdul Haleem during his life time and the second defendant did not pay any amount as he had no independent source of money for paying the same and thus according to the defendants all the suit properties inclusive of the "C" schedule properties absolutely belonged to Abdul Haleem and as such the plaintiffs are each entitled to 7/24 share in the suit properties.

4.As regards the "C" schedule properties, the case of the defendants in short are as follows:

The "C" schedule properties belonged to the second defendant

absolutely and it is he who had paid the entire amount to the vendors and took sale deeds in his name. It is false to state that the sale consideration for the same was contributed by Abdul Haleem and that the second defendant had no wherewithal to purchase those properties. The second defendant went foreign shores and earned money and also sold his lands at Thiruvallapudur and those amounts were pooled together and the properties in the suit village were purchased. Thus, according to the second defendant, the "C" schedule properties being his own properties, the plaintiffs are not entitled to claim partition in respect of the same.

5. In support of the plaintiffs' case, PW1 to 4 were examined and Ex.A1 to 24 were marked. On the side of the defendants DW1 to 4 were examined and Ex.B1 to 8 were marked. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial court was pleased to grant preliminary decree for partition in respect of the shares in the "A" to "C" schedule properties, to which the plaintiffs and the third defendant are entitled to. However, dismissed the suit in respect of the "D" & "E" schedule properties. Aggrieved over the judgment and decree of the trial Court, the defendants have preferred the first appeal.

6. The first Appellate Court on a reappraisal of the evidence

adduced by the parties concerned, confirmed the judgment and decree of the trial Court in respect of the "A" and "B" schedule properties. However, set aside the judgment and decree of the trial Court granting partition in respect of the "C" schedule properties in favour of the plaintiffs and the third defendant and accordingly disposed of the first appeal. Aggrieved over the judgment and decree of the first Appellate Court in respect of the "C" schedule properties, the plaintiffs have preferred this Second Appeal.

7.The Second Appeal is admitted and the following substantial questions of law are formulated for consideration in this Second Appeal.

(i)Whether the lower Appellate court is right in reversing the judgment of the trial court, when it was established that 3rd defendant had no independent source of income to purchase the "C" schedule items in the name of the 2nd defendant?

(ii)Whether the lower Appellate Court is right in relying upon the evidence of DW1, without appreciating that he has no source of income for purchase of the "C" schedule property and had affirmed that his mother-in-law is entitled to share in all the suit properties?

8.The main thrust of the plaintiffs case is that the "C" schedule

properties inclusive of other schedule mentioned properties belonged to Abdul Haleem, the father of the plaintiffs and the first defendant and the husband of the third defendant. The second defendant is the husband of the first defendant. It is admitted that in as much as Abdul Haleem had been doing business at Malaysia, he had entrusted the administration of his properties in India to his son-in-law namely the second defendant. It is also admitted that the second defendant has been managing the properties of Abdul Haleem during his stay at abroad and further the second defendant was also in the management of the suit properties belonging to Abdul Haleem, when he was in sick bed before his death on 01.12.2000.

9. According to the plaintiffs as regards "C" schedule properties and the other properties are concerned, Abdul Haleem had taken agreements of sale from the owners concerned and also paid the entire sale consideration for the same and took possession of those properties and only the sale deeds have not been recorded and therefore, it is stated that the "C" schedule properties thus belonged to Abdul Haleem. The further case of the plaintiffs is that taking advantage of his possession as the manager of the suit properties for and on behalf of Abdul Haleem, it is stated that the second defendant has gone to the extent of getting the sale deeds from the agreement holders in respect of the "C" schedule properties as if he had

purchased the said lands and according to the plaintiffs, the second defendant had no wherewithal whatsoever to tender the sale consideration for the "C" schedule properties. Therefore, it is contended that the plaintiffs are entitled to claim the share to which they are entitled to in respect of "C" schedule properties.

10. Per contra, it is argued by the defendants 1 & 2 that the "C" schedule properties were purchased by the second defendant out of his own funds and that he had the financial capacity to purchase the same and he had earned in foreign shores and also received money by selling his lands at Thiruvallapudur and out of the amounts so carved out, he had purchased the "C" schedule properties and therefore, according to the defendants, "C" schedule properties belonged to the second defendant absolutely and neither the plaintiffs nor the third defendant are entitled to claim any share in the "C" schedule properties.

11. The trial Court was pleased to grant a decree for partition in respect of the "C" schedule properties also. However, the first Appellate Court has not sustained the case of the plaintiffs and the third defendant in respect of the "C" schedule properties on the footing that though the plaintiffs have pleaded before the trial Court that Abdul Haleem had taken the "C" schedule properties under the

sale agreements from the vendors concerned and paid the entire sale consideration, in as much as they had not established the said fact by leading acceptable and reliable evidence, according to the first Appellate Court, in as much as the properties stand in the name of the second defendant, the second defendant is the owner of the said properties and thus the plaintiffs are not entitled to the claim partition in respect of the "C" schedule properties.

12.As seen from the plaint, the plaintiffs have not only contended that Abdul Haleem had taken sale agreements in respect of the "C" schedule properties and the other properties from the vendors concerned and paid the entire sale consideration, took possession of the same and only the sale deeds have to be taken, also pleaded, taking advantage of the administration of the suit properties inclusive of the "C" schedule properties of Abdul Haleem, the second defendant had taken the sale deeds in his name and according to the plaintiffs, the second defendant had no financial capacity whatsoever to purchase the said properties in his name.

13.Per contra, according to the second defendant, he had necessary wherewithal to purchase the "C" schedule properties in his name and thus the "C" schedule properties belonged to him absolutely.

14.No doubt, as found by the lower Appellate Court, the plaintiffs have not produced the sale agreements in respect of the "C" schedule properties which had been taken by Abdul Haleem to evidence that Abdul Haleem had paid the entire sale consideration for the same and consequently took possession of the said properties. However, the plaintiffs had not stopped there and their further case is that the second defendant had no financial capacity to purchase the "C" schedule properties and it is out of the money earned by Abdul Haleem, the "C" schedule properties had been purchased by the second defendant misusing his position as the Manager of the properties of Abdul Haleem and therefore, even if the properties stand in the name of the second defendant still, as according to the plaintiffs sale deeds had been taken by the second defendant for the benefit of Abdul Haleem and his family, the plaintiffs and the third defendant being the legal heirs of Abdul Haleem, are entitled to claim partition of their due shares in respect of the "C" schedule properties also.

15.As regards the case of the second defendant that he had the means to purchase the "C" schedule properties, it has to be held that the second defendant has miserably failed to establish the same. During the cross examination, the second defendant examined as

DW1, has admitted that there is no land in his name at Thiruvallapudur and that his father owned 20 acres of Nanja land at Thiruvallapudur and there was also a plot measuring an extent of 200 kuzhies in the name of his parents and after his marriage in the year 1995, he has permanently settled in his father-in-law's house. Therefore, it could be seen from the evidence of the second defendant, after his marriage he has permanently settled in his father-in-law's house. It could be seen that Abdul Haleem had entrusted the management of his properties to the second defendant. The above fact remains undisputed. Further, according to the second defendant he had earned in foreign shores and that he had been in South Arabia between 1984-1987 and earned 2000 riyal per month equivalent to Rs.25,000/- and further according to him all the income earned by him had been entrusted to his parents and not deposited in the Bank and according to him, he gave Rs.4 lakhs to his parents and after his marriage in the year 1995, he had got back the said amount from his parents and out of the said amount he had not purchased any property at Thiruvallapudur and there was a partition, after the death of his father and in the partition, he had been given Rs.2,50,000/- in lieu of his share. With reference to the above claims of the second defendant other than his *ipse dixit* oral evidence, no material whatsoever is forthcoming in support of his version.

16.Further, according to the second defendant only after seeing the documents, he could state, as to from whom he had purchased the "C" schedule properties and the quantum of consideration paid by him and that he had not earned any money after returning back to India and he had spent about Rs.3 lakhs for the purchase of the "C" schedule properties. Therefore, from the above evidence of the second defendant, it could be seen that he has derived his source of income from the partition which had taken place in his father's family and according to him he had been given Rs.2,50,000/- in lieu of his share. With reference to the above case of the second defendant no iota of evidence is forthcoming. According to the second defendant between 1984-87, he had worked in foreign shores and earned a sum of Rs.25,000/- per month. It is stated that he had entrusted the earned sum to his parents and after his marriage, the said amount had been given back to him by his parents. Even, to substantiate his case, there is no material on the side of the second defendant.

17.Further, according to the second defendant, his father had some lands at Thiruvalapudur and a house site measuring an extent of 200 kuzhies. What is the share or the amount received by the second defendant, out of the same, no material forthcoming. According to the second defendant, after his marriage, he has permanently settled in his father-in-law's house. Further according to

him, after his return from the foreign shores he had no independent income. It could thus be seen that the second defendant had grossly failed to establish that he had the wherewithal whatsoever to purchase the "C" schedule properties in his name. According to the second defendant, he had spent about Rs.3 lakhs for the purchase of "C" schedule properties.

18.The specific case of the plaintiffs is that in as much as the second defendant had been entrusted with the management of the suit properties by Abdul Haleem, the second defendant misused the confidence reposed on him by Abdul Haleem and his legal heirs. According to them, the second defendant had taken the sale deeds in respect of the "C" schedule properties from the vendors in his name by utilising the amount spent for the same by Abdul Haleem and therefore, according to the plaintiffs, the "C" schedule properties did not belong to the second defendant and they only belonged to Abdul Haleem and as such the plaintiffs are entitled to claim their due share in the "C" schedule properties also.

19.From the above facts, it could be seen that when it is found that the second defendant had no financial capacity in any way to purchase the "C" schedule properties in his name and when the "C" schedule properties had been purchased during the management of

properties belonging to Abdul Haleem, when according to the plaintiffs the "C" schedule properties had been purchased by the second defendant by utilizing the funds advanced to the same by Abdul Haleem and when it is found that the second defendant had been in the management of the affairs as regards the properties belonging to Abdul Haleem and particularly, when it is found that Abdul Haleem was in sick bed before his death, taking advantage of his position, the second defendant had gone to the extent of purchasing the "C" schedule properties in his name and obtained the Sale Deeds with reference to those properties from the vendors out of the funds of Abdul Haleem. Therefore, merely because the plaintiffs have failed to produce the sale agreements with reference to the "C" schedule properties to buttress their case and as the second limb of their case had been established namely the second defendant had no wherewithal to purchase the suit properties and that he could have purchased the suit properties only by utilising the funds of Abdul Haleem and when during the relevant period the second defendant is found to be managing the suit properties of Abdul Haleem, as rightly found by the trial Court, it could be seen that though the "C" schedule properties are standing in the name of the second defendant, still the properties only belonged to Abdul Haleem and Abdul Haleem had taken the sale deeds in his name and it has to be considered that the second defendant had taken the sale deeds in his

name only for the benefit of the joint family of Abdul Haleem.

20. In this connection, importing the concept of joint family in Mohammedan law, it is argued by the learned counsel for the plaintiffs that the considering rival case of the parties concerned, depending upon the facts and circumstances, the Court could hold that there is nothing contrary to law in Mohammedan adult members of the family carrying on family trade for the benefit of all the members of the family including the minors and females and the Courts will therefore uphold it, and such legal conclusion as in law follow from it, although, the court will not import into it all the legal consequences, which would follow from such family trade, when it is conducted by a joint Hindu Family or all the legal consequences of a lawful partnership. In such a case, the Mohammedan adult male members carrying on business can be found as a question of fact to stand in a fiduciary relationship to the other female and minor members of the family. Further, in this connection, it is also contended by the plaintiffs' counsel that the acquisition of property independently by a member cannot automatically be said to be for the benefit of the family, however, if there is a conclusive evidence that a member of the Muslim family, who acquire such properties gain advantage to himself and cause prejudice to others and if such acquisition is traceable to surplus family assets and funds from and

out of which property could have been purchased, then the matters would be different and so holding, it could be seen that the concept of joint family has also been imported into Mohammedan law by the Courts and therefore, on that line of arguments, in support of the same, the learned counsel for the appellants placed reliance on the decisions reported in **(i)1931 (34) L.W.220,(Soudagar Muhammal Abdul Rahim Baig Saheb Vs. Soudagar Muhammad Abdul Hakim Baig Sahib and Others), (ii)95 L.W.609, (Mohammed Ismail and another Vs. Khadirsa Rowther & Others)**. To that effect, the above principles of law have been followed in **(i)1993(2)L.W.165 (O.R. Abdul Hamid Vs. O.R. Abdul Rahim & Another and (ii) AIR 1998 Patna 1(Rukaiya Begum & Others Vs. Fazalur Rahman and Others)**.

21.Considering principles of law laid down in the above decisions and applying the same to the facts and circumstance of the case on hand, it could be seen that in as much as the second defendant had failed to establish his financial capacity to purchase the "C" schedule properties in his name and on the other hand when it is found that he had been in the management of the properties belonging to Abdul Haleem, it could be seen that taking advantage of the said position, the second defendant had taken the sale deeds of the "C" schedule properties in his name and falsely depriving the

share due to the plaintiffs and the third defendant in respect of the said properties and therefore importing the concept of joint family to Mohammedan law as laid down in the above decisions, I therefore hold that even though the "C" schedule properties stand in the name of the second defendant still the sale consideration for the same had flown from the funds of Abdul Haleem and as the second defendant had taken the sale deeds in his name for the benefit of joint family of Abdul Haleem and his legal heirs, it could be seen that the "C" schedule properties belonged to Abdul Haleem and on his demise his legal heirs would be entitled to claim their due shares in respect of the "C" schedule properties also.

22. Accordingly I held that the plaintiffs and the third defendant are entitled to their due share as per law in the "C" schedule properties also.

23. In the light of the above discussions, the judgement and decree dated 05.10.2010 made in A.S.No.1 of 2008 on the file of the District Court, Nagapattinam as regards the "C" schedule properties are set aside and the Judgment and Decree dated 12.10.2007 made in O.S.No.242 of 2003 on the file of the Additional Subordinate Judge, Mayiladuthurai are confirmed and accordingly the Second Appeal is allowed. Consequently, connected miscellaneous petition is closed.

No costs.

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Index : Yes/No
Internet:Yes/No

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To

1. The District Court,
Nagapattinam
2. The Additional Subordinate Judge,
Mayiladuthurai

T.RAVINDRAN,J.

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Pre-delivery order in
S. A.No. 55 of 2011

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Pre -delievery judgment
in S.A.No. 246 of 2011

To

The Hon'ble Mr.Justice T.Ravindran

Respectfully submitted by
dn
(P.A.to the Hon'ble Judges)