

IN THE HIGH COURT OF JUDICATURE AT MADRAS

**Reserved on :07.12.2016
Pronounced on :22.12.2016**

CORAM

THE HON'BLE DR. JUSTICE G.JAYACHANDRAN

Second Appeal No.440 of 2002

Palpandian

.. Appellant

/vs/

1.A.Pandian

2.Jeevagan

3.Jothi @ Neelakesi

4.Malliga

5.E.Malliga

6.E.Aruni

7.E.Arthi

8.E.Indhubala

(RR5 to 8 impleaded as party respondent
vide order of Court dated 14.08.2013 made
in C.M.P.No.341 of 2013 in S.A.No.440 of 2002)

.. Respondents

Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 30.04.2001 in A.S.No.55 of 2000 before the Principal District Court, Chengalpattu reversing the judgment and decree dated 29.03.2000 in O.S.No.76 of 1998 on the file of the Sub Court, Ponneri.

For appellant :Mr.V.Raghavachari, Senior Counsel
for Mr.R.Veeramani

For respondents :Mr.V.Vijayashankar, Senior Counsel
for Mr.K.Balajee for R1

No appearance – Mr. Mohan
Sundararajan for R2 to R4

No appearance-Mr.D.Baskar
for R5 to 8

JUDGMENT

The 4th defendant is the appellant herein. Appeal is directed against the judgment of the first appellate Court, which reversed the judgment and decree of the trial Court and allowed the appeal filed by the plaintiff in respect of immovable property shown as item 2 of the suit schedule.

2. For sake of convenience, the parties are described as per their rank and status in the plaint.

3. Appavoo Nainar, who is the first defendant in the suit had three sons viz., (i) Pandian [plaintiff], (ii)Jeevagan [2nd defendant]

and (iii) Elangovan [3rd defendant]. The 4th defendant Palpandian is the purchaser of the 2nd item of the property from the first defendant. In the suit for partition seeking 1/4th share in respect of immovable property shown as item No.2 and in the fixed deposit shown as item No.3 of the suit schedule, the trial Court has partly allowed the suit and held that the fixed deposit is made out of the sale consideration of ancestral property. Whereas the immovable properties are the self-acquired property of the first defendant. Therefore, held in favour of the plaintiff in respect of fixed deposit and disallowed the relief in respect of immovable shown as item No.2.

4. The plaintiff had filed an appeal in A.S.No.55 of 2000 as against the rejection of his claim over the 2nd item of immovable property. The 3rd defendant being aggrieved by the decree of partition in respect of 3rd item fixed deposits, had preferred an appeal in A.S. No.56/2000. Both appeals were heard together by the first appellate Court and were allowed. The first appellate Court reversed the finding of the trial Court and held that, the fixed deposits are the investment made by the 3rd defendant from the sale proceeds of 1st item of property, which got through the partition. So, the plaintiff cannot claim

share in it. Whereas in the 2nd item of immovable property being purchased from out of joint family nucleus, the plaintiff is entitled for 1/4 share in 2nd item immovable property.

5. Aggrieved by the judgement of the first appellate Court allowing the appeal filed by the plaintiff in respect of the 2nd item immovable property, the 4th defendant Palpandian has preferred this appeal.

6. Considering the grounds of appeal, the following Substantial Questions of Law are formulated for consideration:-

"1) Whether in law the lower appellate Court is right in not framing a point regarding the suit being barred under Order 2 Rule 2 C.P.C. or failing to at least consider this substantial legal bar to the second suit?

2) Whether in law the lower appellate Court is not wrong in omitting to see that the suit is barred by res judicata?

3) Whether in law the lower appellate Court is right in failing to see that there is no presumption as to the property standing in the name of the karta being joint family property?

4) Whether in law the lower appellate Court is right in failing to see that the onus of proving sufficient joint family nucleus and the availability funds from the nucleus for purchasing other properties was on plaintiff and that he had failed to discharge it?"

7. Facts admitted and facts proved through evidence:

Appavoo Nainar got some agricultural lands at Peranamallur village, as his share from his family ancestral property in the partition between his brothers held on 30.12.1952. He sold those properties on 17.12.1956 and 23.05.1957. He was employed as a teacher in the Chennai Corporation Middle School for 28 years. The first item property was purchased by Appavoo Nainar on 16.03.1963. The second item property was purchased by Appavoo Nainar on 22.5.1970. In the first item, Appavoo Nainar was running a Montesoori School between 1958 to 1989. The plaintiff Pandian one of the sons of Appavoo nainar, claiming the first item property as the joint family property purchased and improved through joint family fund, filed a suit for partition O.S.No.7245/1989 in respect of first item property and succeeded. After disposal of this suit, Appavoo Nainar and his 3 sons have jointly sold away the 1st item property for Rs. 6,44,000/-, dated 31.12.1992 and

shared the sale proceeds. Meanwhile, on 8.11.1989, Appavoo Nainar sold the second item of property to the 4th defendant to meet out his medical expenses and to repay his debts.

8. Thereafter, the plaintiff Pandian on 30.10.1993 has issued a notice to the defendants claiming share in the 2nd and 3rd items of property and filed the second suit for partition. The averments made in the plaint was that, the 2nd item of property was purchased by Appavoo Nainar from and out of the joint family income derived from the School. The 3rd item fixed deposits are the income of the joint family deposited in the name of Jeevagan, who is one of the sons of Appavoo nainar. The reason for non-inclusion of these properties in the earlier suit for partition was that, the earlier suit for partial partition was filed in hurry under pressure and tension, the 2nd and 3rd items of suit properties were not included in the earlier suit, due to inadvertance and faulty memory is unacceptable.

9. The learned counsel appearing for the appellant as well as the learned counsel appearing for the respondents submitted their respective arguments citing the judgments in their favour. The

main contention of the learned counsel appearing for the appellant/4th defendant is that the second item of property is not a joint family property purchased from the joint family nucleus, since Appavoo Nainar had his own source of income by running a Mondesori School as well as earning as a teacher.

10. In the judgment of this Court in ***M.Rangammal and others v. B.Balavenkatesan*** reported in ***(2002) 3 M.L.J. 187***, wherein the relevant portion of the judgment reads as follows:

"To render the property joint, the plaintiff must prove that the family was possessed of some property, with the income of which the property could have been acquired, or from which the presumption could be drawn that all the property possessed by the family is joint family property, or that it was purchased with joint family funds, such as the proceeds of sale of ancestral property, or by joint labour. None of these alternatives is a matter of legal presumption. It can only be brought to the cognisance of a court in the same way as any other fact, namely, by evidence. There is at times indiscriminate use of the expression 'presumption' in this context. It is to be

understood to indicate those presumptions of fact, which may be said to arise in considering whether the burden of proof has or has not been discharged by a party. It is not as if there is any general solvent for all cases."

11. In the judgment of this Court in ***Thillainayagi Ammal v. Sandanathammal and others reported in (2002) 3 M.L.J. 683***, wherein at para 17, it is held as follows:

"17. In Appalaswami v. Suryanarayana Murthi, (1947) 2 M.L.J. 138: AIR 1947 P.C. 189: I.L.R 1948 Mad. 440, it has been held as follows:

"Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property is joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the

aid of the joint family property."

12. The plaintiff is the eldest son of Appavoo Nainar. At the time of purchase of the 2nd item of property, the plaintiff would have been hardly 20 years of age. His claim that the property was purchased from joint family nucleus and joint family exertion, has no proof to substantiate. While the trial Court has rightly applied the law and facts, held that Appavoo nainar had enough income of his own to purchase the 2nd item of property and voluntarily non inclusion of 2nd item of property in the earlier suit filed by the plaintiff is unacceptable and but, the first appellate Court has reversed the trial Court's finding, without proper ryme or reason. In the absence of evidence to show that, the joint family nucleus had enough income to purchase the 2nd item property in the year 1970 and in the absence of evidence to show that, the property was purchased from joint exertion of the family members as against the proven fact that Appavoo nainar had independant income, by shifting the burden of proof on the defendants much contrary to law, the first appellate Court has reversed the finding of the trial Court in respect of the 2nd item of property.

13. In the judgment of Bombay High Court in ***Dnyanu***

Dadu Ptil v. Shripati Dadu Patil deceased by LRs and Ors.,

reported in ***AIR 2008 Bombay 170***, wherein at para 8, it is observed as follows:

"8.As observed by the Supreme Court and considering the scheme of Order II, Rule 2 of C.P.C., it is necessary that parties must claim all reliefs as available at the time of filing of the suit and/or claim. Any intentional omission bars the second suit and/or claim. There is no dispute that a suit for partition of joint family properties must include the whole of the property jointly held by the parties. Therefore, fresh suit for non-included property/omitted items is not permissible. However, it is subject to exception when the omission in the previous suit was due to inadvertence or through ignorance of the omitted items and/or no knowledge about the joint property at the time of filing the first suit.

9.The submission that once it is omitted whether with knowledge or inadvertence that itself debars the second suit is unacceptable specially in view of the scheme and purpose of Order II, Rule 2 itself and as observed by the Apex Court in the above referred judgments."

14. The first appellate Court has erred, in not considering the bar under Order II, Rule 2 of the Code of Civil Procedure. The first appellate Court has wrongly understood the law that the partition suits are exempted from Order II, Rule 2 of the Code of Civil Procedure. The first appellate Court, while extracted considerable portion of the D.W.1 deposition in respect of item 2 property, has failed to take note the fact that, why the plaintiff did not include this property in the earlier suit, atleast at the point of time when first defendant was examined, if not at the inception. It is not the plea of the plaintiff that he was not aware of the existence of family properties, when he instituted the earlier suit for partition. His only reason for non inclusion of the 2nd item of property in the earlier suit is urgency and inadvertance. The earlier suit was filed in the year 1989. Only after disposal of the earlier suit and appropriating his share in it, the plaintiff has filed the subsequent suit in the year 1993. So far as the partition suits are concerned, the legal presumption is that the entire joint family assets are included in earlier suits. If the plaintiff claims that certain joint family properties were left out, then the burden lies on the plaintiff to satisfactorily establish the same. In this case, the plaintiff has miserably failed to establish this. Unfortunately, the lower appellate Court has failed to consider this cardinal principle of

law in respect of partition suit.

15. The first appellate Court has rejected the plea of first defendant Appavoo nainar that he purchased the 2nd item property from and out of his income as teacher in the Corporation School. According to the appellate Court judgement, in Ex.B6-judgment of the earlier suit in O.S.No.7245 of 1989, Appavoo nainar has not produced documents that he actually deposited money in the Officer's Co-operative Society of Corporation of Madras so as to say that out of such deposit of Rs.2000/- he purchased 2nd item of the suit property under Ex.B2. While the factum of Appovoo nainar employment as teacher is admitted and the 2nd item of property was not the subject matter of the earlier suit, production of documents to show his deposits is totally unwarranted.

16. This Court finds that there is reason to interfere with the findings of the first appellate Court. Hence, ***the Second Appeal is allowed.*** The Judgment and decree of the first appellate Court in A.S.No.55 of 2000 in respect of the 2nd item of suit property in the suit schedule is set aside. No order as to costs.

22.12.2016

Index:Yes/No
Internet:Yes/No

To

1. The Principal District Court, Chengalpattu.
2. The Sub Court, Ponneri.

Dr.G.Jayachandran, J.

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Judgment made in
S.A.No.440 of 2002

22.12.2016

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