

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.1837 of 2001

and

C.M.P.No.19164 of 2001

A.Pandian

.. Appellant

/vs/

Appavoo Nainar(died)

1.Jeevagan

2.Palpandian

3.Jothi @ Neelakshi

(R3 remined exparte in both
Courts below)

4.Malliga

5.E.Malliga

6.E.Aruni

7.E.Arthi

8.E.Indhubala

(RR5 to 8 impleaded as party respondents
vide Order of Court dated 14.08.2013 made
in C.M.P.No.340/2013 in S.A.No.1837 of 2001) .. Respondents

Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree of the Principal District Judge, Chengalpet, dated 30.04.2001 in A.S.No.56 of 2000 reversing the judgment and decree of the learned Subordinate Judge, Ponneri, dated 29.03.2000 in O.S.No.76 of 1998 in so far as schedule 'C' deposit.

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

For respondents :Mr.N.Ishtiaq Ahmed for R1
Ms.R.Meenal for R2
Mr.D.Baskar for R5 to R8
No appearance for R4

JUDGMENT

The plaintiff 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 in respect of the plaintiff's claim in respect of fixed deposits shown as item 3 in the suit schedule property.

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 2 and in the fixed deposits shown as item 3 of the suit schedule, the trial Court 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, it held in favour of the plaintiff in respect of fixed deposits and disallowed the relief in respect of immovable.

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 he got through the partition. So, the plaintiff cannot claim share in it. Whereas the 2nd item immovable property being purchased from out of joint family nucleus, the plaintiff is entitled for 1/4 share in the 2nd item of immovable property.

5. Aggrieved by the judgement of the first appellate Court allowing the appeal filed by his brother, the 3rd defendant declining the plaintiff's claim over the fixed deposits shown as 3rd item of the suit property, has filed this Second appeal.

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

"1)Whether the 1st appellate Court is right in holding that the suit C schedule deposits are the self acquired property of the 3rd defendant while the appellate Court found that the deposits have been made from and out of the share of the 1st defendant in the suit from the sale proceedings of the suit A schedule property?

2)Whether the 1st appellate Court is right in

holding that the appellant herein is not entitled to 1/4th share in the suit schedule property?

3)Whether the finding of the lower appellate Court is right in law without taking note of the evidence of D.W.2?

4)Whether the lower appellate Court is right in holding that the plaintiff is not entitled to any amount in C schedule while the evidence of 1st defendant says that the same has been made by the Kartha of the Joint Hindu Family?"

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 of property was purchased by Appavoo Nainar on 16.03.1963. The second item of property was purchased by Appavoo Nainar on 22.5.1970. In the first item, Appavoo Nainar was running a Montesoori School between

1958 and 1989. The appellant herein, claiming the first item property as the joint family property purchased and improved through joint family fund, filed a suit in O.S.No.7245/1989 before the City Civil Court, Chennai for partition in respect of first item of property and succeeded. After disposal of this suit, Appavoo Nainar and his three sons have jointly sold away the 1st item of property for Rs.6,44,000/- on 31.12.1992 and shared the sale proceeds. In between pending of earlier suit, 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 appellant herein on 30.10.1993 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 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 of fixed deposits are the income of the joint family, which was 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 and 2nd and 3rd items of suit

properties were not included in the earlier suit, due to inadvertance and faulty memory.

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

10. In the judgment of the Hon'ble Supreme Court in ***Marabasappa (dead) by LRs.and others v. Ningappa (dead) by Lrs. And others*** reported in ***(2011) 9 Supreme Court Cases 451***, wherein at para 25, it is held as:

"25.This Court has time and again held that there is no presumption of joint family property and there must be some strong evidence in favour of the same. In Appasaheb Peerappa Chamdgade v. Devendra Peerappa Chamdgade, after examining the decisions of this Court, it was held : (SCC p.532, para 17)

"17. Therefore, on survey of the aforesaid decisions what emerges is that there is no presumption of a joint Hindu family but on the evidence, if it is established that the property was joint hindu family property and the other

properties were acquired out of that nucleus, if the initial burden is discharged by the person who claims joint Hindu family, then 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 by cogent and necessary evidence."

11. In the judgment of Andhra Pradesh High Court in ***Katragadda Venkatasubbayya v. Kartagadda Virayya***, reported in ***AIR 1857 AP 981***, wherein at para 13 it is held as:

"13. Looking at the matter from the point of view of principle, we cannot see why a suit or partition of joint family properties should be any the less subject to the rules, of res judicata or of the provisions of Order 2, Rule 2, Code of Civil Procedure, than any other kind of suit. As was put in Basawana Gowd v. Doddalingappa; 44 Mad LJ 652: MANU/TN/0026/1923: AIR 1923 Mad 584) (E), it cannot be disputed that "the suit for 'partition; joint family property is a comprehensive ascertainment of the assets, including; immovable property "belonging to the family and the liability to be satisfied out of those assets" and "that 'the' cause of action

must be regarded as" exhaustive of the whole property available for division so, far as. Its existence is known at the date of the " plaint."

12. 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 indiscriminated 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."

13. In the judgment of this Court in ***Thillainayaki 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. Suryanarayanamurti*, (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 not acquired without the aid of the joint family property."

14. The earlier partition suit in O.S.No.7245 of 1989 has been disposed of on 30.10.1991(Exs.A14 & 15). The parties have jointly

sold the 1st item of property for a sale consideration of Rs 6,44,000/- on 31.12.1992. All the four fixed deposits, which are shown as 3rd item in the suit schedule are made by the 3rd defendant during that period. On a cumulative reading of the sale deed and fixed deposits receipts, this Court finds that the dates and deposit amounts tallies with the event of sale and share of the 3rd defendant in the sale consideration. The fixed deposits are the exclusive property of the 3rd defendant and the plaintiff cannot lay his hand on that money. The claim of the plaintiff in respect of the fixed deposits is not only baseless, but also mischievous. It appears that these fixed deposits were not even available at the time of earlier suit for partition. That being the fact, knowing fully well that the 3rd defendant has invested his share received from the sale proceeds of 1st item of property, the plaintiff has filed the subsequent suit for partition, which is per se hit by Order 2 Rule 2 CPC and also being factually false. The plaintiff has not even discharged his initial burden that the joint family nucleus was available, when the fixed deposits were made. Whereas DW2-Jeevagan has explained the source of the fixed deposit. Therefore, the first appellate Court has rightly considered the evidence and reversed the trial Court finding, which is erroneous on facts.

15. The Substantial Questions of law are answered in favour of the 2nd respondent and there is no scope to interfere with the findings of the lower appellate Court. Hence, ***this Second Appeal is dismissed.*** The judgment and decree of the first appellate Court in A.S.No.56 of 2000 in respect of fixed deposits mentioned as 3rd item of schedule mentioned property is confirmed. No costs. Consequently, connected Miscellaneous Petition is closed.

22.12.2016

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Index:yes/no

Internet:yes/no

To

1.The Principal District Judge, Chengalpet

2.The Subordinate Judge, Ponneri.

Dr.G.Jayachandran, J.

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**Judgment made in
S.A.No.1837 of 2001**

22.12.2016

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