

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.04.2017

Delivered on : 01.06.2017

CORAM:

THE HON'BLE MR. JUSTICE M.SATHYANARAYANAN

S.A.No.286 of 2017

1.A.Jayanthi

2.A.Sujatha

3.A.Ramesh Babu

4.T.Divakaran

5.A.Bhuvaneswari

Appellants/Appellants/
Plaintiffs 2 to 6

Vs.

1.T.S.Arumugham

2.Mrs.Jeeva

3.Karthikeyan

4.Ananda Sivasankar

5.Ananda Srinivasan

6.M/s.Indian Financial Association of
Seventh Day Adventist,
Rep. by its Director M.Manassesh,
S/o.Masilamani.

7.A.Anbarasan.

Respondents/Respondents/
Defendants 2 to 6, 8 and 9.

Prayer: Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 15.09.2016 made in A.S.No.30 of 2014 on the file of the I Additional District Judge, Thiruvallur, confirming the judgment and decree dated 28.03.2014 made in O.S.No.360 of 1995 on the file of the Subordinate Judge, Thiruvallur.

For Appellant : Mr.A.Sirajudeen, Senior Counsel,
assisted by
Mr.R.Rajamani

JUDGMENT

The appellants, who are the legal heirs of the deceased plaintiff, lost before the Courts below and assailing the concurrent findings recorded by it, have filed this Second Appeal.

2. Facts briefly narrated and necessary for the disposal of this Second Appeal are as follows:

2.1. One T.S.Annamalai, Son of late T.V.Srinivasa Pillai, filed the Suit in O.S.No.360 of 1995 on the file of the Court of Subordinate Judge at Tiruvallur, against his mother-first defendant, second defendant- younger brother, third defendant-wife of the second defendant and the defendants 4 to 7, their children, eight and ninth defendants- subsequent alienees, praying for partition and separate possession of the plaintiff's $\frac{1}{2}$ share in the Suit schedule properties and for mesne profits @ Rs.2000/- per year from 1992 to till the date of filing of the Suit and normal future profit @ Rs.2,000/- per year and for appointment of Advocate Commissioner and also for allotment of share to the plaintiff.

2.2. The plaintiff, pending disposal of the Suit, died on 09.08.2009 and his legal representatives/plaintiffs 2 to 6 were added and they prosecuted the Suit. The averments in the plaint read among other things that the father of the plaintiff and the second defendant and the husband of the first defendant, namely T.V.Srinivasa Pillai died in the year 1945, leaving behind them as legal heirs. The plaintiff and the second defendant eked out their livelihood by preparing and selling eatables at Thozhur Village. The plaintiff was appointed as Village Karnam in the year 1953 and out of income earned, started supporting the family and also earned income as Document Writer. In the year 1958, the plaintiff was appointed as a School Teacher and he retired from service in January 1993 and thus, he had sufficient income and out of the savings, began to purchase land and properties, while the family remained jointly. The first defendant ceased to prepare and sell eatables after the plaintiff became Karnam in the year 1961 and except the 1st Item, which were jointly purchased in the name of the plaintiff and the first defendant, rest of the items were acquired in the name of the first defendant out of the income generated by the

plaintiff and thus, all the suit properties are joint family properties.

2.3. The plaintiff would further aver that he got married in the year 1958 and his wife died without any issues and therefore, he married for the second time and the second defendant married the third defendant in the year 1964 and begot the defendants 4 to 7 and the third defendant also closely related to him. The plaintiff, during March 1998, started living separately on account of adamant attitude exhibited by the second defendant and during the month of December, 1998, the first defendant persuaded the plaintiff to come and join the family and accordingly, he began to live separately on the western portion of the tiled house while the second defendant began to live in the eastern portion and however, the second defendant continued to exhibit hostile attitude. It is also stated by the plaintiff that the second defendant was suspended during the year 1980 and therefore, the entire family was maintained out of the agricultural income and he was also litigating with regard to abolition of the post of Village Karnam and for admission of his son/sixth defendant, capitation fees and incidental expenses are borne out of the joint income and though the plaintiff made demands to the defendants 1 and 2 and the legal heir of the defendants for partition and separate possession, it was not acceded to and therefore, a Lawyer's Notice was issued and Panchayat was convened and as per the decision taken, the plaintiff was persuaded to have 4.70 acres out of the total extent of 14.77 acres and also the old house and Item Nos.3 and 5 - vacant sites and despite the said arrangement, the first defendant failed to part with the title, which is pertaining the suit property.

2.4. The plaintiff would further aver that the first defendant, acting under coercion and undue influence, executed two settlement deeds in favour of the defendants 4 to 7, the children of the defendants 2 and 3 with regard to item Nos.7, 8, 9, 1-38 and 5 and 6. The plaintiff also filed O.S.No.380 of 1993 on the file of the District Munsif Court, Tiruvallur, against the second defendant praying for a permanent injunction restraining the second defendant from committing trespass and putting up construction and however, no interim order was granted and the said Suit is pending. It is the case of the plaintiff that acquisition of suit properties, except Item No.1, were joint family properties and as such, the first defendant has no right to execute the settlement deeds and she has no capacity to do so and therefore, those documents be declared as void and invalid and that apart, the first defendant also created sale deed dated 23.04.2001 in respect of Item No.15 and

the defendants 2 to 7 created another sale deed dated 31.01.2007 in favour of the ninth defendant in respect of the suit Item No.13 and those documents are sham and nominal in order to defeat the lawful claim of the plaintiff and therefore, came forward to file the present suit.

2.5. The second defendant had filed the written statement, which was adopted by other defendants, wherein apart from reputing the averments made in the plaint, the defendants would contend that Suit Item No.1 alone is the joint family property of the plaintiff and the defendant and though the plaintiff left the family and thereafter, started living separately in the western side and soon after his second marriage, the first item was divided between the plaintiff and the defendant 30 years ago and separate door numbers have been given for each portion and the plaintiff is residing in the western half along with his family members from the date of division and the defendant is residing in the eastern half of the Suit Item No.1 along with his family members. Insofar as Suit Item Nos.2 to 5 are concerned, the first defendant would contend that those items are self acquired properties purchased out of her income and neither the plaintiff or anybody had contributed to the same and out of affection and free volition, she executed the settlement deed in favour of the defendants 4 to 7 and she also executed the Will dated 18.10.1993 in favour of the defendants 2 to 5 with regard to other portion of the suit property and therefore, prayed for dismissal of the Suit.

2.6. The ninth defendant had filed the written statement stating that he is only interested in Suit Item No.13 and the first defendant had executed the Will dated 07.02.2011 in favour of the grandsons, namely the defendants 4 to 6, which include the above said item and they sold Suit Item No.13 for a valuable consideration and put them in possession of the same and after obtaining necessary permission, divided as house plots and sold 30 plots and therefore, prayed for dismissal of the Suit.

2.7. The second defendant had also filed additional written statement stating that the Suit in O.S.No.380 of 1993, on the file of the District Munsif Court, Thiruvallur, was filed by the plaintiff stating that already division took place in respect of land and properties admeasuring 4.70 acres in S.Nos.356/7, 356/1C, 53/2, 63/1, 52/1 and 52/3 and that he was in separate possession and enjoyment of the same and also prayed for permanent injunction and in the light of the admission that there was already division of the property, the present Suit is not maintainable. It is also contended that the settlement

deeds executed by the first defendant as well as the Will executed by her in favour of the legal heirs of the second defendant are true and valid.

2.8. The Trial Court, on going through the pleadings, framed the following issues:

(i) Whether the Suit Item Nos. 2 to 15 were purchased out of the income of the first defendant ?

(ii) Whether the partition took place in the presence of panchayatdhars?

(iii) Whether the plaintiff is entitled to 1/3rd share?

(iv) Whether the plaintiff is entitled to mesne profits @ Rs.2,000/-?

(v) To what other relief the plaintiff is entitled to?

Subsequently, the issues were re-casted as follows:

Whether the Suit Item Nos. 2 to 15 were purchased by the plaintiff and the defendants 1 and 2 jointly and they are in possession and enjoyment of the same?

The following additional issue was also framed:

Whether the Survey number given for the Suit Item No.2 in the plaint is correct?

2.9. During the course of trial, the plaintiff examined himself as PW1 and one Thiru.Hemanthiri and Thiru.Murali Chettiyar as PWs.2 and 3 respectively and marked Exs.A1 to A16. The second defendant examined himself as DW1 and also examined five other witnesses and marked Exs.B1 to B105. An Advocate Commissioner was appointed pending disposal of the Suit and his report and sketches were marked as Exs.C1 to C4.

2.10. The Trial Court, on consideration of the pleadings and on appreciation of oral and documentary evidence, found that the legal heirs of the deceased plaintiff, namely the plaintiffs 2 to 6 are not entitled to get any relief and dismissed the Suit,

vide judgment and decree dated 28.03.2014 and the plaintiffs 2 to 6, aggrieved by the dismissal of the Suit, filed A.S.No.30 of 2014 on the file of the Principal District Court at Tiruvallur and it was transferred to the Court of I Additional District Judge Tiruvallur.

2.11. The Lower Appellate Court, on going through the grounds of appeal, formulated the following points for determination:

- (i) Whether the plaintiffs and the respondents 1 to 5 are entitled to half share in the Suit Schedule Properties and the mesne profits out of the same as claimed as them?
- (ii) Whether the trial Court findings is erroneous or perverse and it is liable to be set aside, if so, to what extent?

2.12. The Lower Appellate Court, by applying the settled legal position that burden lies on a member who allege that a particular property is a joint family property and joint family nucleus must have left surplus income, so as to enable such property acquisition and on failure to prove joint family nucleus, inevitable presumption is that acquisition in question is self acquisition and if initial burden is discharged, then burden shifts to member of joint family setting up claim that it is his personal property, found that the plaintiffs have miserably failed to prove that the properties are joint family properties and joint family is having nucleus to acquire other properties. The Lower Appellate Court further found that the first defendant -female member of the family had acquired Suit Item Nos.2 to 15 and taking into consideration the ratio laid down in K.S.Palanisami v. K.S.Pongulappan [2014-1-L.W.] found that there is no clear cut evidence to disprove the self acquiring capacity of the first defendant-female member and that the plaintiffs had also failed to probablise their case that the deceased plaintiff has made contribution for acquisition of the Suit Item Nos. 2 to 15 and also found that in respect of the above Suit items, revenue records also stands in the name of the first defendant. The Lower Appellate Court also repelled the contention put forward on behalf of the appellant that since under Exs.A4, A5 and A10 - certified copies of mortgage deeds in favour of the Government of India which are executed by the first defendant in favour of the Government, signed by the plaintiff and the second respondent, also to be construed as

joint family properties and taking into consideration the various decisions, found that merely signing of the plaintiff and the second defendant in those documents shall not give any room to consider that those properties are joint family properties.

2.13. Insofar as the oral partition pleaded by the plaintiffs is concerned, when it was recorded under Koorchit, the plaintiff did not take any step to get back the same from the custody of the second defendant and did not let in any evidence to sustain the said fact. Insofar as the Settlement Deeds and Will executed by the first defendant in favour of the legal heirs of the second respondent, the Lower Appellate Court found that scribe and attestors were examined to prove the execution of those documents and those documents are genuine and valid and citing the said reasons, dismissed the appeal, vide judgment and decree dated 15.09.2016, confirming the judgment and decree passed by the Trial Court in dismissing the Suit.

3. Mr.A.Sirajudeen, learned Senior Counsel assisted by Mr.R.Rajamani, learned counsel appearing for the appellants/plaintiffs would contend that no specific issue has been framed by the Trial Court as to the joint family nature of the suit properties and even the Lower Appellate Court did not find any point for determination. It is the further submission of the learned Senior Counsel appearing for the appellants that the first defendant did not have sufficient funds to acquire the Suit Item Nos.2 to 15 and the Courts below had failed to take into consideration the occupation of the deceased/plaintiff and the income generated to purchase the suit property in the name of the first defendant and the Courts below ought to have given a finding that the suit items are joint family properties and as such, the plaintiffs are entitled to partition and separate possession. It is the further submission of the learned Senior Counsel appearing for the appellants/plaintiffs that admittedly, the first defendant was selling only eatables and therefore, it is impossible for him to generate income to purchase the Suit Item Nos.2 to 15 and the said vital aspect has been completely overlooked by the Courts below. Insofar as the Settlement Deeds and Will executed by the first defendant in favour of the legal heirs of the second defendant, it is the submission of the learned Senior Counsel appearing for the appellants/plaintiffs that those documents have not been proved in accordance with law and further alienation made in favour of the ninth defendant is also not valid in law and the Courts below, without appreciating the oral and documentary evidence in proper perspective, had erroneously reached the conclusion to reject the case of the plaintiffs and prays for interference.

4. This Court paid it's best attention and anxious consideration to the submission made by the learned Senior Counsel appearing for the appellants and also perused the impugned judgment and decree passed by the Courts below.

5. In the Memorandum of the Grounds of Second Appeal, the following Substantial Questions of Laws are raised by the appellants:

a. Whether the Lower Courts have committed grave error in appreciating the evidences available on record?

b. What is the nature of evidence is required to establish the nature of the title of a property when it is pleaded that it belongs to the joint family?

c. To hold a property as joint family property, is it required that a member should have resided together till the properties are separated?

6. Insofar as the Substantial Question of Law No.1 is concerned, mis-appreciation of evidence cannot be termed as Substantial Question of Law. The First Appellate Court is the final Court on facts and law. This Court has also carefully scrutinized the findings rendered by the Courts below to satisfy itself as to the tenability of the grounds urged by the learned Senior Counsel appearing for the appellants.

7. It is a well settled position of law that existence of a joint family property would not automatically lead to the presumption that the property was acquired by the members of the family from and out of the income generated and the burden rests upon the person who asserts that the properties are joint family properties and sufficient materials are available to acquire the properties.

8. It is not in dispute that the Suit Item Nos.2 to 5 stand in the name of the first defendant and so also the revenue records. The Trial Court had taken into consideration the decision rendered in Pattusami Padayachi v. Mullaiaammal and Others [1976 (II) MLJ 225] and found that in case of the property standing in the name of female member of the family and if it is pleaded that those acquisitions is of benami in nature,

the burden is upon the person to prove the same. The Trial Court has taken into consideration the oral testimony of PW2 and found that the said evidence is of no help as to the contribution made by the deceased plaintiff for purchasing Suit Item Nos.2 to 15. Insofar as the contention put forward by the appellants with regard to signing of Exs.A4, A5 and A10 by the plaintiff and sons of the second defendant, the Trial Court observed that usually it is a normal practice for the banks and financial organizations to obtain signatures from all the close relatives and it cannot be the deciding factor to conclude that the properties are joint family properties and also placed reliance upon the decision in T.S.Subburaju v. T.A.Shivarama Setty and Others [AIR 2004 Karnataka 479]. The Trial Court, insofar as the oral partition in the presence of the Panchayatdars on 03.12.1994 is concerned, found that no Koorchit was produced and though the plaintiffs took a stand that it was in the interest of the second defendant, they did not take any effort to get back the same. The Trial Court further found that it is for the plaintiffs to prove about the existence of the joint family property earning and contribution towards the welfare of the family and acquisition of the properties and they miserably failed to do so and as such, the plaintiffs have failed to prove the convening of the Panchayat on 03.12.1994 and oral partition. The Trial Court has also considered the execution of Will dated 07.02.2011 and found that DW2, who is the scribe of the Will, had testified about the sound and disposing state of mind of the testator and another testator is also no more and there is nothing to discredit the testimony of DW2.

9. The appellants also made a challenge to the three settlement deeds, marked as Ex.B26 to B28, wherein properties purchased by the first defendant under Sale Deeds, marked as Exs.B13 to B24, had been settled and the son of the attester was examined to prove the said fact and insofar as Ex.B26 is concerned, DW6 was examined and the scribe of the said settlement deed was examined as DW4 and his testimony also support the genuineness and validity of the said document and it was marked without any objection. The Trial Court ultimately found that all the sale deeds stand in the name of the first defendant-female member and the plaintiffs have failed to prove about the contribution made by the deceased/plaintiff and the plaintiffs also failed to prove the elements of coercion and undue influence in the execution of the Will and Settlement deeds by the first defendant and citing the said reasons, had dismissed the said Suit.

10. The Lower Appellate Court, on an independent application of mind to the oral and documentary evidence, found that the deceased/plaintiff did not contribute anything for the purchase of suit properties and by placing reliance upon the judgments in K.V.Ramasamy v. K.V.Raghavan [2009 (4) CTC 440], Yanati Venkatarahavamma v. Byrisetty Singarayya Setty and Others [ILR 41 Mad. 985], D.S.Lakshmaiah and another v. L.Balasubramanyam and Another [2004-3-L.W. 49] and R.Deivanai Ammal (Died) and another v. G.Meenakshi Ammal and Others [2004 (4) CTC 208], found that the plaintiffs have miserably failed to discharge the burden to prove that the suit properties are joint family properties and the availability of nucleus/source of income to purchase the properties and it is also well settled that properties standing in the names of the female members are their own unless there is clinching proof to the contrary adduced by the challenging member and it is not for the female member to prove how she acquired the same and found that the Suit Item Nos.2 to 15 were purchased by the first defendant under various sale deeds and that the revenue records also stand in their name. The Lower Appellate Court further found that though Exs.A4, A5 and A10 were signed by the deceased/plaintiff and others, it did not lead to the presumption that those properties are joint family properties and no document has been produced by the deceased/plaintiff to prove the discharge of the same and also placed reliance upon the decision in T.S.Subburaju v. T.A.Shivarama Setty and Others [AIR 2004 Karnataka 479].

11. The Lower Appellate Court further found that oral partition pleaded by the plaintiff on 03.12.1994 has not been proved and insofar as the execution of the Will by the first defendant, all their sons and DW2/scribe and attestors have been examined to prove those documents and in the absence of any contra evidence, it cannot be pleaded that the first defendant did not execute those documents under coercion and undue influence. The Lower Appellate Court ultimately found that the first defendant is the absolute owner of Suit Item Nos.2 to 15 as they were purchased out of self earnings and the appellants/plaintiffs are not entitled to claim any right over the suit properties and citing the said reasons, had dismissed the appeal and confirmed the judgment and decree passed by the Trial Court.

12. The three substantial questions of law raised in the Memorandum of the Grounds of Second Appeal have already been answered by the Trial Court on a thorough consideration and appreciation of oral and documentary evidence and in support of the conclusion, decisions rendered by the Hon'ble Supreme Court of India, this Court as well as Karnataka High Court have also

been relied upon. In the considered opinion of the Court, there is no perversity attached to the findings rendered by the Courts below and there are no Substantial Questions of Law arise for consideration in this Second Appeal.

13. In the result, this Second Appeal is dismissed, confirming the judgment and decree dated 15.09.2016 made in A.S.No.30 of 2014 on the file of the Court of I Additional District Judge, Thiruvallur, in confirming the judgment and decree dated 28.03.2014 made in O.S.No.360 of 1995 on the file of the Court of Subordinate Judge, Thiruvallur. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

jvm

To

1. I Additional District Judge,
Tiruvallur.
2. The Subordinate Judge,
Tiruvallur.
3. The Record Keeper, VR Section,
High Court, Madras.

+1cc to Mr.R.Rajamani, Advocate, S.R.No.39351

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RSK(CO)
CS/15/06/17