

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders reserved on 06.04.2017

Orders delivered on 27.04.2017

CORAM:

**THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MR.JUSTICE M.S.RAMESH**

**A.S.No.593 of 2016
and
C.M.P.No.15815 of 2016**

1.Sadasivam

2.Sathiyamurthy Appellants

Vs.

1.Sankar

2.Santha

3.Mangalakshmi Respondents

Prayer:- Appeal Suit has been filed under Section 96 of C.P.C., against the judgment and decree dated 07.03.2016 in O.S.No.28 of 2013 passed by the learned Principal District Judge, Cudalore District.

For Appellants : Mr.R.Gururaj

For Respondents : Mrs.Hema Sampath, Senior Counsel
for Mrs.R.Meenal

* * * * *

JUDGMENT

(Judgment of the Court was delivered by R.Subbiah, J.)

This appeal has been filed as against the judgment and decree dated 07.03.2016 in O.S.No.28 of 2013 passed by the learned Principal District Judge, Cuddalore, dismissing the suit filed by the appellants/plaintiffs for partition of the suit properties and for separate possession and also for delivery of possession.

2.The appellants herein are the plaintiffs and the respondents herein are the defendants before the Trial Court. For easy reference, hereinafter the parties will be referred to as per their rankings in the suit.

3.The brief facts of the case of the plaintiffs are as follows:-

3-1.The plaintiffs and the 1st defendant are the brothers and the 2nd defendant is their sister. The 3rd defendant is their mother. The 3rd defendant was married to one Vadivel, who died in the year 1987. The plaintiffs, the defendants and the said Vadivel constituted a joint Hindu Family. The suit B schedule property measuring to an extent of 9 cents is an ancestral property obtained by the father of the plaintiffs viz., Vadivelu in a partition between himself and his brothers. In the B schedule property, there is a superstructure with three portions and EB Connection. The

plaintiffs are residing in the front portion while the 3rd defendant is residing in the rear portion. The electricity charges are paid by the plaintiffs.

3-2. It is further case of the plaintiffs that the plaintiffs' father Vadivelu was earning income from various sources by doing business and he was a broker in sale of land & house. He was also raising flowers and the vegetables in the B schedule property and was making income out of it. He was an industrious person and by his hard work, he was making excess income. The plaintiffs and the 1st defendant were also doing business along with their father. By the collective efforts, joint family earned more than what was required to sustain the family and the family could save much. On 29.05.1978 the father of the plaintiffs Vadivelu purchased 'C' schedule property out of his savings in the name of the 3rd defendant. So far as the D schedule property is concerned, it was purchased on 21.03.1981 with the funds contributed by the father and sons; however, the sale deed was not registered. So far as the suit E schedule property is concerned, the same was purchased on 30.12.1992 by the plaintiffs and the 1st defendant, after the demise of their father in the year 1987. But, all the purchases were made in the name of the 3rd defendant, mother of the plaintiffs and the defendants 1 & 2, since the 3rd defendant was considered lucky and also in order to screen away the properties from the pangalis. The properties were purchased either with the funds of the father or with the funds of both the father and the sons. The 3rd defendant, mother, did not have any funds to purchase the properties and she did not contribute even a single pie to

purchase the suit schedule properties. The 3rd defendant belonged to a family of 10 members; she was one of the eight children of her parents, who belonged to a lower middle class family. The parents of the 3rd defendant were not in a position to provide funds to the 3rd defendant. The 3rd defendant is an illiterate and she is a house wife, looking after the family; she was also not provided with any jewels at the time of her marriage or even later; thus, she did not have funds to purchase the suit schedule properties. On the other hand, it was the fund provided by the male members of the family, the coparceners, which were utilised for purchase of the suit C to E schedule properties and the 3rd defendant did not assert title at any time. Therefore, all the suit schedule properties are divisible, wherein the plaintiffs and the defendants 1 & 2 shall have $\frac{1}{5}$ share each. In the $\frac{1}{5}$ share of the father, the plaintiffs and all defendants have $\frac{1}{5}$ share each. In effect, the plaintiffs and the defendants 1 & 2 have $\frac{6}{25}$ shares each, while the 3rd defendant has $\frac{1}{5}$ share. Together, the plaintiffs are entitled to $\frac{12}{25}$ shares in the suit schedule properties.

3-3. It is further case of the plaintiffs that the suit C schedule property is a site, wherein the plaintiffs raised separate sheds for housing cows and they are using the same for the past 20 years. Very recently, the 3rd defendant had put up a hut in the C schedule property and using the same. In the remaining portion, the plaintiffs raised brinjal and casurina saplings for sale. While so, a dispute arose between the plaintiffs and the defendants with regard to the marriage proposal of the 1st defendant's

daughter with the 2nd defendant's son. The defendants 1 & 2 attempted to influence the 3rd defendant and get the suit properties themselves or for their issues. The 3rd defendant being illiterate, by influencing her, the defendants 1 & 2 obtained her signature in documents by fraud and misrepresentation secretly with an intention to dispose of the suit properties. Since all the documents stand in the name of the 3rd defendant, such an attempt is being made by the defendants 1 & 2. Hence, the plaintiffs gave an objection to the Sub-Registrar on 20.11.2012 for registration of any document in respect of the suit schedule properties. But, the Sub-Registrar sent a reply instructing the plaintiffs to obtain orders from the Civil Court.

3-4. It is further stated by the plaintiffs that so far as the suit D schedule property is concerned, Sale Deed has not been registered; nevertheless, possession has been transferred to the plaintiffs and the plaintiffs improved the properties by levelling the land and they are using the same by spending huge amount. When the plaintiffs wanted to put up construction, the defendants prevented it. The 1st defendant is residing in a separate place in a well constructed house. The plaintiffs are in joint possession of the suit properties. Hence, the plaintiffs have filed the suit for partition and separate possession.

4. Before the Trial Court, the case of the plaintiffs was resisted by the 3rd defendant by filing a written statement, which was adopted by the defendants 1 & 2. In the written statement, the 3rd defendant denied the

case projected by the plaintiffs. It is stated by the 3rd defendant that her husband Vadivelu died on 22.08.1988. The suit B Schedule Property was obtained by her husband in a partition between himself and his brothers. In the suit B schedule property, a tiled house is situated and it was divided into three portions and the plaintiffs are occupying the front portion and the 3rd defendant was residing in the back portion of the tiled house. During June, 2012, the 3rd defendant was forcibly sent out of the titled house by the plaintiffs. The 3rd defendant has also denied the case of the plaintiffs that her husband Vadivelu was earning income from various sources. Further, she had stated in the written statement that her husband was suffering from leprosy and he never took any landed property from third parties on lease to make an income out of it by planting flowers as stated by the plaintiffs. Further, the 3rd defendant had stated that the suit C & D schedule properties were purchased by her from the funds provided by her parents. So far as the suit E schedule property is concerned, the same was settled by her mother in her favour on 30.12.1992 through a registered Settlement Deed. Neither the plaintiffs nor their father Vadivelu contributed single pie for purchasing the C & D schedule properties. The 3rd defendant's parents provided the funds to their four children, including the 3rd defendant. The 3rd defendant spent not less than Rs.70,000/- for the reclamation of the suit C schedule property. But, the 3rd defendant was forcibly sent out from the tiled house situated in the B scheduled property by the plaintiffs. Thereafter, the 3rd defendant put up a thatched shed in the suit C schedule property and

residing there; she is having milch cattle and eking her livelihood. So far as the suit D schedule property is concerned, the 3rd defendant had purchased the same by paying the entire sale consideration and she is in the possession of the suit D schedule property. Except the suit B schedule property, the other properties cannot be considered as Joint family properties by any imagination. Except the suit B schedule property, all other suit schedule properties are separate properties of the 3rd defendant. The plaintiffs have no right, interest and title over the suit schedule properties, except B schedule property. Thus, the 3rd defendant sought for dismissal of the suit.

5. On the above pleadings, the Trial Court framed the following issues_

- i) Whether the suit properties are joint family properties of the plaintiffs and the defendants?
- ii) Whether the suit B to E schedule properties were purchased in the name of the 3rd defendant out of the income of joint family properties?
- iii) Whether the plaintiffs are entitled to get a decree for partition and separate possession as prayed for?
- iv) To what other reliefs the plaintiffs are entitled?

6. Before the Trial Court, the 2nd plaintiff examined himself as P.W.1 besides examining three other witnesses as P.W.2 to 4 and marked four documents as Ex.A.1 to Ex.A.4. On the side of the respondents, the 3rd defendant examined herself as D.W.1, besides examining one Ramalingam as D.W.2 and marked four documents as Ex.B.1 to Ex.B.4.

7.Considering the evidence both oral and documentary adduced on either side, the Trial Court dismissed the suit, on the findings that the plaintiffs have failed to prove that the suit schedule properties are joint family properties and they are in joint possession of the suit schedule properties with the defendants. Aggrieved over the same, the present appeal has been filed by the appellants/plaintiffs.

8.The learned counsel for the appellants/plaintiffs submitted that it is the specific case of the appellants/plaintiffs that the plaintiffs, the 1st defendant and their father constituted a joint hindu family and they constituted a coparcenary. The 2nd defendant, being a female and having been married more than 35 years prior to the filing of the suit, she is not a coparcener. So far as the B schedule property is concerned, even in the written statement, it was admitted by the 3rd defendant that the said property was obtained by the father of the plaintiffs Vadivelu in a partition between himself and his brothers. Since it was admittedly ancestral property, the plaintiffs are entitled for a share in the B schedule property, but the Trial Court has dismissed the suit even with regard to the B schedule property in spite of the admission made by the 3rd defendant that it is an ancestral property.

9.It is further submitted by the learned counsel for the

appellants/plaintiffs that so far as the suit C schedule property is concerned, the said properties have been purchased by means of a registered Sale Deed dated 29.05.1978 (original sale deed was marked as Ex.B.1 on the side of the defendants and xerox copy of the same was marked as Ex.A.1 on the side of the plaintiffs). Similarly, as regards the suit D schedule property, the same was purchased by means of an unregistered Sale Deed dated 21.03.1981 (copies of the same were marked as Ex.A.2 on the side of the plaintiffs and as Ex.B.2 on the side of the defendants). The suit C & D schedule properties were purchased from the funds of the joint family in the name of the 3rd defendant, since she was considered as lucky and also in order to screen away the properties from the pangalis.

10.It is further submitted by the learned counsel for the appellants/plaintiffs that in the suit B schedule property, flower plants and casurina saplings were raised by the father of the plaintiffs and he was making income out of it. That apart, the father of the plaintiffs was also doing real-estate business; hence, out of the income earned by him, the properties were purchased in the name of the 3rd defendant, only for the benefit of the joint family. When it is the specific case of the 3rd defendant that the suit C & D schedule properties were purchased from the funds provided by her parents and not through the income earned by the father and sons, the burden of proving the same lies upon her to prove the said statement; but, the 3rd defendant has not produced any evidence to prove

her means. In fact, the 3rd defendant belonged to a family of eight children, her father being a coolli worker, he could not have provided the funds. In her evidence as D.W.1, the 3rd defendant has stated in the cross-examination that she was provided with 8 sovereigns of jewels at the time of marriage, which she sold and spent on the children. If so, the 3rd defendant had no other source to purchase the suit C schedule property. Further, the 3rd defendant has also admitted in her cross-examination as D.W.1 that the plaintiffs are in possession of the suit C schedule property, in which they are tethering cows and storing hayricks. If really the property was the separate property of the 3rd defendant, she would not have allowed the plaintiffs to be in possession.

11. Further, the learned counsel for the plaintiffs submitted that even though there was a pleading in the written statement to the effect that the parents of the 3rd defendant gave funds to purchase the property, no tangible evidence was produced by the 3rd defendant to prove the same. The 3rd defendant does not even know the vendor's name or the value, for which the properties were purchased, which would show that the 3rd defendant did not provide funds, and also does not enjoy the properties; on the other hand, the father of the plaintiffs alone provided the funds. The suit C & D schedule properties could not have been purchased by the 3rd defendant. In this regard, the learned counsel for the appellants/plaintiffs has also relied upon the judgment reported in **AIR 1975 SC 1534**

[Dr.N.G.Dastane Vs. Mrs.S.Dastane] in support of his contention that every case should be decided on the probabilities.

12.The learned counsel appearing for the appellants/plaintiffs submitted that so far as the suit E schedule property is concerned, it was purchased under Ex.B.4 dated 30.12.1992. It is submitted by the learned counsel for the appellants that it is the case of the 3rd defendant that the suit E schedule property was settled by her parents in her favour by the settlement deed dated 30.12.1992. Actually the suit E schedule property was purchased from the funds provided by the father and the plaintiffs, but the document was taken in the form of a Settlement Deed to avoid higher stamp duty. But, the Trial Court has rejected the claim of the plaintiffs regarding the suit C to E schedule properties and dismissed the suit. The learned counsel for the appellants/plaintiffs submitted that all the properties (C to E schedule properties) were always treated, enjoyed and dealt with as joint family properties. In this regard, the learned counsel for the appellants/plaintiffs has also relied upon the decision reported in **AIR 1965 SC 289 (Narayanaswami Vs. Ramakrishna)**, in support of his contention that the property purchased in the name of any member of a joint family could be treated as joint family property. The relevant portion in the said decision reads as follows_

"The legal position is well settled that if in fact at the date of acquisition of a particular property the joint family had

sufficient nucleus for acquiring it, the property in the name of any member of the joint family should be presumed to be acquired from out of family funds and so to form part of the joint family property, unless the contrary is shown."

The learned counsel appearing for the appellants/plaintiffs has also relied upon another judgment in ***AIR 1959 SC 51 (M.M.B.Catholicos Vs. T.Paulo.Avira)***, for the proposition that the question of burden of proof at the end of the case, when other parties have adduced their evidence, is not of very great importance and the Court has to come to a decision on a consideration of all materials.

13.The learned counsel for the appellants/plaintiffs submitted that in the instant case, if the entire material is considered it would give a clear inference that the 3rd defendant has failed to establish the defence that the properties were purchased from the funds provided by her parents. On the other hand, by producing the documentary evidence, the plaintiffs have establish their case that the properties were purchased in the name of the 3rd defendant only for the benefit of the joint family and as such, the appellants/plaintiffs are entitled to a share in the suit schedule properties.

14.Per contra, the learned senior counsel appearing for the defendants submitted that the case of the plaintiffs that the suit C to D schedule properties were purchased out of the income earned by the father and the

sons, in the name of the mother-D3, for the benefit of the joint family, is totally incorrect. The plaintiffs have miserably failed to prove that the suit schedule properties were purchased out of the income earned by the father and the sons, by adducing proper evidence. Though it is the specific case of the plaintiffs that they had jointly contributed to the father for the purchase of the properties, the 2nd plaintiff in his evidence as P.W.1, in his cross-examination, has admitted that he was born in the year 1975; whereas the the suit C to E schedule properties were admittedly purchased only in the year 1978, 1981 and 1992; therefore, at that time, the 2nd plaintiff/P.W.1 was only 3, 6, 17 years respectively. Therefore, it is very difficult to accept the statement of the plaintiffs that they had contributed to the purchase of the properties and this fact would speak volumes about the defects in the case of the plaintiffs.

15. Further, it has been suggested to P.W.1 and has been averred in the written statement and spoken about by the mother as D.W.1 that the father Vadivelu suffered from leprosy and he was not doing any income yielding job. Except the *ipsi dixit* of P.W.1 that the properties were purchased out of the income earned by the father and sons, absolutely no tangible evidence was produced on the side of the plaintiffs to prove the same. The burden is on the plaintiffs to prove their case about the sufficient income of the father. Since the plaintiffs miserably failed to prove their case, the Trial Court has rightly, by rejecting the case of the plaintiffs, held

that the properties belonged to the 3rd defendant and not belong to the joint family. The evidence of P.W.2 to 4 also do not help the case of the plaintiffs to sustain their case. In fact, P.W.2 in his cross-examination admitted that he was not in talking terms with the 3rd defendant/mother; therefore, he has motive to give false evidence against the 3rd defendant. P.W.2 further admitted that he did not know about the settlement of the C schedule property in favour of the 3rd defendant. The evidence of P.W.3 & P.W.4 will also not be helpful to come to a conclusion that the suit properties were purchased by the father and sons in the name of the mother-D3 for the benefit of the joint family. In this regard, the learned senior counsel appearing for the respondents/defendants has also relied upon the decision reported in ***AIR 1954 SC 379 [Srinivas Krishnarao Kango Vs. Narayan Devji Kango and ors]*** and submitted that the plaintiffs have not discharged their initial burden of proving the fact that the suit properties were purchased only for the benefit of the joint family with the aid of the joint family funds; only on discharging such initial burden by the plaintiffs, the burden would shift on the defendants to prove that the suit properties are separate properties of the 3rd defendant. In the instant case, since the plaintiffs have miserably failed to establish that the suit properties were purchased from the funds of the joint family, the Trial Court has rightly, by rejecting the case of the plaintiffs, dismissed the suit.

16.Further, the learned senior counsel appearing for the

respondents/defendants submitted that P.W.1 has also admitted in his evidence that the suit properties are standing in the name of the 3rd respondent/D3 and the property taxes are paid by her. In fact, the plaintiffs have not made any attempt to prove the bald allegations made in the plaint. Therefore, according to the learned senior counsel for the respondents, no interference is necessary to the judgment of the Trial Court.

17.We have given our anxious consideration to the submissions made on either side and perused the materials available on record.

18.In view of the above submissions made on either side, the only question that has to be decided in this appeal is *whether the suit C to E schedule properties could be considered as joint family properties to seek for partition by the plaintiffs?*

19.It is the case of the plaintiffs that the suit C & D schedule properties were purchased out of the income earned by their father. Their father was earning income by doing real-estate business and also by raising flowers and casurina saplings in the suit B schedule property. It is further case of the plaintiffs that the plaintiffs and the 1st defendant were also doing business along with their father Vadivelu and out of the income earned by their father along with them, the suit properties were purchased in the name of their mother-3rd defendant, for the benefit of the joint family. It is further

submitted by the learned counsel for the appellants/plaintiffs that though it is the case of the defendants that the 3rd defendant had purchased the properties from the funds provided by her parents, she has not produced any tangible evidence before the Court to prove the same. Therefore, on the basis of the *ipsi dixit* of the defendants, the Trial Court ought not to have dismissed the suit.

20. But, We are of the opinion that the initial burden only lies on the shoulders of the plaintiffs to establish that their father had multiple avocations and that apart from maintaining the family consisting of his wife and four children, he had surplus income and out of the said surplus income, the suit C to E schedule properties were purchased in the name of the mother-3rd defendant for the benefit of the joint family. Though it is submitted that the appellants/plaintiffs were doing business along with their father and earning income, We find that the suit C schedule property was purchased in the year 1978 through Ex.A.1 dated 29.05.1978 and the suit D schedule property was purchased under Ex.A.2, dated 21.03.1981 and the suit E schedule property was settled in favour of the 3rd defendant under Ex.B.4 dated 30.12.1992. According to P.W.1, he was born in the year 1975. Therefore, as contended by the learned senior counsel for the respondents, he was only three years in the year 1978 and 6 years in the year 1981 and 17 years in the year 1992. Therefore, the case projected by the plaintiffs that they are helping their father in his business and earning income, is

totally unbelievable and the same cannot be accepted.

21. Further, except the oral evidence of P.W.1, No other tangible evidence was produced on the side of the plaintiffs to show that the properties were purchased out of the income earned by the plaintiffs and the 1st defendant along with their father and they are treating the properties as joint family properties. Though the plaintiffs have examined some independent witnesses as P.W.2 to P.W.4, their evidence are also not helpful in any way to sustain the case of the plaintiffs. In fact, P.W.2 stated in his evidence that he was not in talking terms with the 3rd defendant. Therefore, the submission made by the learned counsel for the respondents that P.W.2 has motive to give evidence against the 3rd defendant, is acceptable one. Further, P.W.3 & P.W.4 in their evidence deposed that the plaintiffs' father was doing flower business and earning income and purchased the properties. But, these evidences are not sufficient to come to the conclusion that the properties were purchased only from the income of the father Vadivelu, when admittedly all the documents are standing in the name of the 3rd defendant-mother. Therefore, We are of the opinion that the plaintiffs have miserably failed to discharge their initial burden to establish that the properties were purchased from the income of the father and sons.

22. It is well settled legal principal that initially burden lies upon the 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 utilising the same, the property in question could have been acquired. 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/her personal property and the same has been acquired without any assistance from the joint family property. On the failure to prove the existence of nucleus, the inevitable presumption is that the acquisition in question is nothing but self acquisition. Mere fact of existence of a joint family does not lead to the presumption that a property held by any of its members is joint family property unless the above aspects are proved. If the property acquired is standing in the name the of the female member of a joint family, she need not prove as to how she acquired it.

23. In this regard, a reference could be placed in the judgment reported in ***AIR 1954 SC 379 [Srinivas Krishnarao Kango Vs. Narayan Devji Kango and others]***, wherein it has been held as follows_

"The lower Courts came to the conclusion that having regard to the smallness of the income from the ancestral lands and the magnitude of the acquisitions made, the former could not be held to be the Foundation for the latter, and on the authority of the decision of the Privy Council in *Appalasawai Vs. Suryanarayanamurti*, AIR 1947 PC 189, at page 192, held that the initial burden which lay on the plaintiff of establishing that the properties of which a division was claimed were joint family properties had not been discharged.

In the instant case, since the plaintiffs have miserably failed to discharge their initial burden of establishing that the properties were purchased from the joint family nucleus, the plaintiffs are not entitled for the relief as sought for by them in the suit.

24.However, We find that so far as the suit B schedule property is concerned, it is admitted by the defendants that it is an ancestral property having been acquired by the father Vedivelu in a partition between himself and his brothers. Hence, the plaintiffs are entitled to a share in the said property, as prayed for in the plaint. Hence, the appeal has to be allowed in respect of the suit B schedule property alone and the findings of the trial Court in respect of the suit B schedule property that it is also a separate property of the 3rd defendant, is liable to be set aside. So far as the other suit schedule properties are concerned, the appeal is liable to be dismissed by confirming the judgment and decree of the Trial Court.

25.In fine, the appeal is partly allowed. The finding of the trial Court in respect of the suit B schedule property alone is set aside and the suit is decreed in respect of suit B schedule property. As regards the other suit schedule properties, the appeal is dismissed confirming the judgement and decree of the trial Court. Consequently, connected Miscellaneous Petition is closed. No costs

(R.P.S.J.,) (M.S.R.J.,)
27.04.2017

Internet : Yes / No

Index : Yes / No
ssv

**R.SUBBIAH, J.
AND
M.S.RAMESH, J.**

(ssv)

To,
1.The Principal District Judge,
Cuddalore District.

*Pre-delivery judgment
in*

**A.S.No.593 of 2016
and
C.M.P.No.15815 of 2016**

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<http://www.judis.nic.in>