

Judgment Reserved on: 21.03.2017

Judgment Pronounced on : 27.03.2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Coram:

The Hon'ble Mr. Justice N. SATHISHKUMAR

Appeal Suit No. 917 of 2010

and

M.P.No.1 of 2010

Puspanathan

... Appellant / Plaintiff

Versus

1. Kasirajan

2. Alamelu

3. Senthamaraikannan

4. Sadasivam

... Respondents/Defendants

Appeal Suit filed under Section 96 of Civil Procedure Code, against the Judgment and decree passed in O.S.No.88 of 2007 by the learned Additional District Judge (Fast Track Court-II), Cuddalore dated 25.06.2010.

For Appellants

... Mr.D.Ravichander

For Respondents

... Mr.P.Mani.

JUDGMENT

Aggrieved over the dismissal of the suit filed for partition, the present appeal came to be filed by the plaintiff. The parties are arrayed as per their own ranking before the trial Court.

2. Brief facts of the plaintiff's case is as follows:- The suit properties originally belonged to joint family of Narayanasamy Padayachi and his son Kasirajan the first defendant and Janakiraman. Narayanasamy Padayachi died 30 years ago, leaving behind him one Kasirajan and Janakiraman and also two daughters and Alamelu the second defendant herein and one Athilakshmi. The said Athilakshmi also pre-deceased leaving behind her husband third defendant herein and son fourth defendant. Defendants 2 to 4 had relinquished their share in

favour of the first defendant. The first defendant and Janakiraman are entitled to 1/2 share in the suit properties. Janakiraman died more than 12 years ago leaving behind him the plaintiff as his only son and his widow-Sarasu and two daughters Sundaram Ammal and Valli. The plaintiff being the family manager of Janakiraman's branch filed the suit. The plaintiff demanding partition from the defendant for the past 3 years. The defendant have not come forward for partition. Whereas the defendant issued legal notice dated 25.5.2007 stating that the family debts borrowed by Janakiraman is yet to be cleared and after clearing the family debts he will be ready for partition of the properties. Hence, the suit.

3. Admitting the relationship pleaded in the plaint, it is the contention of the first defendant that the first defendant and his brother Kasirajan after the death of their father Janakiraman, divided the family properties more than 40 years back and enjoyed the properties allotted to them separately. The properties in Survey No.s. 191/1, 773/4, 773/2B and 797/4 and 773/2A and other properties were allotted in the share of this defendant under oral partition. The first defendant also purchased the properties in Survey Nos. 193/9, 193/11, 195/7 and 195/5, 195/7, 195/8, 199/9, 773/4 and 690/5 out of his own income and he is enjoying the said properties. Hence, he prayed for dismissal of the suit.

4. On the basis of the above pleadings, the learned trial Judge has framed the following issues:-

1. Whether the oral partition between the parties was true?
2. Whether item 1, 3 to 6 and 10 of the suit properties are absolute properties of the first defendant?
3. Whether the plaintiff is entitled to $\frac{1}{2}$ share in the suit properties?
4. To what relief?

5. On the side of the plaintiff, Plaintiff examined himself as P.W.1 and marked Ex.A1. Ex.A1 is the lawyer's notice dated 25.5.2007, issued by the first defendant to the plaintiff. On the side of the defendants two witnesses were examined as D.W.1 and D.W.2 and Exhibits B1 to B16 were marked. Ex.B1 is the Xerox copy of the notice dated 21.2.2007 issued by the plaintiff to the Special Officer, Ramanathapuram, Andipalayam Primary Agricultural Co-operative Society; Ex.B2 is the certified copy of sale deed dated 21.4.1943 executed by Ponnappa Padayachi in favour of Narayanasamy Padayachi; Ex.B3 is the certified copy of sale deed dated 18.11.1957 executed by Vellaya Padayachi in favour of Narayanasamy Padayachi; Ex.B4 is the certified copy of sale deed dated 8.6.1960 executed by Thampusamy Naidu in favour of Narayanasamy Padayachi; Ex.B5 is the certified copy of sale

deed dated 1.11.1962 executed by Rajambal and Panchali Ammal in favour of Narayanasamy Padayachi; Ex.B6 is the certified copy of sale deed dated 7.10.1963 executed by Devanatha Naidu in favour of Kasinatha Padayachi; Ex.B7 is the certified copy of sale deed dated 20.09.1964 executed by Anjalaiaammal in favour of Kasinatha Padayachi; Ex.B8 is the certified copy of sale deed dated 20.09.1967 executed by Kaliya Padayachi in favour of Kasinatha Padayachi; Ex.B9 is the certified copy of release deed dated 24.7.1968 executed by Ramakrishna Padayachi in favour of Kasinatha Padayachi; Ex.B10 is the true copy of sale deed dated 13.5.1971 executed by Subburayalu Naidu in favour of Kasinatha Padayachi; Ex.B11 is the true copy of sale deed dated 4.7.1974 executed by Jayaramu Naidu in favour of Kasiraja Padayachi; Ex.B12 is the true copy of sale deed dated 4.7.1974 executed by Kaliyaperumal Padayachi in favour of Kasirajan Padayachi; Ex.B13 is the true copy of sale deed dated 15.9.1993 executed by Perumal Padayachi in favour of Kasirajan; Ex.B14 is the true copy of mortgage deed dated 8.12.1999 executed by Janakiraman and his wife Sarasu Ammal in favour of Kasi Padayachi; Ex.B15 is the original sale deed dated 27.11.2003 executed by Parantham in favour of the plaintiff; Ex.B16 is the Xerox copy of the sale deed dated 5.7.1977 executed by Ramakrishna Padayachi in favour of Kasirajan Padayachi.

6. Based on the oral and documentary evidence and materials the learned trial Judge has dismissed the suit. Aggrieved over the same, the present appeal came to be filed.

7. Learned counsel for the appellant submitted that admittedly the suit properties originally owned by one Narayanasamy Padayachi-grandfather of the plaintiff and he had two sons by name Janakiraman and Kasirajan-first defendant herein. The properties were enjoyed by them. Ex.A1-the legal notice issued by the first defendant itself clearly show that the alleged oral partition pleaded by them is not true. Merely because the parties enjoyed the joint family properties for the sake of convenience the oral partition cannot be assumed. The first defendant also not appeared before the Court. The evidence of D.W.1 in fact falsifying the alleged oral partition between the parties. Hence submitted that though certain properties were purchased in the name of the first defendant, those properties were purchased out of the income from the joint family properties. Therefore, the entire family properties are liable for partition. In support of his above submissions the learned counsel for the appellant relied upon the following judgments reported in:

1. AIR 1967 SC 1124-Girijanandini Devi and others v. Bijendra Narain Choudhary.

2. AIR 1946 Madras 118-Appavu alias Lakshmanan Pilla and

- another v. Manickam Pillai and others.
3. 1993 (3) SCC 573-Vidhyadhar v. Manikrao and another.
 4. 1999 (51) DRJ 704 - Surinder Kumar Jhamb v. Om Prakash Shokeen.
 5. (2005) 2 SCC 217-Janki Vashded Bhojwani and another v. Indusind Bank Ltd. And others.
 6. 2005 (3) CTC 344 -Kandavel and others v. Chidambara Padayachi.

8. Disputing the contention of the learned counsel for the appellant, it is the contention of the learned counsel for the Respondents that though the properties originally owned by Narayanasamy Padayachi, after his death, the properties were divided equally between his two sons and they have been enjoyed the properties as per the oral partition. The evidence of P.W.1 also proves the division in status and Ex.B14 is the usufructuary mortgage executed by the plaintiff's father and mother in favour of one Kasi Padayachi, in which also one of the boundaries was shown as property of the first defendant. This fact also clearly proved the factum of oral partition. Further it is the contention of the learned counsel for the Respondents that several properties were purchased by the first defendant out of his own income. Absolutely, there is no pleading or evidence in the plaint to show that these properties were purchased by the first defendant out of joint family nucleus. Hence, submitted that the learned trial judge on considering the evidence had come to the right conclusion and dismissed the suit. Hence, prayed for dismissal of the appeal. In support of his above submissions the learned counsel for the Respondents relied upon the judgments reported in:

1. 1995-2-L.W. 74 - K.Sengodan v. K.Dharmalingam and 5 others.
2. 99 L.W. 759 - P.Kamakshi Ammal v. P.Venkatesan.
3. 2004 -3- L.W.49 - D.S.Lakshmaiah and another v. L.Balasubramanyam and another.
4. 2006 AIR SCW 5562 - Appasaheb Peerappa Chandgade v. Devendra Peerappa Chandgade and others.

9. In the light of the above submissions now, the points that arise for consideration are:

1. Whether the plaintiff is entitled to partition as prayed for?
2. Whether the suit properties were already divided in a oral partition between the parties?
3. To what relief?

10. Points 1 to 3:- It is not in dispute that the plaintiff is the son of one Janakiraman and his father and the first defendant Kasirajan are brothers and both of them were sons of one Narayanasamy Padayachi. It is the contention of the plaintiff that the suit properties originally belonged to the joint family of Narayanasamy Padayachi and he died 30 years ago. Therefore, being the son of Janakiraman, the family manager of Janakiraman's branch, the plaintiff sought for preliminary decree for partition of the suit properties into two equal shares and allot one such share to him.

11. It is the case of the first defendant that the joint family properties of Narayanasamy Padayachi were divided in a oral partition 40 years back, between him and his brother Janakiraman and they were enjoyed the properties separately and thereafter first defendant had also purchased several properties out of his own income and earnings. Hence prayed for dismissal of the suit.

12. It is to be noted that the plaintiff's mother and two other daughters have not been impleaded in the suit. The suit has been filed by the plaintiff as a manager of the Janakiraman's branch. Admittedly, in para 3 of the plaint the plaintiff himself pleaded that his father left behind his widow and two daughters Sundarammal and Valli. They have not been made as party to the suit. The suit itself is filed as if the entire suit properties were originally belonged to the joint family of Narayanasamy Padayachi and his sons Kasirajan and Janakiraman. The date of death of Narayanasamy Padayachi was also not mentioned in the plaint. Further, it is not pleaded in the plaint that what was the nature of the income derived from the suit properties at the relevant time. Ex.A1 is the legal notice said to have been sent by the first defendant. No other document whatsoever has been filed by the plaintiff to gather the claim for partition. On a careful perusal of the Ex.A1 legal notice dated 25.5.2007, it is seen the first defendant in fact sent a legal notice to the plaintiff stating that after the death of Narayanasamy Padayachi his sons namely his father and the first defendant have divided the joint family properties equally. Despite such oral division registered partition deed has not been executed between them as Kasirajan did not agree to clear the debts of the family.

13. When the fact remains, the plaintiff is making unwanted quarrel for division of the properties. Therefore, the defendant has issued a legal notice to the effect that if the plaintiff wanted to partition let him go to the Civil Court. Though Ex.A1 in its tenor appears as if no partition between the parties, on a careful reading of the entire recitals, this Court can easily

come to the conclusion that in fact the first defendant has clearly mentioned that even though there was a oral partition the above partition was not registered legally in view of the fact that the plaintiff's father did not agree to clear the debts of the family. From the reading of Ex.A1 in its entirety it can be seen that in fact the defendant has never admitted that there was no partition at all. What was insisted in his notice that registration of deed could not be done as the plaintiff's father did not agree for the family debts. Therefore, Ex.A1 cannot be construed to mean that there was no partition at all.

14. Now in the above background other materials when carefully analysed, it is the contention of the defendant that as far as the joint family property is concerned, there was oral partition between two brothers and they are enjoying the properties separately. That apart the first defendant has also purchased several properties out of his own earnings. On reading of the plaint in its entirety, he has not even pleaded what are all properties actually belonged to Narayanasamy Padayachi-grandfather of the plaintiff and what are all other properties purchased out of income from the joint family properties. In the absence of any pleadings to that effect the plaintiff now cannot contend that the properties purchased in the name of the first defendant is also only out of joint family nucleus. From the documents exhibited on the side of the defendants it can be seen that under Ex.B2 of the year 1943 and Ex.B3 of the year 1957 and under Ex.B4 dated 8.6.1960, under Ex.B5 dated 1.11.1962 Narayanasamy has purchased the properties to an extent of 3.22 Acres in all the above four sale deeds. From Ex.B6 to B13 from the year 1963 to till 1993, the first defendant has purchased various properties.

15. Under Ex.B6, the first defendant has purchased the property to an extent of about 1.40 Acres in Survey No.195/2, 193/8 which also shows as the one of the first item of the suit property. Similarly, under Ex.B7 the first defendant has purchased the property to an extent of 0.19 cents in Survey No.619/5, which is also shown as 10th item of the suit property and under Ex.B8 and B9 sale deed and release deed he has purchased 0.09.5 cents in Survey No.619/5. Under Ex.B10 he has purchased the property to an extent of 2.55 Acres in Survey Numbers 193/1, 193/4, 194, 195/5, 195/7, 195/8, 195/9, this also shown as 4th item of the suit schedule properties. Under Ex.B11 dated 29.7.1971, the first defendant has purchased the property to an extent of 0.09 cents in Survey No.195/7, which is also shown as 4th item. Under Ex.B12 dated 4.7.1974, he has purchased 61 cents in Survey No.773/4, which is shown as 5th item of the suit property. Under Ex.B13 dated 5.9.1993, he has purchased 0.33.5 cents in Survey Number 193/11 which is shown as third item of the suit properties. In toto, he has purchased more than

5.79.50 Acres in his individual name. All the sale deeds show that the first defendant has purchased the property.

16. A reading of the entire plaintiff pleadings would show that it is not the case of the plaintiff that these properties are purchased by the first defendant out of joint family nucleus. It is well settled that initial burden is always on the person who asserts that the property belonged to Hindu Undivided Family only where the initial burden is discharged by the person, onus shifts to other side to establish his case. But the plaintiff in this case has failed to prove the existence of ancestral nucleus out of which the first defendant had purchased all the remaining properties. Though under Ex.B2 to B5 his grandfather had purchased the properties to an extent of 3.22 Acres, it must be established by the plaintiff to show that the properties were fetching sufficient income and there was sufficient nucleus and out of which only the properties were purchased in the name of the first defendant. But the plaintiff's pleadings is silent about this aspect. Further, his evidence when carefully seen P.W.1 even in his chief-examination has not stated about the nature of the joint family nucleus. In the cross-examination he has admitted that he does not even know the extent of the land. He never seen the title deeds and only his mother knows how much his grandfather was entitled to at the relevant time. He has filed the suit only at the instruction of his mother. Further, he has also admitted that originally the grandfather had 6 Acres out of which 3 Acres was enjoyed by the first defendant and another 3 Acres was enjoyed by the plaintiff's father and after his death the plaintiff is enjoying the same.

17. The specific admission of P.W.1 in the cross-examination only show that the property of his grandfather was already divided between his two sons and two sons were enjoyed the properties separately. When the grandfather's properties were enjoyed separately by his two sons, the subsequent purchase made by one of his sons namely the first defendant on various dates under Ex.B6 to B13, it cannot be said that he has purchased the properties only from the joint family nucleus. When the parties were enjoyed the properties separately as per the oral partition, now the plaintiff cannot contend that the entire properties have been purchased out of income from the joint family nucleus. Of course initial burden is always on the person who asserts oral partition. Now, the evidence of P.W.1 itself clearly show that their grandfather properties were already enjoyed separately by his two sons separately. Of course mere enjoyment of the properties separately for the convenience shake will not amount to division in status and partition by meets and bounds. But at the same time the conduct of the parties enjoying the properties and treating the properties of their own, also

assumes significance to infer oral partition. The oral partition is not alien into joint family. The division in status can be effected orally by all the parties. To prove such oral partition apart from evidence, conduct of the parties also relevant.

18. P.W.1 himself has stated that his grandfather properties were already divided and enjoyed separately by his father and first defendant. In this regard, Ex.B14 copy of the usufructuary mortgage executed by Late Janakiraman and his wife Sarasu Ammal on 8.12.1999 in respect of 1.03 Acres in various Survey Numbers 767/2, 773/2A, 773/2B, 773/5 when carefully perused, in the above mortgage Northern boundary was shown as the land belonged to the first defendant herein. Similarly, in Ex.B15 the plaintiff himself has purchased the property in the year 2003 from one K.Paramanantham, wherein also one of the boundaries was shown as the property of the first defendant. If really there was no oral partition whatsoever and there was severance of status between the parties there was no need whatsoever for mentioning one of the boundaries as that of the defendant's property. This conduct of the parties mentioning the first defendant's property as one of the boundaries coupled with the admission of P.W.1, in fact fortified the contention of the defendant that in fact there was division in status and parties were enjoyed the properties separately on the basis of the oral partition. It is further to be noted that as already stated the relief in the plaint plaintiff itself is not confined only to the absolute properties of Narayanasamy Padayachi purchased under Ex.B6 and B13 but also to the several properties which were purchased by the first defendant from 1963 to 1993. But it is not the case of the plaintiff that these properties were also purchased only out of the joint family nucleus. In the absence of necessary pleadings and evidence, the properties standing in the name of the first defendant cannot be construed as the joint family property at all. To contend that the above properties also joint family properties there must be necessary pleadings in the plaint followed by the evidence and onus is on the person who set up such plea. Without any pleadings and evidence this Court cannot presume that these properties are also joint family properties.

19. Further, the plaintiff claiming to be the manager of the Janakiraman's branch has filed the present suit without impleading necessary parties namely his mother and two sisters. This also goes to show that this suit is filed merely on the basis of some misreading of Ex.A1, for speculative purpose. Whereas Ex.A1 and plaint read together clearly show that in fact the first defendant was insisted that there was oral partition. Hence, this Court is of the view that when the plaint pleadings is very bereft of details about the properties, there is no evidence to show that the properties standing in the name of the first defendant are all purchased by him out of the income from

the nucleus of the joint family properties. The plaintiff cannot succeed in the suit for partition claiming half share in the entire properties particularly the major portion of the properties were purchased by the first defendant in his name out of his own earnings.

20. In the judgment cited by the learned counsel for the appellant in 1993 (3) SCC 573-Vidhyadhar v. Manikrao, wherein there was a plea regarding non payment or inadequacy of sale consideration. There is no dispute with regard to the proposition laid down by the Hon'ble Supreme Court in the above Judgment. But the same is in no way connected with the facts of the present case.

21. In AIR 1946 Madras 118-Appavu v. Manickam Pillai, it has been held as follows:-

"An agreement between members of a joint family called Kutumbanataavati Karar dividing the income of the agricultural lands of the family and the moveables and the outstanding and making provision for the management of the estate would not operate as a division in status between the parties to the agreement if there was no intention to effect such a severance. Partition of some of the joint family assets does not of itself imply a division in status. In deciding whether a joint family has become divided, the Court must naturally have regard to the terms of any instrument bearing on the question and, if the wording is ambiguous, to the subsequent conduct of the parties. Neither the division of the income of the agricultural lands nor the fact that the brothers divided the outstanding and other moveable properties for convenience would itself be sufficient basis for holding that there is a clear indication of a division in status. The fact that the immovable property of considerable extent is left completely undivided and the nomenclature of the deed of the document taken along with the conduct of the parties subsequent to the agreement pointed to the conclusion that there was no division in status between the brothers in this case."

Further, in this case, the intention of executing the mortgage deed mentioning one of the boundaries as the defendant clearly show that the parties have in fact effected oral partition.

22. In 2005 (3) CTC 344 -Kandavel v. Chidambara Padayachi, wherein it has been held as follows:-

"The defendant raised plea of co-ownership but failed to examine herself as witness-Plaintiff relied on certified copy of partition deed filed by defendant in some other earlier proceeding to dispute contention of defendant on co-ownership - Adverse inference could be drawn on non-examination of defendant as witness."

There is no dispute with regard to the above facts. D.W.1 the son of the first defendant was examined and besides that he was also appointed as agent of the first defendant. D.W.1 in his evidence has stated that since his father was short of hearing, he could not come to the Court. The above specific evidence of D.W.1 about his father's disability is not even denied. Therefore, merely because the first defendant was not examined, it cannot be said that adverse inference has to be drawn against him. Initial burden if discharged by the plaintiff then it can be said that non-examination of the first defendant lead to draw adverse inference. In this case admittedly, the plaintiff has come before this Court stating that the properties are joint family properties. But he has failed to establish the nature of the properties. However, his own documents also show that there was a division in status. Hence, the judgments cited by the learned counsel for the appellant is not applicable to the facts of the present case. Accordingly all the points are answered against the appellant.

23. In the result, the appeal is dismissed. No costs. Consequently, M.P.No.1 of 2010 is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To
The Additional District Judge,
Fast Track Court - II,

+1cc to Mr.D.Ravichander, Advocate, S.R.No.19285
+1cc to Mr.P.Mani, Advocate, S.R.No.18933

PRE DELIVERY JUDGMENT
IN A.S.No.917 of 2010

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