

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.01.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.21 of 2013

and

M.P.No.1 of 2013

Muthusamy ...1st defendant/Appellant

Vs.

1.S.Kaliammal ...Plaintiff/1st respondent

A.Kaliammal (Died)

2.A.Radhakrishnan

3.Arumugam

...Defendants 3 & 4/Respondents 2 & 3

This Appeal has been filed under Section 96 of Civil Procedure Code against the judgment and decree dated 10.06.2011 made in O.S.No.784/2007 on the file of the Additional District Judge-cum-Fast Track Court No.III, Coimbatore.

For Appellant : Mr.S.Mukunth
for M/s.Sarvabhauman Associates

For Respondents : Mr.R.Bharath Kumar (For R1)

* * * * *

JUDGMENT

The 1st defendant, who suffered a decree for partition and separate position of 1/6th share in the items 1 to 3 and 1/3rd share in Item 4, is the appellant.

2. According to the plaintiff, the suit properties belonged to joint family consisting of her father Ramasamy Gounder and 1st defendant Muthusamy. The said Ramasamy Gounder died on 02.09.1988 leaving behind his wife Maruthakkal, two daughters Kaliammal (senior) & Kaliammal (junior) and 1st defendant, being the son. The plaintiff would claim that all the four items of properties belonged to the said joint family and seek partition and separate possession of her 1/3rd share in the suit properties.

3. The suit was resisted by the 1st defendant contending that not all the properties were joint family properties. According to the 1st defendant, Items 1 to 3 were admitted to be the joint family properties. The 4th item, as per the plaintiff, comprised of five sub-items. The 1st defendant would claim that the 4th item consists of only three sub-items; though the extent of property in the 4th item was only 6.01 acres. The 1st defendant would claim that an extent of 2.20 acres in S.Nos.435 & 440 and an extent of 1.34 acres in S.No.475/2 were purchased by him out of his own income under two sale deeds dated 10.09.1972 (Ex.B.11) and 20.04.1981 (Ex.B.12). Insofar as

2.47 acres in S.Nos.472 & 437/1, the 1st defendant would contend that the said property belonged to his mother Maruthakkal and she had executed a settlement under Ex.B.13 dated 14.11.1984, thereby settling the said property in favour of the 1st defendant. Therefore, according to the 1st defendant, the plaintiff is not entitled to any share in the 4th item of the properties.

4.The 2nd defendant namely Kaliasammal (Junior) died pending the suit and her sons were impleaded as defendants 3 & 4 and they however remained *exparte*.

5.On the above pleadings, the learned Additional District Judge (FTC-III), Coimbatore framed the following issues_

- 1)Whether the plaintiff is entitled for 1/3rd share in the suit property?
- 2)Whether the plaintiff is entitled for permanent injunction?
- 3)To what other relief, if any, is the plaintiff entitled?

6.The plaintiff examined herself as P.W.1 and Ex.A.1 to Ex.A.6 were marked. The 1st defendant examined himself as D.W.1 and also examined one Natarajan as D.W.2 and marked 33 documents as Ex.B.1 to Ex.B.33.

7.On consideration of the oral and documentary evidence, the learned Additional District Judge (FTC-III), Coimbatore concluded that in respect of

Items 1 to 3 of the suit properties, being admittedly ancestral properties, the plaintiff would be entitled only 1/6th share as against her claim of 1/3rd share.

8. With reference to the 4th item of the properties, the defence was two fold, namely

a) a portion of the 4th item is claimed to be the property of the 1st defendant through Ex.B.11 & Ex.B.12

b) the remaining portion of the said property belonged to mother Maruthakkal and she executed a settlement deed under Ex.B.13 dated 14.11.1984.

The learned Trial Judge, considering the validity of the said settlement deed dated 14.11.1984, found that since the 1st defendant had not examined any of the attestors to the said document, the requirement of Section 68 of the Evidence Act was not satisfied. On the said conclusion, the learned Trial Judge held that the plaintiff would be entitled to 1/3rd share in the property which is subject matter of the settlement viz., 2.47 acres in S.Nos.472 & 437/1. As regard the other two properties viz. 2.20 acres in S.Nos.435 & 440 and 1.34 acres in S.No.475/2, the learned Trial Judge concluded that the 1st defendant has not established separate source of income to show that he had purchased the said properties out of his own income. Considering the admission made by the 1st defendant as well as D.W.2 in their evidence that

the 1st defendant was in the management of the properties of the joint family, since his father Ramasamy Gounder was unwell even from the year 1955, the learned Trial Judge concluded that they are also joint family properties; however, the learned Trial Judge proceeded to grant a preliminary decree for 1/3rd share in those items. Aggrieved by the said judgment and decree, the 1st defendant has come forward with the present appeal.

9. I have heard Mr.S.Mukunth learned counsel appearing for the appellant/1st defendant and Mr.R.Bharath Kumar appearing for the 1st respondent/plaintiff. The respondents 2 & 3 (D3 & D4) namely children of Kaliammal (junior) have remained exparte in the appeal also.

10.The learned counsel appearing for the appellant/D1 does not dispute the decree of the Trial Court with referrece to Items 1 to 3.

11.The following points arise for determination in this appeal_

1)Whether the Trial Court was right in concluding that the settlement deed dated 14.11.1984 has not been proved in accordance with Section 68 in the light of the proviso to Section 68 of the Evidence Act?

2)Whether the properties purchased by the 1st defendant under Ex.B.11 & Ex.B.12 dated 10.09.1972 & 20.04.1981 are his separate properties?

3)Whether the Trial Court was right in granting

1/3rd share in Item 4 of the suit properties, after having concluded that a portion of the Item 4 is also joint family property?

12. Mr.S.Mukunth, learned counsel appearing for the appellant/1st defendant would submit that the Trial Judge erred in holding that the settlement deed dated 14.11.1984 has not been properly proved. Relying upon the proviso to Section 68 of the Evidence Act, the learned counsel for the appellant/D1 would submit that in the absence of a specific denial of execution of Ex.B.13 viz., settlement deed dated 14.11.1984, the 1st defendant as propounder of the said document is not bound to examine the attesting witness, since the document has been registered properly.

13.On the other hand, Mr.R.Bharath Kumar learned counsel appearing for the 1st respondent/plaintiff would contend that there was no occasion for the plaintiff to deny the execution of the Settlement Deed dated 14.11.1984, since it was projected only in the written statement.

14.Mr.S.Mukuth learned counsel appearing for the appellant/D1 would invite the attention of this Court to the evidence of the plaintiff in cross-examination, which runs as follows_

"என் தாயார் தானம் பற்றி விவரம் வழக்கறிஞர் மூலமாக எனக்கு தெரிய வந்தது. அந்த தான பத்திரத்தை ரத்து செய்வதற்கு நடவடிக்கை எதுவும் எடுக்கவில்லை"

Even in her proof affidavit, she does not deny the execution of the Settlement Deed by her mother. In the light of the above evidence, it is clear that the plaintiff has not specifically denied the execution of Settlement Deed by her mother Maruthakkal. The said document is a registered instrument and it has been executed even in the year 1984. There is nothing in evidence to disbelieve the said document. Hence, the Trial Court was not right in invalidating the Settlement Deed dated 14.11.1984 on the basis of the non-examination of the attesting witness as required under Section 68 of the Evidence Act. The Trial Court has lost sight of the proviso, which exempts the examination of an attesting witness of a registered instrument if the execution of the instrument has not been specifically denied. The Trial Court concluded that to prove the Settlement Deed, it was obligatory on the part of the 1st defendant to have an attesting witness to Ex.B.13 (Settlement Deed) examined. Ex.B.13 being a registered instrument, that too a settlement deed, results in transfer of title in presenti. Under such circumstances, I am of the considered opinion that the Trial Court erred in going into its validity and holding that it is invalid on the sold ground of non-examination of an attesting witness. Therefore, the plaintiff's suit will have to fail in respect of the properties covered by the Settlement Deed viz., an extent of 2.47 acres in S.Nos.472 & 437/1, which is a part of suit Item No.4. The first point is answered against the plaintiff/1st respondent herein.

15.As regards the acquisition of other two items of properties namely an extent of 2.20 acres in S.Nos.435 & 440 and 1.34 acres in S.No.475/2, the learned counsel for the appellant/D1 would contend that the two Sale Deeds under Ex.B11 & Ex.B.12, dated 10.09.1972 & 20.04.1981, stand in the name of the 1st defendant/appellant herein. He would also rely upon the oral evidence of D.W.1 to substantiate the claim that the 1st defendant had enough income to have purchased the said property out of his own income without the aid of the income from the joint family properties.

16.The learned counsel for the appellant/D1 has also relied upon the judgment of the Hon'ble Supreme Court in the case of **Achuthan Nair Vs. Chinnammu Amma and others** reported in **AIR 1966 SC 411** and contended that the presumption, that would arise when it is proved that the family is possessed of sufficient nucleus, with the aid of which a member of the family might have made an acquisition, will not arise in case of acquisition by a junior member of the family. The learned counsel would also contend that there is no presumption either way, according to the Hon'ble Supreme Court, and hence, the nature of the property has to be decided on the facts of each case.

17.The learned counsel for the appellant/D1 would also invite my attention to the judgment of the Division Bench of this Court in

Nagayasami Naidu and others Vs. Kochadai Naidu and others reported in ***AIR 1969 Madras 329***, wherein the Division Bench has made a distinction between acquisitions in the name of male member and female member. So far as the acquisition in the name of female member, the Division Bench had pointed out that there shall be no presumption; however, in the case of acquisition by a male member, there will be a presumption if joint family had sufficient ancestral nucleus. According to the learned counsel for the appellant/D1, in the case on hand, it is not shown that there was enough surplus income in the hands of the family to enable purchase of the properties under Ex.B.11 & Ex.B.12. He also invited my attention to the judgment of this Court in ***Thambiran Naicker Vs. Duraiswamy Naicker [1996(2) MLJ 207]***, wherein this Court after referring to ***Achuthan Nair's case (cited supra)*** held that acquisition in the name of the junior member cannot be automatically deemed to be for the benefit of the family.

18. Yet another case relied upon by the learned counsel is ***Muniappa Naicker Vs. Balakrishna Naicker [1998 (2) MLJ 388]***, wherein this Court had taken note of the fact that the acquisition have been made during the life time of the father by a junior member and held that unless it is shown that there was adequate nucleus and surplus income, the burden will not shift. In the case on hand, according to the learned counsel for the appellant/D1, the plaintiff has not discharged the said burden; therefore, the properties standing in name of the 1st defendant covered by Ex.B.11 & B.12 cannot be

subject matter of partition.

19. On the other hand, Mr. R. Bharath Kumar, learned counsel appearing for the plaintiff/1st respondent herein would rely upon the judgment of the Division Bench of this Court in **C.K. Krishnan Vs. C.K. Shanmugam and others [1975 (2) MLJ 73]**, wherein this Court had held that in the event of a challenge, it is for the particular member, in whose name the property stands, to show that he had purchased the property out of his own income, without resorting to or without deriving any assistance from the joint family nucleus or its income.

20. The learned counsel for the plaintiff/1st respondent would also invite my attention to certain observations of the Division Bench of this Court in the case of **Kandaswami Chettiar and others vs. Gopal Chettiar and others [1995(2) MLJ 184]** and contend that unless it is shown that the 1st defendant had separate income, he cannot claim that the properties belong to him.

21. The learned counsel for the plaintiff would also rely upon the observations of this Court in **Thambiran Naicker Vs. Duraiswamy Naicker [1996(2) MLJ 207]**, wherein this Court after referring to the observations of the Hon'ble Supreme Court made in **Achuthan Nair's case (cited supra)**, held as follows:-

"15. Merely because the defendants are junior members, they cannot contend that it is for the plaintiff to prove the surplus income through which the other properties were acquired. The defendants who are in management are bound to account the management and their possession is that of a trustee. It is for them to prove that no part of the family income was made use of, for acquiring 'C Schedule items. A similar question came for consideration by this Court, and the same is reported in *Sonnappa Iyer v. K.R. Ramuthaiammal and others* (1994)¹ M.L.J. 44, wherein a Division Bench of this Court has held thus:

"The evidence on record conclusively shows that the first defendant had ancestral properties comprising of houses and was running a business which was also ancestral. He had no other source of income with which he could have purchased properties of his own. When there is no evidence as to his independent source of income and when he admittedly was the manager of the undivided family consisting of himself and his sons, the presumption under Hindu Law has to be drawn and the property should be presumed to be joint family property."

In this case, the burden of proof is really on the defendants, and they have failed to discharge the same. Presumption is against them. The appellants cannot take refuge on some allegations made in the plaint. The parties are aware of the real nature of the acquisition and how it was acquired. It cannot be expected of the plaintiff to say how it was acquired and when it was acquired. The best evidence that can be produced was not produced by the appellant.

22.In the light of the above pronouncements, it is clear that there arose no presumption in case of acquisition in the name of a junior member of the family. Each case has to be decided on its facts. However, if it is shown that the junior member was in management of the family properties at the relevant point of time, then the burden of proving that the properties acquired in his name were actually acquired out of his own income, is on the said junior member, who sets up title in himself. If we are to examine the evidence in the case on hand, in the light of the above legal position, it is seen that the 1st defendant himself as D.W.1 in his cross-examination had admitted as follows_

"என் தகப்பனாருக்கு காலில் நீர்கோத்திருந்தால் நடக்க முடியாமல் இருந்தார். 1955ம் ஆண்டில் இருந்து அவர் இறக்கின்ற காலம் வரை 1988ம் ஆண்டு வரை முடியாமல் இருந்தார். 1955 முதல் குடும்ப சுமை முழுவதையும் ஏற்றுக்கொண்டு செய்து வந்தேன்."

D.W.2, who was examined on the side of the 1st defendant, would say that the properties purchased under Ex.B.11 & Ex.B.12 were purchased by the 1st defendant out of his own income. He would even in his proof affidavit state as follows_

"அவரின் தகப்பனர் ராமசாமி கவுண்டர் பல வருடங்களாக கால் மீட்டு நோயால் பாதிக்கப்பட்டிருந்ததால் குடும்பத்தை முத்துசாமி நடத்தி வந்தார்."

23.The fact that the joint family possessed of properties is admitted. The extent of the properties possessed by the joint family is nearly about 10 acres, apart from rental income yielding house properties. The fact that the 1st defendant was in the management of the entire properties is admitted. Therefore, it is for the 1st defendant to prove that he had separate income and the properties covered by Ex.B.11 & Ex.B.12 were purchased by him out of the said income, without the aid of the income from the joint family properties.

24.In my considered opinion, the 1st defendant has failed to discharge the said onus. Even according to his own evidence, he was in management of the properties. Though he would claim that he did milk vending business and trading in construction materials, I do not find any convincing evidence to accept his contention. In the light of the evidence available in this case

and in the light of the pronouncements of this Court in above cited cases, I am constrained to hold that the properties purchased under Ex.B.11 & Ex.B.12 should also be considered as joint family properties acquired in the name of the 1st defendant, who was in fact in management of the family properties at the relevant point of time. Therefore, the plaintiff would be entitled to a share in those properties also. The learned Trial Judge has granted 1/3rd share to the plaintiff in the said properties. Having held that properties in question are the joint family properties and father Ramasamy Gounder having died on 02.09.1988, that is prior to coming into force of the Hindu Succession Amendment Act, 1 of 1990, the learned trial Judge erred in granting 1/3rd share to the plaintiff, while he had rightly granted 1/6th share in Items 1 to 3, which are admittedly joint family properties; the same would apply to the properties covered by the two sale deed namely Ex.B.11 & Ex.B.12 also. Therefore, the plaintiff would be entitled to 1/6th share in the said properties also and to that effect, the judgment and decree of the trial Court needs to be modified. Points 2 & 3 are answered accordingly.

25. In fine, the appeal is partly allowed. The judgment and decree of the Trial Court with reference to Items 1 to 3 are confirmed. The suit in respect of the properties measuring an extent of 2.47 acres in S.Nos.472 & 437/1, which is the subject matter of the Settlement Deed dated 14.11.1984 executed by mother Maruthakkal, will stand dismissed. In respect of the properties to an extent of 2.20 acres in S.Nos.435 & 440 and 1.34 acres in

S.No.475/2, which form part of Item 4, the judgement and decree of the Trial Court will stand modified and the plaintiff will be entitled to 1/6th share in those properties also. Considering the close relationship of the parties, I make no order as to costs in the appeal. Connected Miscellaneous Petition is closed.

30.01.2017

Internet : Yes / No

Index : Yes / No

(ssv)

To,
The Additional District Judge-cum
-Fast Tract Court No.III, Coimbatore.

R.SUBRAMANIAN, J.

SSV

A.S.No.21 of 2013
and
M.P.No.1 of 2013

30.01.2017

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