

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19.07.2017

Coram:

The Honourable Mr.Justice R.SUBRAMANIAN

A.S.No.354 of 2013
& M.P.No.1 of 2013

1.Mathan @ Munisamy
2.Soundar
3.Pachiappan

.. Appellants/R1
,R4 Defendants in LRS O.S. 16/11.

Vs.

1.Mani
2.Kusala Kumar
3.Minor Muniappan,
Represented by his next friend and
mother Vellai Ammal

..Respondent/Plaintiffs O.S.16/11
.. 2nd & 3rd Respondents/2nd & 3rd
Respondents in O.S. 16/11.

First Appeal is filed under Order 41 Rule 1 Sections 96 and 151 C.P.C., to set aside the judgment and decree dated 07.03.2013 made in O.S.No.16 of 2011 on the file of Additional District Judge, Krishnagiri.

For Appellants : Mr.Ruban Prabhu
For respondents : Mr.P.M.Duraiswamy

JUDGMENT

The appellants are defendants 1, 4 and 5 in O.S.No.16 of 2011. The said suit was filed by the first respondent seeking partition and separate possession of his 1/5th share in the suit properties as well as for permanent injunction restraining the defendants 1, 2, 4 and 5 from alienating and encumbering over the suit properties till the partition is effected and the share of the plaintiff is allotted separately.

2. According to the plaintiff, the suit Item No.I, which consists of 8 sub items belonged to the joint family of one Chinna Gounder, who died leaving behind five sons. On partition between the sons of Chinna Gounder, the suit item No.I

consisting eight sub items was allotted to the share of the first defendant. The plaintiff would further contend that the first defendant has purchased the suit second item of the property under Ex.B3 on 17.02.1993 from the sale proceeds of certain other properties. The plaintiff would contend that out of the sale proceeds of those properties, which were sold under Ex.A5 dated 27.07.1992, the suit item No.II was purchased under Ex.B3 on 17.02.1993. The suit item No.III was purchased in the name of the first defendant on 30.04.1979 out of the income derived from joint family properties. Since the first defendant was acting against the interest of the plaintiff and executed a settlement deed in 1997 under Ex.A6 in favour of the third defendant, the plaintiff filed the present suit seeking partition. The plaintiff would also plead that the settlement deed dated 15.10.1997 executed by the first defendant in favour of the third defendant, marked as Ex.A6, was not acted upon.

3. The first defendant resisted the suit contending that the properties in Item No.I except Survey No.122/4C were admittedly ancestral properties and they were allotted to him in the partition between him and his brothers. Insofar as sub item 2 in Item No.I in Survey No.122/4C, the first defendant would contend that the same was purchased by him and his two brothers under Ex.A1 dated 15.10.1967 and therefore, the said 24 cents in Survey No.122/4C is a self acquired property. With regard to Items II and III, the first defendant would contend that they were purchased from his own income and not out of the income from the joint family properties. He has claimed that he has been doing fire wood business apart from milk vending business, out of which, he earned substantial amounts and purchased these properties. The first defendant would also contend that the partition was effected between himself and his sons even in the year 1992 and properties were allotted to his sons including the plaintiff. On the above contentions, the first defendant sought for dismissal of the suit.

4. The other defendants adopted the written statement filed by the first defendant.

5. On the above pleadings, the trial Court framed the following issues.

1. Whether the suit items II and III were purchased out of the income from the ancestral properties allotted to the first defendant and as such, they are joint family properties?

2. Whether the claim of the first defendant that the suit items II and III were purchased out of his separate income is true?
3. Whether the plaintiff is entitled 1/5 share in the suit properties?
4. What other relief the plaintiff is entitled to?

6. On the side of the plaintiff, two witnesses were examined and Exs.A1 to A6 were marked. On the side of the defendants, three witnesses were examined and Exs.B1 to B5 were marked.

7. On consideration of the oral and documentary evidence, the learned trial Judge concluded that the plaintiff has established the fact that the family owned ancestral properties, which were capable of yielding income and on the other hand, the first defendant has not shown that he had any separate income, to enable him to purchase the properties under Exs.A1, B1 and B3. The claim of the first defendant that he had effected partition between his sons in the year 1992 was also rejected by the trial Court. The trial Court concluded that the suit items II and III were purchased out of the income from the joint family properties that were in the hands of the first defendant. The trial Court also took note of the admissions made by the first defendant in his cross-examination that the joint family properties yielded good income. The trial Court found that the settlement deed dated 15.10.1997 said to have been executed by the first defendant in favour of the third defendant is not binding on the plaintiff and on the evidence, of the first defendant, concluded that the said document was not acted upon. On the above findings, the learned trial Judge decreed the suit as prayed for. Aggrieved by the same, defendants 1, 4 and 5 are on appeal.

8. I have heard Mr.Ruban Prabhu, learned counsel for the appellants and Mr.P.M.Duraiswamy, learned counsel for the first respondent. The other respondents, though duly served, have not appeared either in person or through counsel.

9. Mr.Ruban Prabhu, learned counsel for the appellants, would vehemently contend that the burden to prove that the

properties are joint family properties standing in the name of the first defendant is only on the plaintiff and in the absence of any evidence to show that the income from the joint family properties was sufficient to enable the first defendant to acquire the other properties, the trial Court erred in concluding that the properties are joint family properties. He would further contend that since it is admitted that the properties were allotted to the first defendant in the partition that took place between him and his brothers, the plaintiff cannot seek a relief of partition even during his life time.

10. Per contra, Mr.P.M.Duraiswamy, learned counsel appearing for the first respondent/plaintiff would invite my attention to the evidence of the first defendant as D.W.1 to contend that the partition between the first defendant and his sons has not been established. He would further contend that the first defendant having admitted that the ancestral properties are capable of yielding high income, would submit that the case of the plaintiff that the suit properties were joint family properties is established. The learned counsel would contend that if once it is proved that the joint family had sufficient properties, which could have yielded income so as to aid purchase of other properties, the onus of showing that the properties that have been purchased by the first defendant, who was the senior member of the family out of his separate earnings, rests on the first defendant.

11. On the above arguments, the following points arise for determination in this appeal.

1. Whether the plaintiff has established that the income yielded from the joint family properties would be sufficient to purchase other properties in the name of the first defendant?
2. Whether Items II and III could be said to be joint family properties though they stand in the name of the first defendant?
3. Whether the partition pleaded by the first defendant has been established?

12. POINT NO.1:- The first defendant would admit that atleast 7 out of 8 sub items of item No.I were ancestral properties. He would claim that item No.II viz., an extent of

24 cents in Survey No.122/4C was purchased by him under Ex.A1 dated 15.10.1967. Therefore, it belongs to him absolutely. A perusal of Ex.A1 dated 15.10.1967 would show that the total extent of property purchased by the three brothers viz., first defendant, Mannan and Ullathy @ Chinna Gounder is 1.19 acres. Out of the said 1.19 acres purchased, the first defendant has been allotted 24 cents, which is just about 1/5 of the property. It is also the case of the parties that the first defendant has four brothers. Therefore, it is crystal clear that the sons of Chinna Gounder had treated the property purchased under Ex.A1 as ancestral and divided it among themselves each taking 1/5th share. The contention of the first defendant that the property was purchased separately by him from and out of his own income under Ex.A1 dated 15.10.1967 fails on this very short ground. Insofar as the other two items of the properties are concerned, the same have been purchased under Ex.B1 sale deed dated 30.04.1979 and Ex.B3 sale deed dated 17.02.1993. According to the plaintiff, the II item of the property was purchased out of the sale proceeds of another property that belonged to the family sold by the first defendant and his brother Mannan on 27.07.1992 under Ex.A5. Though in Ex.A5, the vendor had claimed that the properties belonged to them under the Will of the year 1975 and under the sale deed of the year 1973, the said Will has not been produced. The sale deed states that the properties were sold for discharging certain debts and for family expenses. This sale has taken place on 27.07.1992. Out of the abovesaid sale proceeds, the first defendant has purchased Item No.II of the suit property on 17.02.1993 under Ex.B3. The first defendant, in his evidence, particularly in the cross-examination, has admitted as follows:

“பிராஜித சொத்து நல்ல விளைச்சலை கொடுக்கக் கூடிய நிலம் என்றாலும், வருமானம் தரக் கூடிய நிலம் என்றாலும் சரிதான்.”

Though he claims to have divided the properties between the sons in 1992, the said fact stands disproved by Exs.A2. A3 and A4, which are revenue records relating to the suit properties, which continued in the name of Chinna Gounder and the first defendant.

13. The first defendant is unable to give particulars of the lands that were allotted to him and his sons in the said partition, which according to him, took place in 1992. No one has been examined to prove the said partition and separate enjoyment of the properties by the first defendant and his sons.

With reference to Item No.III, the said property was purchased by the first defendant on 30.04.1979 from the Co-operative Society. The said sale deed shows the occupation of the first defendant as agriculturist. Though he is said to have been doing business, he has not been shown to be a businessman in the sale deed. Even according to the first defendant, a division took place between him and his sons in the year 1992 and before that, they were living jointly. The purchase of the Item No.III has been made in the year 1979. Therefore, the necessary conclusion is that the said property was purchased out of the income derived from the joint family property, more so, when the first defendant was the eldest member of the family and was also the Manager of the family.

14. The learned counsel for the appellant would invite my attention to the judgment of this Court in GURUVAPANDARAM (DIED) V. G.GURUSWAMY ((2002) 2 M.L.J. 508), for the proposition that the burden of proof vests on the party, who asserts that any item is joint family property. According to him, mere proof of existence of joint family does not lead to presumption that the property held by member is joint family property. There is no quarrel about the proposition of law, but the said burden is not a static burden. The onus shifts according to the facts and circumstances of each case. In D.S.LAKSHMAIAH AND ANOTHER V. L.BALASUBRAMANYAM AND ANOTHER (AIR (2003) Supreme Court 3800(1)), the Honourable Apex Court has held on the onus of proof as follows:

"The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available."

(emphasis supplied)

15. In the case on hand, the fact that the family possessed ancestral properties is admitted. The first defendant has also admitted that the said ancestral properties yielded

high income. Therefore, once the existence of the nucleus is proved, as pointed out by the Supreme Court, the onus shifts to the person, who claims the property to be a self acquired property. The evidence of the first defendant is totally lacking on this. Though he has claimed that he was doing fire wood business as well as milk vending business, except his own statement there is nothing to prove the said claim. The first defendant would also claim that he has executed settlement deed in 1997 under Ex.A6 in favour of the third defendant, he also added that he has not delivered possession of the property to the third defendant. This also shows that the first defendant was in possession of the entire property, from which he was getting income. Therefore, the claim of the first defendant that sub item 2 of item No.I and Items II and III were purchased by him out of his own income has not been established. The point No.1 was answered against the appellant.

16. POINT Nos.2 and 3:- As already discussed, Item Nos.II and III of the properties have been purchased in 1979 and 1993. The claim of the first defendant that he has separate income, from which he purchased the property and that he effected partition amongst the sons in the year 1992 has not been proved. Therefore, Item Nos.II and II are also held to be joint family properties though sale deeds stand in the name of the first defendant, who happened to be the eldest member and Manager of the family. The first defendant would plead that there was a partition in the year 1992 between him and his sons. His oral evidence on the said partition is quite satisfactory. Though in proof affidavit, he claimed that he had effected partition between his sons and has handed over the properties after retaining Items II and III for himself, in his cross-examination, he would admit that no mutation was effected in the revenue records and he does not know as to which property was allotted to his sons. Apart from this admission on the part of the first defendant, the revenue records produced, viz., Exs.A2, A3 and A4 would show that the properties stand either in the name of the first defendant or in the name of his father Chinna Gounder. No mutation has been effected and therefore, the theory of partition is really unbelievable.

17. For the foregoing reasons, I do not find any illegality in the appreciation of evidence by the trial Court and its conclusions. Hence, the appeal is dismissed, confirming the judgment and decree of the trial Court. However considering the

relationship between the parties, I make no order as to costs. Consequently, connected miscellaneous petition is also dismissed.

-s/d-
Assistant Registrar (CCC)

True Copy

Sub-Assistant Registrar

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To

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V.R. Section
high Court, Madras.

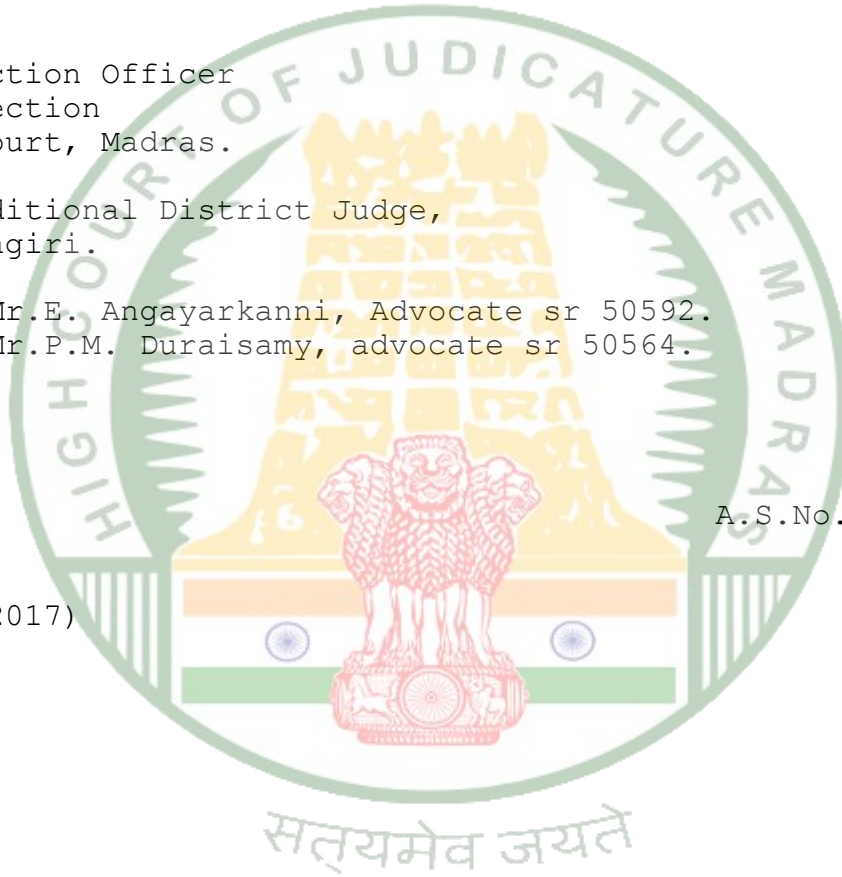
2. The Additional District Judge,
Krishnagiri.

+1 CC to Mr.E. Angayarkanni, Advocate sr 50592.

+1 CC to Mr.P.M. Duraisamy, advocate sr 50564.

SVI (CO)
sp(24/08/2017)

A.S.No.354 of 2013



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