

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.07.2017

CORAM

THE HON'BLE MR. JUSTICE R.SUBRAMANIAN

A.S.No.530 & 531 of 2006
and
MP.No.1 of 2011

G.K.Palanisamy
Proprietor, Sri Kathirvelu Finance,
109, Municipal Colony,
2nd Street, Erode 638 004 ...Appellant in both the appeals/
Plaintiff in O.S.249/2004 and
2nd defendant in O.S.69/2004

vs.

1.Amudhaveni ...1st respondent/Plaintiff in O.S.69/2004

2.K.P.Chinnasamy

3.Erode Municipality,
represented by its Commissioner,
Brough Road, Erode.

..2 & 3 Respondents in AS.No.530 of 2006/
Defendants 1&3 in O.S.69/2004

RR2 & 3 Given up vide order of
Court dated 06.04.2017
by NSKJ made in AS No.530 of 2006.

1.K.P.Chinnasamy

2.Amudhaveni.

..Respondents in As.No.531 of 2006/
Defendant in O.S.249/2004

R1 Given up vide order of Court dated 06.04.2017
by NSKJ made in AS No.531 of 2006

Appeal suits have been filed under Section 96 of the
Civil Procedure Code, to set aside the judgment and decree
dated 19.08.2005 passed in OS.Nos.69 of 2004 and 249 of 2004
on the file of Principal District Court, Erode.

For Appellant : Mr.S.Parthasarathi Sr. Counsel
for Mr.V.Kadirvelu

For Respondents: Mr.S.V.Jayaraman Sr.Counsel
for Mr.K.S.Jeyaganesan

C O M M O N J U D G M E N T

The 2nd Defendant in OS.No.69 of 2004 and who is also the plaintiff in OS.No.249 of 2004 is the appellant. The suit in OS.No.69 of 2004 was filed by the 1st respondent seeking partition and separate possession of her half share in the suit properties and for permanent injunction.

The case of the plaintiff in OS No.69 of 2004 brief is as follows :

2. The plaintiff is the daughter of the 1st defendant. The suit properties belonged to Pongianna Gounder, father of the 1st defendant. The said Pongianna Gounder had 3 sons by name Kandhasamy, Possappan and K.P.Chinnasamy (1st Defendant). The plaintiff claims that the suit property was allotted to Pongianna Gounder under a compromise final decree dated 09.09.1977 made in OS.No.501 of 1974. After the said compromise final decree, the father of the plaintiff namely 1st Defendant in OS.No.69 of 2004 entered into an agreement of sale with his father on 16.09.1978 to purchase the suit property for a sum of Rs.35,000/- and had paid an advance of Rs.20,000/-. Since the father Pongianna Gounder died without executing the sale deed, the 1st defendant namely K.P.Chinnasamy filed a suit in OS.No.288 of 1979 seeking specific performance. The said suit was decreed on 07.11.1991. Pursuant to the said decree a sale deed was executed on 16.04.1993 by the learned Subordinate Judge and the possession was also taken by the decree holder namely the 1st defendant. Thereafter, the 1st defendant had sold the property to the second defendant/ appellant under a sale deed dated 21.11.1996. The plaintiff claimed that the said sale deed will not be binding on her and inasmuch as the suit property was purchased by the first defendant from and out of the income from the joint family property, and she being a co-parcener by virtue of the introduction of the Hindu Succession (TamilNadu Amendment) Act, 1989 (Act 1 of 1990), she would be entitled to a half share in the suit property. The sum and substance of the case of the plaintiff is that the suit property was acquired by her father, the 1st defendant from and out of the ancestral nucleus and hence, she is entitled to half share in the suit property. The 1st defendant remained ex-parte.

3. The suit was resisted by the second defendant, contending that the suit property is not a joint family property. According to him the suit property is self acquired and separate property of the first defendant who is a well known real estate broker. The second defendant would further contend that the plaintiff being a party to the suit for specific performance in OS.No.288 of 1979 filed by the first defendant is estopped from now contending that the suit

property was purchased by the first defendant out of the joint family nucleus. It is also contended that the suit itself has been brought in collusion with the first defendant who is notorious court bird. An additional written statement was also filed claiming that the suit is barred by res-judicata.

4. The third defendant / Municipality filed a separate written statement.

5. On the basis of the above pleadings the I Additional Sub-Judge, Erode has framed the following issues:

- 1) Whether the plaintiff is entitled for the relief of partition and permanent injunction as prayed for?
- 2) Whether the suit property is the self acquired property of the first defendant?
- 3) Whether the alleged partition and compromise decree as stated in the plaint is true and valid?
- 4) To what relief the plaintiff is entitled to?

6. The suit in OS.No.69 of 2004 was originally filed on 24.06.1997 on the file of the Sub Court, Erode and numbered as OS.No.244 of 1997, thereafter, it was transferred to the District Court and re-numbered as OS.No.69 of 2004. Pending the said suit the plaintiff in OS.No.69 of 2004 and the first defendant in the said suit trespassed into the suit property. Hence, the second defendant who has purchased the property from 1st defendant filed the suit in OS.No.249 of 2004 seeking recovery of possession.

The claim of the plaintiff in OS.No.249 of 2004 briefly stated reads as follows:

7. The suit property belonged to the first defendant as per the decree passed in OS.No.288 of 1979 on the file of the I Additional Sub-Court, Erode and the sale deed dated 16.04.1993 was executed by the learned Subordinate Judge. The first defendant had sold the said suit property for valuable consideration of Rs.3,52,500/- under the sale deed dated 21.11.1996. The plaintiff had taken possession of the property and leased out the same to 5 tenants. This being so, defendants 1 and 2 herein, namely the father and daughter, colluded and filed a suit for partition in OS.No.246 of 1997 and pending the suit, they trespassed into the suit property in the 1st week of March 2000. Therefore, the plaintiff herein sought for recovery of possession. Expectedly the first defendant who is the vendor of plaintiff remained ex-parte. The second defendant alone resisted the suit contending that the suit property is the joint family property and the first defendant namely her father had no appreciable income to purchase the property out of his own income. It was also contended that the plaintiff was never put in a possession of the property at the sale itself is sham and nominal having been executed by her father to screen away the property from her.

8. On the basis of the above pleadings the learned I Additional Sub Judge, Erode framed the following issues:

1) Whether the plaintiff is entitled to delivery of vacant possession as prayed for?

2) Whether the plaintiff is entitled to past damages and future damages as prayed for?

3) To what relief if any the plaintiff is entitled to?

9. The suit for partition in OS.No.69 of 2004 and the suit for possession in OS.No.249 of 2004 were clubbed together and jointly tried, when the evidence was let in, in OS.No.69 of 2004 the plaintiff in OS.No.69 of 2004 had examined PW1 to PW3 on her side and marked Exs.A1 to A21. The second defendant in the said suit had examined 3 witnesses and marked Exs.B1 to B7.

10. On an analysis of oral and documentary evidence the learned trial Judge concluded that the suit property first item in OS.No.69 of 2004 was purchased by the first defendant therein out of the income from the ancestral property which was admittedly available with the first defendant. On the said finding the learned trial Judge concluded that the plaintiff is entitled to half share in 3 items of the properties, subject matter of OS.No.69 of 2004. Thus the learned trial Judge decreed the suit in OS.No.69 of 2004 granting a preliminary decree declaring half share of the plaintiff in the suit properties. As regards OS.No.249 of 2004 the learned trial Judge dismissed the suit in view of the decree passed in OS.No.69 of 2004 holding that the plaintiff is entitled to half share in the suit property subject matter of OS.No.249 of 2004 which were shown as item 1 in OS.No.69 of 2004. Aggrieved the 2nd defendant in OS.No.69 of 2004 who is also plaintiff in OS.No.249 of 2004 has come forward with the above appeals.

11. I heard Mr.S.Parthasarathi, learned Senior Counsel appearing for Mr.V.Kadirvelu for the appellant in both the appeals and Mr.S.V.Jayaraman, learned Senior Counsel appearing for Mr.K.S.Jeyaganesan learned counsel for the first respondent in both the appeals. Since the respondents 2 and 3 remained Ex-parte before the trial Court notice to them is dispensed with in these appeals.

12. Mr.S.Parthasarathi, learned Senior Counsel would contend that the only question that has to be decided in these appeals is with respect to the character of the 1st item of suit property in OS.No.69 of 2004 which has been admittedly sold by K.P.Chinnasamy in favour of the appellant. He has no objection for grant of preliminary decree in favour of plaintiff in OS.No.69 of 2004 in respect of items 2 and 3 therein. The learned Senior counsel would contend that if the conclusion of trial Court that the suit first item was not a

joint family property and was not purchased out of the income from the joint family nucleus as a corollary is suit in OS.No.249 of 2004 will have to be decreed. He would also contend that the suit in OS.No.69 of 2004 itself is a collusive suit brought out by the first defendant after having executed the sale deed in favour of the appellant herein.

13. Contending that the Suit property cannot be considered to be ancestral property purchased out of the income from the ancestral nucleus, the learned Senior counsel would point out that the partition in the family of Pongianna Gounder took place in the year 1977 and the first defendant was allotted the house property in Erode and small extent of agricultural land which were described as items 2 and 3 in OS.No.69 of 2004. The learned counsel would also point out that the sequence of the events would prove that the property was purchased by the first defendant out of his own funds without aid of the funds from ancestral nucleus.

14. Per contra Mr.S.V.Jayaraman, learned Senior Counsel appearing for the first respondent / plaintiff in OS.No.69 of 2004 would contend that the first defendant being the manager of the joint family, a presumption would arise that the property is joint family property. It is for the second defendant to prove by tangible evidence that the first defendant had enough separate income to purchase the property out his own funds. The learned Senior counsel would rely upon the judgment of the Supreme Court in D.S.Lakshmaiah and another v. L.Balasubramanyam and another reported in AIR 2003 SC 3800.

15. On the above arguments the following points arise for determination in these appeals:-

1) Whether the claim of the plaintiff in O.S.No.69 of 2004 that the first item of the suit property is a joint family property and was purchased out of the income from the ancestral nucleus by the first defendant has been established?

2) Whether the plaintiff in OS.No.69 of 2004 is entitled to half share in all the properties in OS.No.69 of 2004 as a co-parcener?

3) Whether the second defendant has discharged the burden of showing that the first defendant had individually purchased the property independent of ancestral nucleus.

4) Whether the plaintiff in OS.No.249 of 2004 is entitled to a decree for delivery of possession?

Point No.1 :

16. The case of the plaintiff is OS.No.69 of 2004 as set out in plaint is that the items 2 and 3 of the suit properties in OS.No.69 of 2004 are ancestral properties and it is from the income from the ancestral properties, the first defendant had purchased item 1 for a consideration of Rs.35,000/-. She would also contend that the first defendant, her father colluded with the second defendant and created the sale deed dated 21.11.1996. The fact that the plaintiff was married after the coming into force of Hindu Succession (TamilNadu Amendment) Act 1989 (Act 1 of 1990) and she would become co-parcener along with the father and in respect of the co-parcenary properties is not denied.

17. Inorder to see whether the first defendant would have had enough income from the ancestral nucleus to have purchased the suit first item even in the year 1979 from his father we will have to find out what are the properties that were allotted to the 1st defendant in the family partition that took place in the year 1977. The properties that were allotted to the first defendant are item 2 a residential house 94 cents of land in item 3 and 45 cents of land which he sold in 1981 for a consideration of Rs.8,500/-.

18. It is contended by the plaintiff that the first defendant had mortgaged his share in the ancestral property in 1973 for a sum of Rs.10,000/-. Therefore, according to the plaintiff the property allotted to him in the partition was capable of yielding the substantial income. The partition had taken place on 09.09.1977 and within a year from that date the first defendant has entered into an agreement of sale with his father for purchasing the first item in OS.No.69 of 2004 on 16.09.1978. It is also admitted case of the parties that an advance of Rs.20,000/- was paid on the date of agreement and a balance consideration of Rs.15,000/- was deposited in the Court even in the year 1979.

19. Mr.S.Parthasarathi, learned Senior Counsel appearing for the appellant/ second defendant in OS.No.69 of 2004 the purchaser would contend that the plaintiff herself has admitted that the first defendant was a real estate broker earning substantial amounts even in the year 1979. In OS.No.351 of 1982, which is the suit for maintenance filed by the mother of the plaintiff and the plaintiff who was then a minor, it is specifically alleged that the first defendant has been allotted certain property in the family partition and he is getting income of Rs.12,000/- from the allotted properties. It is also averred that the first defendant has been earning not less than Rs.15,000/- per annum from his real estate business. The fact that the first defendant was doing real estate business and was earning substantially from the real estate business is admitted.

20. It is contended that the suppression of the sale by Pongianna Gounder in favour of the first defendant by itself show that the case of the plaintiff is not bonafide. No doubt when it is established that there was a joint family and joint family had enough properties, the subsequent acquisition by the manager of the family in his name would be presumed to be joint family properties. In order to invoke the said presumption

i) It should be initially established that there was joint family

ii) The joint family was possessed of properties.

iii) there was substantial income from the joint family properties.

iv) there was substantial surplus after meeting the expenses of the joint family and it was that surplus that contributed to the purchase of property in the name of the manager.

21. Unless the plaintiff establishes the above 4 ingredients, the court cannot presume that the property standing in the name of the manager is a joint family property. The learned Senior Counsel for the respondents Mr.S.Jayaraman would rely upon observations of Hon'ble Supreme Court in D.S.Lakeshmaiah's case referred to supra, which are as follows.

"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. "

22. In the light of the above observation of the Hon'ble Supreme Court, the learned senior counsel would contend that it is for the second defendant to show that the first defendant had substantial income apart from the income from the joint family property, so that he could have purchased the property of his own separate income.

23. As already pointed out the first defendant was allotted a residential house in which he was residing. Apart from the residential house, he was allotted a half share of extent in 1 acre and 88 cents of land which is about 94 cents. He had sold 41 cents in the year 1981 for a consideration of Rs.8,500/- out of the joint family properties. Therefore, at best the first defendant was possessed of about 1 acre and 28 cents of agricultural land and the same was allotted to him only as per the compromise final decree dated 09.09.1977. Whereas, the agreement for purchase of the first item of

property in OS.No.69 of 2004 was entered into on 16.09.1978 that is within a period of about a year from the date of compromise decree. An advance of Rs.20,000/- was paid on the date of agreement itself and balance sale consideration of Rs.15,000/- was paid in 1979 immediately after filing of the suit for specific performance in OS.No.288 of 1979. Therefore, the case of the plaintiff that the first defendant has been allotted substantial property in the partition and possessed of sufficient means which would have contributed to the purchase of item 1 is highly improbable.

24. Of course the learned counsel for the respondent/ plaintiff would contend that the appellant/ second defendant had knowledge of the factum of existence of daughter of the first defendant and therefore, he should have made enquiries to find out whether the properties were purchased out of the joint family funds or not.

25. I do not think that the second defendant could be faulted for purchasing the property. Even in the plaint filed by the plaintiff and her mother in OS.No.351 of 1982 they have specifically averred that first defendant was a real estate broker having substantial income. The income from his occupation of a real estate broker was shown as Rs.15,000/-, and the income from landed property was shown at Rs.12,000/- per annum. This by itself would show that the first defendant was independently doing business and earning money apart from having the ancestral property. It is also admitted that the suit in OS.No.351 of 1982 was not prosecuted and the same came to be dismissed.

26. Mr.S.Parthasarathi, learned Senior Counsel appearing for the appellant would rely upon the judgments of this Court in Amirthalingam Vs. Uthayathamma and others reported in 1999-2-LW-713 and Muniappa Naicker Vs. Balakrishna Nayar reported in 1998-2-LW-259. In both the said judgments this Court had held that a co-parcener, who claims that the property standing in the name of the manager of the family was purchased from and out of the nucleus, has to prove:

1)that the income from the nucleus was so much that there was sufficient surplus left to purchase the property; and

2)that the property was purchased by sale of ancestral property that is by detriment to the joint family property.

27. It is not the case here that some joint family property was sold and the said sale proceeds were utilized in purchase of suit item No.1. On the other hand, it is the consistent case of the parties that from and out of the income from the joint family nucleus, the said item 1 was purchased

by the first defendant in his capacity as manager of the family. There is no evidence to show the amount of income that was earned by the first defendant from the ancestral property that was used for purchase of item 1 of the suit property. In the absence of such evidence, I do not think the claim of the plaintiff that the suit property has been acquired by the first defendant from and out of the joint family nucleus can be accepted. Therefore, first question is answered against the plaintiff.

Point No.2:

28. In view of the answer to the first point that the plaintiff has not established the first item of the suit property in OS.No.69 of 2004 was purchased by the first defendant out of ancestral nucleus, she would not be entitled to any share, even though she became co-parcener in view of the Hindu Succession (TamilNadu Amendment) Act, 1989 (Act 1 of 1990).

Point No.3:

29. In the absence of evidence to show that the first defendant had enough income and there was enough surplus which would have contributed to the purchase of the property in his name in the year 1979, the burden of establishing that the first defendant had enough separate income does not arise. Since the plaintiff has failed to establish that the suit first item was purchased by her father out of the surplus income which he was possessed of from the ancestral nucleus, I do not think the second defendant could be called upon to show that the first defendant had enough separate income. Even otherwise the plaintiff herself had in the suit filed by her mother in OS.No.351 of 1982, seeking maintenance, has admitted that the first defendant was a real estate broker and was earning substantial amount which was more than income from the ancestral property. Therefore, the said evidence would be sufficient to discharge burden on the second defendant to show that the first defendant had enough separate income out of which he had purchased the suit first item of the property.

30. In the result, all the three points are answered in favour of the appellant and the appeal is partly allowed. The decree for partition granted by the trial Court in respect of item 1 alone is set aside.

Point No.4:

31. Inasmuch as the partition decree has been set aside, the defendants have no right to be in possession of the property subject matter of OS.No.249 of 2004. The first defendant having sold the property subject matter of OS.No.249

of 2004 to the appellant herein under a registered sale deed dated 21.11.1996, the appellant herein would be entitled to decree for recovery of possession of the suit properties in OS.No.249 of 2004. The plaintiff also claimed mesne profits. The same is to be decided by way of separate proceedings under Order 20 Rule 12 C.P.C.

31. In the result, AS.No.530 of 2006 is allowed in part, a decree for partition granted in OS.No.69 of 2004 is set aside in respect of suit first item alone suit in OS.No.69 of 2004 will stand decreed granting a preliminary decree in favour of the plaintiff declaring her half share in suit items 2 and 3. No Costs. AS.No.531 of 2006 is allowed. The judgment and decree of the trial Court are set aside and the suit in OS.No.249 of 2004 will stand decreed as prayed for with costs throughout.

Sd/-
Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

jv/dsa

To

1. The Principal District Judge,
Erode.

2. The Section Officer,
VR Section, High Court, Madras.

+ 1 cc to M/s. K.S. Jayaganeshan, Advocate SR.53703

A.S.No.530 & 531 of 2006
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