

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.03.2018

CORAM:

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.451 of 2017

M.P.Sivasamy

.. Appellant/Plaintiff

Vs.

1. M.P.Palaniappan

2. M.P.Balasubramaniam ... Respondents/Defendants

Prayer : Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgement and decree dated 07.03.2011 passed in A.S.No.2 of 2009 on the file of the Additional District Judge (Fast Track Court No.2), Gobichettipalayam, confirming the judgement and decree dated 30.09.2008, in O.S.No.183 of 1998 on the file of the I Additional Subordinate Judge, Gobichettipalayam.

For Appellant : Mr.A.V.Arun

For Respondents: Mr.Guruprasad for R1

J U D G E M E N T

Aggrieved by the unanimous decisions of the Courts below in rejecting the relief of partition sought for, the plaintiff in O.S.No.183 of 1998 has preferred the above Second Appeal.

2. The plaintiff and the first and second defendants are the brothers born to Pongali. The said brothers also had a sister. It is stated that the father was maintaining the family business dealing in cotton and cotton seeds. The first defendant, who is the elder brother of the plaintiff, continued the business after the death of the father in the year 1962. However, he had to leave the village, as the business was not very successful and join the business with his maternal uncle. The plaintiff after completing his school, joined the Army in the year 1969 and he served there till 1977 and thereafter, he was discharged from service. According to the plaintiff, as the Army had taken care of his daily expenses, namely, food, dress etc. and had given other allowances, the entire salary, he received, was sent

to his mother. The second defendant, who is younger to the plaintiff, was employed in a transport corporation. It is the specific case of the plaintiff that after his joining in the business, a vacant site measuring 1872.50 sq.ft. was purchased in the name of the first defendant on 06.02.1981. The site was purchased for providing three separate houses for the three brothers. Accordingly, three separate houses were constructed, which is the item No.1 of the suit property. Yet another property was purchased out of the joint family funds, which is shown as item No.2 of the suit property. The plaintiff claimed that since the properties were purchased out of the joint family funds and they were also treated as joint family properties, he was entitled for a share. Thus, he wanted 1/3rd of the share in the property. Hence, he filed the suit.

3. The first defendant filed his written statement and resisted the suit denying the facts set out in the plaint leading to the cause of action for the suit. The first defendant also specifically denied the fact that the houses were built out of the joint family funds. It is his specific case that the houses were constructed with his own contribution and as it was purchased by the individual contribution, the plaintiff was not entitled for any claim, much less a claim that they are joint family properties. The second defendant also adopted the written statement filed by the first defendant.

4. The first defendant also filed a separate suit in O.S.No.209 of 1998 for the same relief of partition. Both the suits were tried in common and were dismissed. Aggrieved by the same, two appeals were filed in A.S.Nos.2 of 2009 and 74 of 1999. The appeals were also met with the same fate. Only the plaintiff in O.S.No.183 of 1998 has preferred the above second appeal and there is no appeal preferred by the other plaintiff, namely, the first defendant in the said suit. It is the specific case of the plaintiff that he was employed in the Army and was regularly contributing to the family by sending money to his mother. Even after his discharge from the service, he had contributed fair sum for the purchase of the suit items No.1 and 2. Since the first defendant had contributed for the construction of the houses in the first item of the suit property, the plaintiff pleaded that it should be treated as joint family funds and that he is entitled to 1/3rd share along with his other brothers.

5. It is the settled principle that a person, who affirms has to prove and the burden to prove lies upon him, who asserts and not upon the person, who denies.

6. In the present case, since the plaintiff has specifically pleaded that the suit properties are purchased out of the income

from the joint family exertion, the burden lies on him to establish that the properties are of joint family in nature and that he is entitled to a share in the same. As the suits were tried in common, the appellant/plaintiff in O.S.No.183 of 1998 was examined as D.W.1 during the trial. The first defendant was examined as P.W.1. The appellant/D.W.1 had specifically deposed that till 1990, the family was doing business jointly. Their father was dealing in cotton and cotton seeds business and the income from the said business was sufficient only for the maintenance of the family. On the said date, there were no properties belonging to the family. Further, he has stated that after the death of the father in the year 1962, his elder brother attempted to continue the business till 1965. As the same was not profitable, he had given up the said business. Having deposed that there was no income from the joint family business or joint family earnings, the appellant/plaintiff is making an attempt to state that the suit properties were purchased out of the joint family income. To corroborate his evidence, P.W.1 had also stated that they had never done the business jointly, and only after the demise of the father, as the elder brother he had taken over the business and it is not established that there was joint family contribution in the same. P.W.1 has also stated that he used to lend money to the appellant and the same would be returned to him immediately. When P.W.1 has deposed, as above, the question of contribution by the plaintiff for the purchase of the property does not arise, as it is only borrowal and repayment.

7. The next contention of the plaintiff/appellant was that the suit property was purchased by the wife of the plaintiff one Tamilselvi. The plaintiff's wife has also been examined as D.W.4 and Exs.B.42 to B.48 were marked. According to her, she was given jewels and other articles during her wedding and by selling the same, the suit properties in items 6, 7 and 9 were purchased. The Courts below admitting the evidence had held that the said items were separate property of Tamilselvi/the third defendant in O.S.No.209 of 1998.

8. Though the plaintiff had stated that the rice mill business was carried on jointly by the brothers, there is no evidence for the same. The house site to an extent of 1872.50 sq.ft. was also purchased only in the name of the first defendant and three houses were constructed in the same. No doubt, the plaintiff is residing in one of the houses. It is the specific case of the first defendant that he is only in permissive occupation. Merely because he was allowed to stay in one of the houses it should not automatically mean that the properties were treated as joint family properties.

9. Having failed to establish that the house site of 1872.5 sq.ft. was purchased out of the joint family income and three houses constructed on that were out of the income from the joint family business, the plaintiff is not entitled to claim for partition. The Courts below also, accordingly, had rightly dismissed the suits. The plaintiff in O.S.No.209 of 1998 also had not preferred further appeal. There is no infirmity in the findings by the Courts below and there is no question of law, much less substantial question of law that arises for consideration in this second appeal.

10. In the result, the Second Appeal is dismissed confirming the judgement and decree of the Courts below. No costs.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1. The Additional District Judge
(Fast Track Court No.2),
Gobichettipalayam.
2. The I Additional Subordinate Judge,
Gobichettipalayam.

+lcc to M/s.M.Guruprasad, Advocate Sr.No.17096
+lcc to Mr.AV.Arun, Advocate Sr.No.16772

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VR Section, High Court, Madras (2 copies)

AK (CO)
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Judgement in
S.A.No.451 of 2017

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