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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :31.08.2018

PRONOUNCED ON:22.10.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.424 of 2015

and

M.P.No.1 of 2015

Pichaimuthu ... Appellant/Defendant

Vs.

1.Rasu ... 1st Respondent/Plaintiff

2.Kaliyamoorthy

3.Veerammal ... Respondents 2 & 3/Defendants 2 & 3

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 06.08.2014 passed in A.S.No.2 of 2013 on the file of the Principal District Court, Perambalur, in modifying the judgment and decree dated 11.01.2013 passed in O.S.No.81 of 2010 on the file of the Sub Court, Perambalur.

For Appellant : Mr.P.Mani

For Respondents: Mr.P.Valliappan

J U D G M E N T

In this Second Appeal, challenge is made to the judgment and decree dated 06.08.2014 passed in A.S.No.2 of 2013 on the file of the Principal District Court, Perambalur, modifying the judgment and decree dated 11.01.2013 passed in O.S.No.81 of 2010 on the file of the Sub Court, Perambalur.

2. The second appeal has been admitted on the following substantial question of law:

Whether in law, items 5 & 6 of the suit properties could be partitioned as joint family properties when the said items are



the self acquired and absolute properties of the 1st defendant purchased out of his own funds?

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. The suit has been laid by the plaintiff against the defendants for partition. The plaintiff and the defendants 1 and 2 are brothers and the sons of Ponnusamy Muthu Raja and the third defendant is the sister of the plaintiff and the defendants 1 and 2. The relationship between the parties is not in dispute. Putting forth the case that the items 1 to 4 of the plaint schedule properties had been purchased by the father Ponnusamy Muthu Raja with the aid of the income derived from the ancestral nucleus and also further putting forth the case, the father had entrusted the management of the joint family with the eldest son namely the first defendant since 1980 onwards and accordingly also putting forth the case that in that capacity, with the aid of income earned from the joint family properties, the first defendant had purchased the items 5 and 6 of the plaint schedule properties in his individual name, but, in the capacity as the joint family manager, accordingly also blended the abovesaid items of the properties with the other joint family properties belonging to the family and thereby claiming share in the suit properties, the plaintiff has laid the suit for partition.

5. The first defendant had resisted the plaintiff's suit contending that, in particular, the items 5 and 6 of the plaint schedule properties are the separate properties of the first defendant and purchased by him out of his self income and earnings and not with the aid of income received from the ancestral nucleus and also contended that there are other properties acquired in the name of the plaintiff, the plaintiff's wife and the second defendant's wife and also contended that the father had alienated certain properties of the joint family to one Angamuthu and accordingly put forth the defence that the suit laid by the plaintiff without including the abovesaid properties is bad for partial partition and the purchaser Angamuthu as well as the wives of the plaintiff and the second defendant having not been impleaded as parties to the proceeding, the suit is bad for non-joinder of proper and necessary parties and accordingly prayed for the dismissal of the plaintiff's suit.



6. Based on the materials placed on record, the trial court was pleased to decree the suit in respect of the items 1 to 4 of the plaintiff schedule properties by granting a preliminary decree as prayed for in favour of the plaintiff and dismissed the suit in respect of the items 5 and 6 of the plaintiff schedule properties. Challenging the same, the plaintiff has preferred the first appeal. It is found that the first defendant has not preferred any first appeal challenging the judgment and decree of the trial court granting the preliminary decree of partition in favour of the plaintiff in respect of the share allotted as regards the items 1 to 4 of the plaintiff schedule properties. The first appellate court on an appreciation of the materials placed on record including the additional document pressed into the service during the course of the first appeal and accordingly, holding that the items 5 and 6 of the plaintiff schedule properties are also the properties acquired by the first defendant in his capacity as the manager of the joint family, only out of the income derived from the ancestral properties, granted the preliminary decree for partition in favour of the plaintiff in respect of the abovesaid items of the suit properties also. Challenging the same, the present Second Appeal has been laid by the first defendant.

7. Insofar as the judgment and decree of the trial court granting the preliminary decree for partition in respect of the items 1 to 4 of the plaintiff schedule properties, the same had become final. Therefore, it is unnecessary to dwell into the aspects of the case as regards the same in the present Second Appeal.

8. The only issue is whether the items 5 and 6 of the plaintiff schedule properties are the joint family properties of the parties or the separate properties of the first defendant. Materials placed on record go to show that the first defendant has laid the suit for partition in O.S.No.489 of 2000 on the file of the District Munsif Court, Perambalur against the brothers and father and however, did not prosecute the said suit and left it go for dismissal. It is found that in the abovesaid suit, the first defendant has not included properties said to have been acquired in the name of the plaintiff, the plaintiff's wife and the wife of the second defendant as well as the properties alienated by the father in favour of Angamuthu. No doubt, on a perusal of Exs.B1 to B4, it is found that the properties standing in the name of the plaintiff, the plaintiff's wife and the wife of the second defendant had been acquired after the institution of O.S.No.489 of 2000. Still it is seen that the first defendant has not endeavoured to include those properties in the suit laid by him in O.S.No.489 of 2000. Furthermore, he has not endeavoured to include the properties alienated by his father to Angamuthu in the abovesaid suit. He



has also not impleaded the wives of the plaintiff and second defendant, Angamuthu as parties to the abovesaid suit. Be that as it may, the above suit has been dismissed for non-prosecution. The same could be seen from the decree copy marked as Ex.A7. In such view of the matter, as rightly determined by the Courts below, the first defendant cannot now plead and complain that the properties acquired in the name of the plaintiff, his wife and the wife of the second defendant as well as the properties alienated by the father to Angamuthu are the joint family properties and therefore, those properties should also be included in the present suit and the abovesaid parties should also be impleaded as proper and necessary and parties to the present suit. Therefore the rejection of the abovesaid defence projected by the first defendant by the Courts below, in my considered opinion, do not warrant any interference.

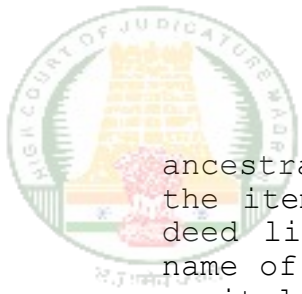
9.The main point that arises for consideration in this matter is whether the items 5 and 6 of the plaint schedule properties are the separate properties of the first defendant or the joint family properties of the parties concerned. In this connection, the first appellate court seems to have relied upon the written statement of the father filed in O.S.No.489 of 2000, whereunder he has raised the contentions that the abovesaid items had been purchased by the first defendant in his capacity as the family manager out of the income derived from the ancestral properties and on the footing that the first defendant has not filed any reply statement repudiating the abovesaid contentions of the father raised in the written statement in O.S.No.489 of 2000 and also holding that the above statement of the father attracts section 32 (6) of Indian Evidence Act and based on the same, the first appellate court seems to have granted the decree for partition in respect of the items 5 and 6 of the plaint schedule properties determining that they are also the joint family properties of the parties. Furthermore, reliance is placed upon the sale deed marked as Ex.A5 whereunder the items 5 and 6 of the properties had been purchased by the first defendant in his capacity as the manager and accordingly holding that the same should have been acquired by the first defendant only in his capacity as the family manager out of income of the joint family properties proceeded to hold that the items 5 and 6 of the plaint schedule properties are also the joint family properties of the parties concerned.

10.However, as rightly contended by the first defendant's counsel, section 32 (6) of the Indian Evidence Act would not apply to the written statement pleas raised by the father in O.S.No.489 of 2000. When it is found that the above contentions put in the written statement by the father had been made after the dispute had arisen between the parties concerned and furthermore, when the pleas of the written statement cannot be brought within the ambit of Section 32 (6) of the Indian



Evidence Act, the determination of the first appellate court that merely because, the first defendant has not filed a reply statement to the same, the same is admissible as evidence as provided under Section 32(6) of the Indian Evidence Act as such cannot be countenanced. Accordingly, it is found that in my considered opinion, the first appellate court has erred in holding that the written pleas of the deceased father put forth in O.S.No.489 of 2000 would attract Section 32(6) of the Indian Evidence Act and the same cannot be sustained in the eyes of law.

11.The reliance placed by the first appellate court on the document Ex.A5 sale deed that inasmuch as the same had been entered into by the first defendant as the manager of the family as recited therein, should only meant to be the joint family of the parties also cannot be accepted. Materials placed on record go to show that the first defendant got separated from the family and living with his wife and children separately during the relevant point of time. In this connection, the plaintiff examined as P.W.1 would depose that the items 5 and 6 of the plaint schedule properties had been acquired in the name of the first defendant and at that point of time, the father was not well. However, when at the relevant point of time, the father was alive, merely because he was unwell, would not deter the parties in taking the sale deed in the name of the father in respect of the items 5 and 6 of the plaint schedule properties. Therefore, the reasoning of the first appellate court that the items 5 and 6 of the plaint schedule properties had not been acquired in the name of the father and acquired only in the name of the first defendant at that point of time, as the father was not maintaining good health, as such, cannot be straightaway accepted. When it is found that at the relevant point of time, the father was the eldest member and if really the items 5 and 6 of the plaint schedule properties had been acquired out of the income derived from the joint family properties, the same would have acquired only in the name of the father and not in the name of the first defendant. Furthermore, as could be seen from the evidence of the first defendant, he has denied that he was the manager of the family consisting of his brothers and sisters at the point of time of the acquisition of the items 5 and 6 of the plaint schedule properties. On the other hand, it is found that the first defendant had separated from the family and living separately with his wife and children during the relevant point of time and accordingly, it is seen that merely because the recitals are found in Ex.A5 that the said properties had been acquired by the first defendant as the family head, it cannot be held that the same had been acquired by the first defendant as the family manager consisting of his brothers and sister. If that be so, when at the relevant point of time, the father was very much alive as abovenoted, if really the income from the



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ancestral properties had been the source for the acquisition of the items 5 and 6 of the plaint schedule properties, Ex.A5 sale deed like the other sale deeds would have been acquired in the name of the father. In such view of the matter, merely from the recital in Ex.A5 that the first defendant acquired the said properties as the family head cannot be construed that as the family manager of his brothers and sister, he had acquired the said properties under Ex.A5. There is no material placed on record to show that at the point of time of Ex.A5 sale deed, the first defendant was acting as the manager of the family consisting of his brothers and sisters, particularly, at the relevant point of time when the father was alive. Furthermore, when according to the first defendant, the parties namely the plaintiff, first defendant as well as the second defendant are found to have acquired the properties in their individual names as well as in the names of their wives, as could be seen from the materials placed on record, when according to the plaintiff, the properties acquired in his name and in the name of his wife and in the name of the wife of the second defendant are the separate properties, his case that the properties acquired in the name of the first defendant should only be treated as the joint family properties as such cannot be readily countenanced. Particularly, when there is no material to show that only with the aid of ancestral nucleus, the first defendant had acquired the said properties under Ex.A5 sale deed. Furthermore, there is no material to show that, following Ex.A5 sale deed, the items 5 and 6 of the plaint schedule properties had been blended with the other joint family properties and enjoyed by the members of the joint family in common as such. In particular, when at the time of Ex.A5, there is no material to hold that the first defendant was acting as the family manager consisting of the father, his brothers and sisters, merely because, the father was ill at the relevant point of time, it cannot be held that the first defendant was the family manager, even at the point of time of acquisition of the items 5 and 6 of the plaint schedule properties under Ex.A5. On the other hand, when the materials placed on record go to show that at the relevant point of time i.e., 1980 onwards the first defendant had been living separately with his own family and when the parties had been acquiring the properties in their individual names as abovenoted and when according to the plaintiff, the properties acquired in the individual names of the other members and their wives respectively are their self acquired properties and only the properties acquired in the name of the first defendant are the joint family properties derived from the income of the joint family sans any material pointing to the same as above discussed, it is seen that the first appellate court is not justified in holding that the items 5 and 6 of the plaint schedule properties are also the joint family properties of the parties and that the plaintiff is entitled to claim partition in respect of the said properties also. If the logic applied by



the first appellate court that inasmuch as the first defendant had not filed any reply statement to the written pleas of the father in O.S.No.489 of 2000, the items 5 and 6 of the plaint schedule properties should be held to be the joint family properties, the same applies to the present case also as to the written pleas raised by the first defendant contending that the properties acquired in the name of the plaintiff, his wife and the wife of the second defendant are also the joint family properties and despite the same, plaintiff and the second defendant having not filed any reply statement repudiating the same. Still the first appellate court proceeded to hold that the said items of the properties are not the joint family properties and they are only the separate properties of the plaintiff, his wife and the wife of the second defendant. Therefore, it is found that different yardstick had been applied by the first appellate court for determining the character of the properties standing in the name of the first defendant and standing in the name of the plaintiff, the plaintiff's wife and wife of the second defendant.

12.In particular, when there is no acceptable and reliable material placed to hold that, at the time of Ex.A5 sale deed, the first defendant was acting as the family manager of the family comprising of his brothers and sisters and on the other hand, he had separated from the joint family and living with his own family members separately and the parties are found to be acquiring the properties in their individual names as above discussed, in such view of the matter, the first appellate court is found to have erred in determining that the items 5 and 6 of the plaint schedule properties are also the joint family properties of the parties. In the light of the above discussions, as right rightly determined by the trial court, the items 5 and 6 of the plaint schedule properties are only the separate properties of the first defendant purchased out of his own funds and they are not the joint family properties of the plaintiff and the defendants as put forth by the plaintiff and hence the first appellate court has erred in holding that the items 5 and 6 of the plaint schedule properties are also liable for partition as prayed for by the plaintiff. The substantial question of law formulated in the second appeal is accordingly answered in favour of the first defendant and against the plaintiff.

13.In the light of the above discussions, the judgment and decree dated 06.08.2014 passed in A.S.No.2 of 2013 on the file of the Principal District Court, Perambalur declaring that the plaintiff is entitled to obtain 1/3 share in the items 5 and 6 of the plaint schedule properties are setaside and in other



aspects the judgment and decree of the first appellate court are confirmed. Accordingly, the Second Appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

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Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

1. The Principal District Judge,
Principal District Court, Perambalur.

2.The Subordinate Judge,
Perambalur.

+1cc to Mr.P.Mani, Advocate sr.no.71854

+2cc to Mr.P.Valliappan, Advocate sr.no.71672, 71815

S.A.No.424 of 2015
and
M.P.No.1 of 2015

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