

IN THE HIGH COURT OF JUDICATURE OF MADRAS

Judgment Reserved on : 14.09.2017

Judgment Pronounced on : 19.03.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.BASKARAN

S.A.No.218 of 2011  
and  
and M.P.No.1 of 2011

1.C.Palanisamy  
2.C.Kulandaivelu ... Appellants/Dependents 1 & 2  
Vs.

1.C.Shanmugam  
2.C.Natarajan ... Respondents 1 & 2/Plaintiffs

3.A.Kaliammal (Deceased)  
4.S.Bakkiam (Deceased)  
5.Poovathal  
6.C.Sulochana  
7.A.Subramaniam  
8.P.Gandhimathi  
9.S.Maragatham  
10.S.Prabhu  
11.S.Yogeswaran

(Respondents 6 to 11 brought on record LRs of the deceased third respondent viz, A.Kaliammal Vide this Court by order dated 25.07.2017 made in CMP.Nos.20214 to 20219/2016 in SA.No.218/2011)

12.R.Sundaram  
13.S.Selva Maheswari  
14.D.Vishalakshi

(Respondents 12 to 14 brought on record LRs of the deceased 4th respondent viz, S.Bakkiam Vide this Court by order dated 25.07.2017 made in CMP.Nos.20214 to 20219/2016 in SA.No.218/2011)

15.A.Kasilingam

(R 15 implead vide this court order dated 19.03.2018 made in S.A.218/2011)

... Respondents 3 to 15/Defendants 3 to 5

This second appeal has been filed under Section 100 of CPC, against the judgment and decree dated 16.07.2009 passed by the learned Principal District Judge, Coimbatore, in A.S.No.23 of 2008, partly modifying the Judgment and decree dated 19.06.2007 passed by the learned Principal Subordinate Judge, Coimbatore O.S.No.677 of 2003.

For Appellants : Mr.R.Bharathkumar

For Respondents : Mr.S.N.Kirunbanandam  
for R1 and R2.  
Mr.S.Kumaradevan for R-5

Mr.B.Balamurugan for 6 to 10

Mr.P.Valliappan for 15  
R 11 to 14 - Not Ready Notice

#### JUDGMENT

The above second appeal arises out of the Judgment and Decree dated 16.07.2009 passed by the learned Principal District Judge, Coimbatore, in A.S.No.23 of 2008, partly modifying the Judgment and decree dated 19.06.2007 passed by the learned Principal Subordinate Judge, Coimbatore in O.S.No.677 of 2003.

2. Brief facts of the plaintiffs' case is as follows:-

The Plaintiffs and Defendants are brothers and sisters. While some of the suit properties originally belonged to the plaintiffs and defendants, Parents Chellakutti Gounder and Subbathal, who were owning ancestral property, from and out of the income of the ancestral property, some of the suit properties were purchased in the name of the plaintiffs, defendants and their parents jointly. During the life time of the Parents of Plaintiffs and defendants, no partition took place. Both the parents died intestate leaving behind the plaintiffs and defendants as their legal heirs. While the father Chellakutti Gounder died on 30.05.2000, mother Subbathal died on 16.02.1998. From the date of death of their father, both the plaintiffs and defendants are in joint possession and enjoyment of the suit property. Subsequently, as misunderstanding arose between themselves, the plaintiffs demanded partition by issuing legal notice dated 14.02.2002 and 26.04.2002, but the defendants failed to comply with the request of the plaintiffs. Hence, the plaintiffs have come forward with the suit for partition.

3. The defendants 1 and 2 filed their written statement stating that the plaintiffs are their brothers and defendants 3 to 5 are their sisters. The defendants 1 and 2 denied the allegations of the plaintiffs on the ground that during the life time of their father Chellakutti Gounder purchased Item No.4 of the suit property from and out of the income of the father as well as the defendants 1 and 2. Hence, the father of the plaintiffs made a partition in the year 1991. It was termed as Panchayat agreement. From the date of said Panchayat Agreement dated 29.10.1991, the plaintiffs and defendants 1 and 2 and the

father of the plaintiffs were in possession and enjoyment of the suit property in respect of their share allotted in the above said agreement. Subsequent to that, the defendants 1 and 2 obtained patta in their name and also paid taxes separately by them in their name. The 6th Item of the suit property was purchased by the defendants 1 and 2 in their name. The above said property is the exclusive property of the defendants 1 and 2. Since the family properties were already divided, the plaintiffs have no right to claim the partition.

4. The defendants 3 to 5 remained exparte and they did not come forward to contest the case.

5. In order to prove their case, the plaintiffs examined P.W.1 and produced documents Ex.A1 to Ex.A26 to substantiate their claim. On the side of the defendants, D.W.1 and D.W.2 are examined and produced documents Exs.B1 to B19 to prove their claim. The Trial Court, by its Judgment dated 19.06.2007 decreed the suit partly and granted partition to the plaintiffs with regard to the suit properties Item Nos.1,4 and 5, holding that the plaintiffs are entitled to 1/7th share each. Regarding Item No.2,3 and 6, the suit was dismissed. Aggrieved over the same, the plaintiffs preferred the first appeal before the Principal District Court, Coimbatore. After contest the case, the first appellate Court modified the trial Court decree and judgment and allowed the first appeal in part and decreed the suit as regards Item No.1,4, 5 and 6 holding the plaintiffs and defendants are entitled to 8/35 share each. Regarding Item No.2 and 3, the trial Court judgment and decree was confirmed. Aggrieved against the decree and judgment of the first appellate Court, the defendants 1 and 2 have preferred the present second appeal.

6.The learned counsel appearing for the appellants came forward with this second appeal with the following substantial questions of law?

A)Is not the Judgment of the Lower Appellate Court vitiated by erroneous application of law relating to proof of joint family property contrary to axiomatic principles in law that there must be proof of existence of joint family nucleus yielding substantial income to characterise that the properties standing in the name of individual member are joint family properties i.e. Item-6 of suit property?

B) Is the Appellate Court correct and justified in modifying the well considered judgment of the Trial Court without framing proper points that arise for consideration ?

C) Have not the Appellate Court misread and misinterpreted the evidence of D.W.1 while modifying the judgment of the Trial Court and the evidence if property read and understood the appellate court could have held that there

was no joint family after the marriage of plaintiffs?

D) Is the Appellate Court correct and justified in modifying the judgment of Trial Court in failure of discharge of initial burden of proof by the Plaintiffs that there was joint family nucleus yielding substantial income to acquire some of the suit properties ?

E) In the absence of proof of yielding income from item-4 of the suit property whether the Lower Appellate Court is correct in law holding that item-1, 5 and 6 are joint family properties in ancestral character ?

F) Whether the Judgment and Decree of the Lower Appellate Court is vitiated on the ground of perverse ?

7. The learned counsel appearing for the appellants/ Defendants 1 and 2 would submit that the Trial Court has dismissed the claim of the plaintiffs for partition on the ground that proof of existence of joint family nucleus yielding substantial income to characterize the properties standing in the name of individual member or joint family properties, that is the 6th item of the suit property. Further would contend that the first appellate Court without framing proper points modified the well considered judgment of the trial Court is erroneous. The evidence of D.W.1 was misinterpreted and misled by the first appellate Court. The trial Court came to a conclusion that the plaintiff shifted to discharge the initial burden as there was joint family nucleus yielding substantial income to acquire some of the suit properties without any proof on the side of the plaintiffs. The first appellate Court modified the findings of the Trial Court which is erroneous. In the absence of proof of yielding the income from Item No.4 of the suit property, the finding of the first appellate Court holding that Item Nos.1,5 and 6 are joint family property in ancestral character is absolutely against the law and without evidence. Hence, he sought for allowing this appeal and to set aside the decree and judgment of the first appellate Court.

8. The learned counsel appearing for the respondents/ plaintiffs contended that the first appellate Court came to the conclusion only on the basis of the evidence of the second defendant as D.W.1. His evidence alone is sufficient to come to a conclusion that the Item No.4 of the suit properties yielded income. Contra to that, on the side of the defendants 1 and 2 have not put forth any documentary evidence to show that Item Nos.1,5 and 6 were purchased from their own income. In such circumstances, the findings of the first appellate Court has no infirmity, the question of law raised by the appellants are not sufficient to interfere with the findings of the first appellate Court. Hence, the second appeal is liable to be dismissed.

9. I have heard the rival contentions and perused the materials available on record.

10. The points for consideration is that whether the findings of the first appellate Court based upon the evidence to prove that the joint family properties yielded income.

11. On perusal, there are 6 Items of the suit properties involved in this suit. Out of six properties, Item Nos. 2 and 3 is concerned, the trial Court as well as the first appellate Court negatived the claim on the ground that the second item of the suit property measuring 4 acres 58 cents, out of which, the plaintiffs claim only 70 cents. So the trial Court negatived the claim on the ground of partial partition. The 3rd item of the suit property is given as pathway. The second item of the suit property has divided as plots and the said plots were sold. In such circumstances, the plaintiffs are not entitled to Item Nos. 2 and 3 of the suit properties. The plaintiffs have not preferred any appeal against the findings with regard to Item Nos. 2 and 3 of the suit property. The appellants have also not insisted or raised any question in respect of the same.

12. Hence, the question raised by the appellants herein with regard to the modification of the findings of the trial Court by the first appellate Court, the first appellate Court came to a conclusion that the 4th Item of the suit property yielded income and from and out of that income, the other suit properties were purchased in the name of the defendants 1 and 2. The above said facts were disclosed by D.W.1 who is the second defendant. D.W.1 has admitted in his evidence that during the life time of his father, he sold some properties, which were purchased by him for purchase of first item of suit property and the contribution made by the father and defendants 1 and 2. In the year 1982, the first item of suit property was purchased, the 4th item of the property belongs to ancestors. There is no partition effected with regard to ancestral property which is item No. 4, from the beginning they have cultivated in 4th item of the suit property and derived income by way of doing coolie works, family was maintained by his father. Every year, they are cultivating, but he did not know the exact income. All the members of the family were in joint family and single kitchen and lived into single room. The father of the defendants 1 and 2 were earning and for maintaining the family. Against the evidence of D.W.1, the plaintiffs 1 and 2 have not produced any documentary evidences. Hence, the first appellate Court came to the conclusion that the item No. 4 of the suit property is the ancestral property, had derived income and all the family members lived jointly in a single room. From the joint earning, they have purchased Item No. 1 of the suit property. Subsequently, Item No. 5 of the suit property was also purchased through Ex.P4. During the period of purchase, there was no separation between the family members. Item No. 6 also purchased through Ex.P5 in the name of defendants 1 and 2 from and out of

the income of the joint family property. Even at the time of purchase of Item No.6 of the suit property also there was no separation among the family members. They were in joint possession and enjoyment in the joint family property. In such circumstances, the defendants 1 and 2 claimed that Item No.6 was purchased from and out of their own income.

13. To substantiate their claim, they have produced some documents, namely, Ex.B7 to Ex.B10. Ex.B7 to Ex.BP9 are Electricity Charges receipt and water charges receipts paid through said documents. As the elder male member transferred by one of the male member will not clothe with any special right was his individual property. The defendants 1 and 2 have not established that they were separated from the joint family and they were earning separately. In this regard they have not produced even a single paper to substantiate their claim. On the side of the defendants, Ex.B10 is also relied upon by the appellants simply because of the plaintiffs have not questioned the Ex.B10, which alone is not sufficient to come to conclusion that the defendants 1 and 2 were separated and they are having separate sufficient means and purchased the property in their same. On the side of the appellants, they also relied upon the reported decision in 2004 (4) CTC 2008 in R.DEIVANAI AMMAL(DIED) AND ANOTHER Vs. G.MEENAKSHI AMMAL AND OTHERS. In the above said Judgment, it has held as follows:-

"When members of joint family acquire property by their joint labour or joint business such property would be joint family property in absence of clear indication of contrary intention."

14.As per the above citation, the contrary intention ought to have been established by the defendants 1 and 2. In this case, no material is available to show that the defendants 1 and 2 has shown their contrary intention with regard their separate property. Hence, the above said reported decision is not in favour of the appellants.

15. The another Apex Court decision relied upon by the appellant reported in 2003 0 Supreme SC 818 in D.S.LAKSHMAIAH Vs. L.BALASUBRAMANYAM, wherein it has held 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.

16. As per the Apex Court verdict, it is clear that as per the admission of D.W.1, joint family nucleus was available other Item No.4 of the suit property. D.W.1 has clearly and categorically admitted in his evidence that his father and his brother, the first defendant were jointly earned and maintained the family. In such situation, the onus automatically shifted to the defendants to prove that with his own funds Item No.6 was purchased by them and not from the joint family nucleus. On the side of the defendants, neither oral nor documentary evidence to prove the above said principles. So, the trial Court finding was modified by the first appellate Court on the ground of admission made by the second defendant, since admission is substantial evidence. Regarding the partition suit is concerned, both the plaintiffs and defendants are same category as plaintiffs, the initial burden proved by the plaintiffs through admission of D.W.1. In such circumstances, the claim of the appellants is rightly negatived by the first appellate Court.

17. From the above said discussions, the finding of the first appellate Court does not suffer from any infirmity and there is no need to interfere with the said findings. The substantial question of law raised by the appellants are all clearly and rightly answered by the first appellate Court itself on the basis of evidence available on record. Therefore, this Court comes to a conclusion that this appeal has no merits and the same is liable to be dismissed.

18. In the result, the second appeal is dismissed. The Judgment and Decree dated 16.07.2009 made in A.S.No.23 of 2008 passed by the learned Principal District Judge, Coimbatore is hereby confirmed. Considering the relationship for the parties, there shall be no order as to costs. Consequently, connected MP.NO.1 of 2011 is closed.

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Sd/-  
Assistant Registrar

//True copy//

Sub Assistant Registrar

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To

1.The Principal District Judge,  
Coimbatore.

2.The Principal Subordinate Judge,  
Coimbatore.

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

+1cc to Mr.R.Bharathkumar, Advocate SR.No.20665

+1cc to Mr.S.N.Kirunbanandam, Advocate SR.No.20273

+2cc to Mr.P.Valliappan, Advocate SR.No.20732, 20733

S.A.No.218 of 2011

KJI (CO)

GMV (24/12/2018)



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