

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.11.2019

PRONOUNCED ON : 12.12.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

A.S.Nos.443 & 585 of 2011

A.S.No.443 of 2011

K.Perumal

...

Appellant

Vs.

1.Kathiravan

2.Sathya

3.G.Vimala

4.S.Suresh

...

Respondents

A.S.No.585 of 2011

G.Vimala

...

Appellant

Vs.

1.Kathiravan

2.Sathya

3.K.Perumal

4.S.Suresh

...

Respondents

Prayer:- First Appeal has been filed under Section 96 of CPC against the judgment and decree dated 30.06.2011 passed in O.S.No.127 of 2009 on the file of the Principal District Court, Namakkal.

For Appellant in
A.S.No.443 of 2011

: Mr.T.Dhanya Kumar

For Appellant in
A.S.No.585 of 2011

: Mr.R.Krishna Prasad
for M/s.Sarvabhauman Associates

For Respondent
Nos.1 & 2 : Mr.C.Jagadish
in both appeals

For Respondent No.3 : Mr.T.Dhanya Kumar
in A.S.No.585 of 2011

For Respondent No.3 : Mr.R.Krishna Prasad
In A.S.No.443 of 2011 for M/s.Sarvabhauman Associates

COMMON JUDGMENT

A.S.Nos.443 & 585 of 2011 are directed against the judgment and decree dated 30.06.2011 passed in O.S.No.127 of 2009 on the file of the Principal District Court, Namakkal.

2.For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3.Suit for partition.

4.The case of the plaintiffs in brief is that they are the children of the first defendant and the joint family consisting of the plaintiffs and the first defendant was owning properties in Pudukombai Village in Survey Nos.145/5C, 145/5, 145/4, 145/2, 145/3 and 144/1B comprising of an extent of 1 ½ acres and the first defendant was engaged in agricultural activities and cultivating sugarcane, paddy and turmeric etc., and out of

the income derived from the joint family properties, the first defendant as the Kartha of the family purchased the items 1 and 2 of the suit properties by way of the sale deeds dated 05.09.1986, 08.07.1991 and also the first defendant exchanged a portion of the properties to an extent of 3 ½ cents from item 1 to Sellappan and further, out of the income derived from the joint family properties, purchased the third item of the suit properties on 10.01.1996 and since then, it is only the joint family members abovesaid, who are in the possession and enjoyment of the suit properties. Further, the first defendant sold the ancestral properties at Pudukombai Village for Rs.1,00,000/- on 21.06.2001 to one Thangaraj and out of the amount derived therefrom, along with the third defendant purchased the 4th item of the suit properties on 04.07.2008. In all, according to the plaintiffs, each one of them is entitled to 1/3 share in items 1 to 3 of the suit properties and 1/6 share in the 4th item of the suit properties and while so, the first defendant had alienated the joint family properties in favour of the second defendant on 26.08.2009 and due to difference of opinion, the first defendant is living separately and thereby denying the share of the plaintiffs in the joint family properties and the alienation made in favour of the second defendant is not valid and binding on the plaintiffs and the first defendant has been proclaiming that the suit properties are his separate properties and hence, according to plaintiffs, the need for the suit for appropriate reliefs.

5.The first defendant resisted the plaintiffs' suit contending that the purchase of the items 1 to 3 of the suit properties by him as averred in the plaint is true, but it is false to state that the items 1 to 3 of the suit properties had been purchased out of the income derived from the joint family properties and according to him, no income had been derived from the ancestral properties situated at Pudukombai Village and the first defendant was engaged in milk vending business and also doing money lending business and out of the income derived therefrom, purchased the items 1 to 4 of the suit properties and the suit properties, as such, are the self acquired properties of the first defendant and thereby, put forth the contention that the plaintiffs are not entitled to claim any share in the suit properties on the footing that the suit properties are the joint family properties and accordingly, prayed for the dismissal of the plaintiffs' suit.

6.The second defendant resisted the plaintiffs' suit contending that the first defendant's family was not owning any ancestral property as put forth in the plaint and the suit properties are the self acquired properties of the first defendant and the second defendant purchased the property from the first defendant on 26.08.2009 for a valid consideration and is a bona fide purchaser for value without notice and in the event of this Court holding that the plaintiffs have any share in the suit properties, particularly, in the property purchased by the second defendant,

accordingly, prayed as per equity, the property purchased by the second defendant may be allotted to the share of the first defendant and prayed for the dismissal of the plaintiffs' suit.

7.On the basis of the abovesaid pleas put forth by the respective parties, the following issues were framed by the trial Court for consideration:

" (1).Whether the plaintiffs are entitled to 1/3rd share in item 1 to 3 of the properties?

(2).Whether the plaintiffs are entitled to 1/6th share in item 4 of the properties?

(3).Whether the plaintiffs are in joint possession with the 1st defendant and the court fee paid is correct?

(4).To what relief if any the plaintiffs are entitled to?"

8.In support of the plaintiffs' case, PWs1 to 4 were examined and Exs.A1 to A6 were marked. On the side of the defendants, DWs1 to 3 were examined and Exs.B1 to B4 were marked. Exs.C1 & C2 and Exs.X1 & X2 were also marked.

9. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to declare that the plaintiffs are each entitled to 1/3 share in the items 1 to 3 of the suit properties and 1/6th share each in item 4 of the suit properties and accordingly, granted the preliminary decree in favour of the plaintiffs. Impugning the same, the first and second defendants have preferred the abovesaid appeals respectively.

10. The following points arise for determination in this first appeal:

(i). Whether the suit properties are the joint family properties of the plaintiffs and the first defendant as put forth by the plaintiffs?

(ii). Whether the suit properties are the separate properties of the first defendant as claimed by him?

(iii). Whether the plaintiffs are entitled to claim partition and separate possession of their shares in the suit properties as put forth in the plaint?

(iv). Whether the second defendant is the bonafide purchaser of the suit property for value without notice?

(v).To what relief, the first defendant/appellant in A.S.No.443/2011 is entitled to?

(vi).To what relief, the second defendant/appellant in A.S.No.585 of 2011 is entitled?

(vii).To what relief the plaintiffs are entitled to?"

11.Point Nos.i to iv

From the materials placed on record and the submissions made, it is found that there is no dispute as regards the relationship between the plaintiffs and the first defendant. The plaintiffs are the children of the first defendant. It is also not in dispute that the joint family of the first defendant consisting of the first defendant and his children viz., the plaintiffs, was owning ancestral properties in Pudukombai Village as put forth in the plaint. Even the first defendant does not dispute the existence of the ancestral properties in Pudukombai Village as averred in the plaint. According to the plaintiffs, the suit properties had been acquired by the first defendant as the Kartha of the joint family out of the income derived from the joint family properties and thereby, it is put forth by the plaintiffs that they are entitled to claim partition and separate possession

of their respective shares in the suit properties as claimed by them. Further, according to the plaintiffs, with a view to deprive them of their lawful share in the suit properties, the first defendant had alienated the portion of the suit properties in favour of the second defendant without any authority and also started depriving the claim of share of the plaintiffs in respect of the suit properties and hence, according to the plaintiffs, they had been necessitated to levy the suit for appropriate reliefs.

12.The first defendant though had admitted the existence of the ancestral properties belonging to the joint family, according to him, no income had been derived from the joint family properties and put forth the case that the suit properties had been acquired by him out of his own separate income derived from milk vending business and money lending business and therefore, put forth the case that the plaintiffs are not entitled to claim any share in the suit properties. Similar defence has been put forth by the second defendant and contended that he has bona fide purchased the property from the first defendant for a valid consideration and therefore, according to the second defendant, the plaintiffs are not entitled to seek the relief prayed for in the suit.

13. In the light of the rival contentions put forth by the respective parties, as above pointed out, when the first defendant has not disputed that he is the Kartha of the joint family consisting of himself and the plaintiffs 1 & 2 and when it is found that the first defendant, during the course of his evidence examined as DW1, has admitted the existence of the ancestral properties, in the suit Village and also had admitted that a Well is situated in the ancestral properties naturally, it is evident that the income would have been derived from the ancestral properties. In this connection, the first defendant, during the course of his evidence at the time of cross examination, has deposed that he along with his son had alienated the ancestral properties in the year 2001 to Thangaraj and further, admitted that only out of the income derived from the sale of the abovesaid ancestral properties, he along with the third defendant had purchased the 4th item of the suit properties and thereby, stated that he and the third defendant have equal share in the 4th item of the suit properties and further, also admitted that he was having a sum of Rs.3,00,000/- in his custody during 2001 and the same is joint family fund and also admitted that he has no independent source of income and further admitted that only 30 days prior to the institution of the suit, difference of opinion had crept in between him and his son and accordingly, when it is found that from the abovesaid evidence of the first defendant, he has admitted the receipt of the income from the sale of the

ancestral properties and also admitted that he was having joint family fund of a sum of Rs.3,00,000/- during the year 2001 and when it is found that the ancestral properties belonging to the joint family were fitted with a Well and therefore, agricultural income would have also been received by the first defendant by cultivating the same and when according to the plaintiffs, the first defendant was engaged only in agriculture and not engaged in any other avocation and when as above pointed out, the first defendant admittedly is the Kartha of the joint family, in such view of the matter, the 4th item of the suit properties had been admittedly secured out of the sale proceeds of the ancestral properties and in such view of the matter, it is for the first defendant to establish that he had acquired the other item of the suit properties without any reliance upon the ancestral properties or the income derived therefrom and that he had acquired the same exclusively out of his own and independent income.

14.In this connection, the first defendant would put forth the case that he was engaged in milk vending and money lending business. As rightly determined by the trial Court, if really the first defendant was engaged in money lending business, some proof pointing to the same would have been projected by the first defendant to evidence the same. However, other than ***ipsi dixit*** testimony of the first defendant, there is no material to hold that the first defendant was engaged in money

lending business. Equally with reference to his claim that he was engaged in milk vending business, absolutely, there is no proof worth acceptance placed on the part of the first defendant. If really he had been engaged in milk vending business, he would have been a member of the milk vending society and the identity card of the society would have been issued to him and the same could have been produced by the first defendant to establish prima facie that he had been engaged in milk vending business during the relevant point of time and earning separate income. However, with reference to his independent avocation and derivation of the income from the same absolutely there is no material put forth by the first defendant.

15. Further during the course of his evidence, the first defendant has also admitted that he has put up a house in the second item and has been doing grocery business and from the said income, he had set up lorry business and handed over the same to the plaintiffs. Per contra, according to the plaintiffs, the lorry business had been started out of the Seervarisai money of the plaintiffs' mother and with the assistance of the plaintiffs and the first defendant had in no way contributed any sum with reference to the lorry business. Be that as it may, when it is found that the first defendant as the Kartha of the joint family has also been engaged in grocery business in the second item of the suit properties,

when the first defendant has failed to establish that he had acquired the second item out of his independent income and on the other hand, when from the admission put forth by the first defendant that he is possessed of all the joint family funds, that he is possessed of ancestral nucleus and though he would claim that no income was derived from the joint family nucleus, however, considering the nature of the agricultural lands constituting the ancestral nucleus fitted with the Well as put forth by the plaintiffs, there is every possibility of the income derived therefrom particularly, when other than agriculture, the first defendant has not established that he had been engaged in any other avocation as claimed by him. In such view of the matter, as put forth by the plaintiffs and as determined by the trial Court, the ancestral nucleus belonging to the joint family was the source for the acquisition of the suit properties by the first defendant and in such view of the matter, the trial Court was fully justified in holding that the first defendant had not acquired the suit properties out of his independent income as put forth by him and that, he has failed to establish that he had been deriving independent income out of the avocation in which he is said to have been engaged.

16.The counsel for the defendants contended that the trial Court erred in shifting the burden on the first defendant to establish that the suit properties are his separate properties, particularly, the plaintiffs

having failed to establish the obtainment of any income from the ancestral nucleus. However, as abovenoted, when the first defendant is admittedly the Kartha of the joint family and when the existence of ancestral nucleus has been admitted by both the parties and in addition to that, when it is found that the ancestral properties are capable of yielding income both by way of agriculture and by way of sale of the same and when it has been admitted by the first defendant that he had purchased the 4th item only out of the sale proceeds of the ancestral properties in the year 2001 and furthermore, when admittedly the first defendant had also been in the custody of nearly Rs.3,00,000/- during 2001 and when he has not established his source of the abovesaid amount naturally as contended by the plaintiffs' counsel, the same would have been derived by the first defendant only out of the income received from the ancestral nucleus and in such view of the matter, the contention of the defendants' counsel that the trial Court had shifted the burden erroneously on the defendants, as such, cannot be countenanced. In so far as the first defendant has not disputed that he is the Kartha of the family, in such view of the matter, considering the abovesaid factors, it is only upon the first defendant to establish that he had derived the suit properties without any recourse to the ancestral properties in any manner. However, as above pointed out, the first defendant has failed to establish the independent source of income in any manner, the obvious

conclusion that could be arrived at is that the suit properties had been derived by the first defendant only out of the assistance of the ancestral nucleus and therefore, the trial Court is found to be justified in holding that the suit properties are the joint family properties of the plaintiffs and the first defendant.

17.The first item of the suit properties is said to have been purchased by the second defendant from the first defendant. However when it is found that the first item of the suit properties is the joint family property and the plaintiffs also have share in the same, the sale transaction effected by the first defendant in favour of the second defendant would not bind the plaintiffs in any manner. That apart, the second defendant has not placed any material as to on what basis he had formed the conclusion that the first item of the suit properties is the independent property of the first defendant and not the joint family property. When with reference to the abovesaid case, there is no material forthcoming on the part of the second defendant and as above discussed, when there is no material on the part of the first defendant as above discussed, in all, it is found that the second defendant cannot be held to be a bona fide purchaser for value without notice. That apart, it is also seen that after the institution of the suit, the second defendant appears to have hurriedly put up construction in the property purchased by him

and the same could be gathered from the report of the advocate commissioner, who had visited the properties twice. The hurried nature in which the second defendant had put up construction in the suit property would only go to show that his endeavour is to keep the property purchased by him one way or the other without giving the shares of the plaintiffs to which they are lawfully entitled to. In such view of the matter, the second defendant cannot be allowed to contend that he is a bona fide purchaser for value without notice as put forth by him.

18. During the course of arguments, the counsel for the defendants put forth the contention that the plaintiffs' suit is bad for partial partition. As rightly put forth by the plaintiffs, no specific plea that the plaintiffs' suit being bad for partial partition has been raised by the defendants in the written statement. That apart, the defendants have also not come forward as to what are the properties left out by the plaintiffs in the suit, they have not given the description of the suit properties in any manner and also not established that the lorry business had been run out of the income derived from the joint family properties as such and the first defendant was instrumental in starting the lorry business and all put together, the claim of the defendants that the plaintiffs suit is bad for the non-inclusion of lorry business as the subject matter of the partition, as

such, cannot be accepted in any manner and rightly rejected by the trial Court.

19.In support of his contentions, the counsel for the defendants placed reliance upon the decisions reported in **2005 (5) CTC 264 (Savithiri Ammal Vs. Ilayaperumal and another), (2007) 10 Supreme Court Cases 602 (Makhan Singh (Dead) By LRs. Vs. Kulwant Singh), (2003) 10 Supreme Court Cases 310 (D.S.Lakshmalah and another Vs. L.Balasubramanyam and another) and 2013 (5) CTC 49 (Mariammal & another Vs. Subbuthai & others)**. The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

20.For the reasons aforesated, I hold that the suit properties are the joint family properties of the plaintiffs and the first defendant as put forth by the plaintiffs. I hold that the suit properties are not the separate properties of the first defendant as claimed by him. I hold that the second defendant is not a bona fide purchaser for value without notice as claimed by him. I therefore, hold that the plaintiffs are entitled to obtain partition and separate possession of their shares as claimed by them and as determined by the trial Court. Accordingly, point Nos.1 to 4 are answered.

21.Point Nos.5 & 7

In the light of the abovesaid discussions, the judgment and decree dated 30.06.2011 passed in O.S.No.127 of 2009 on the file of the Principal District Court, Namakkal, are confirmed and resultantly, both the first appeals are dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Index : Yes / No
Internet : Yes / No
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12.12.2019

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The Principal District Court, Namakkal.

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A.S.Nos.443 & 585 of 2011

T.RAVINDRAN, J.

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**Pre-delivery Judgment made
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