



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07..03..2019

CORAM

THE HON'BLE MR.JUSTICE V.BHARATHIDASAN

Appeal Suit No.884 of 2010

M.R.Ramamoorthy

... Appellant/Plaintiff

-Versus-

- 1.M.B.Rashakrishna Iyer (Died)
- 2.M.R.Srinivasan (Died)
- 3.Janaki Ammal (Died)
- 4.B.K.Rajalakshmi
- 5.B.R.Vasanta
- 6.M.M.Roja (Died)
- 7.N.R.Padmavathi
- 8.R.M.Lalitha
- 9.T.R.Kanchana (Died)
- 10.R.Vanaja
- 11.Mrs.S.Sundari
- 12.Mrs.Sri Lakshmi
- 13.Mrs.Anusuya
- 14.Mrs.Gayathri

[Respondents 11 to 14 were brought on record as  
LRs of the deceased 2nd respondent as per order of  
this court dated 28.11.2017 made in CMP Nos.20378 to  
20380 of 2017] in As No.884/2010

... Respondents/Defendants

Prayer : This Appeal Suit is filed under Section 96 ofCPC r/w  
under 41 Rule I and II of CPC against the judgment and decree  
dated 30.11.2009 made in O.S.No.248 of 2004 by the learned  
Additional District Judge, Fast Track Court-II, Kancheepuram.

For Appellant

: Mr.G.K.Sekar

For Respondent (s)

: Mr.S.Balasubramaniam for  
R4, R5, R7 & R8 to R10

Mr.N.Ramanujan for R11 to  
R14

R1, R2, R3, R6 and R9 Died

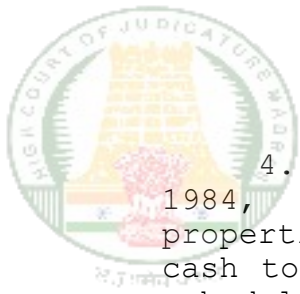


## JUDGMENT

The plaintiff, who succeeded partly before the court below in a partition suit, is the appellant herein. The suit in O.S.No.248 of 2004 was filed before the learned Additional District Judge, Fast Track Court-II at Kancheepuram, for preliminary decree for partition and separate possession of plaintiff's 1/3rd share in the suit A to C schedule properties. The learned Additional District Judge, by judgement dated 30.11.2009 decreed the suit partly, granting preliminary decree in respect of plaintiff's 10/27th share in Item Nos.2 & 8 in suit A-schedule property and C-schedule property and dismissed the suit in other respects. Challenging the above said judgement and preliminary decree, the plaintiff is before this court with this appeal suit.

2. The case of the plaintiff is that the 1st defendant is the father, 2nd defendant is the brother and the 3rd defendant is the mother of the plaintiff. The defendants 1, 2 and the plaintiff constituted a Hindu Joint Family. The joint family possessed various properties acquired out of the income of the joint exertion of the plaintiff and the 1st defendant of which few items were already divided amount the plaintiff and the defendants 1 and 2 by way of registered partition on 17.01.1977 and they have been in separate possession and enjoyment of the partitioned properties. At the time of partition, the properties described under A and B-Schedule were set apart to be partition at a later point of time and thus, the plaintiff is entitled for partition in suit A & B schedule properties. The house properties mentioned under Item Nos.3 to 6 in suit A-schedule stand in the name of the 3rd defendant, she was only a name lender and the same were purchased only from out of the savings of the plaintiff and the 1st defendant. The 3rd defendant has no right whatsoever and therefore, the plaintiff is entitled to 1/3rd share in the above said properties also.

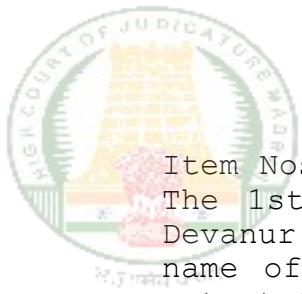
3. While so, the 1st defendant executed a registered Will on 01.07.1979 bequeathing the properties allotted to his share in the partial partition and also the properties mentioned in B-schedule as if they were his separate properties. The 1st defendant had no such right with regard to those properties as they are joint family properties and they were acquired by joint exertion of the plaintiff and the 1st defendant. Hence, the Will is not valid under law. so also, the 3rd defendant had executed a Will on 05.07.1979 bequeathing the properties under Item Nos.3 to 6 in A-schedule as if they were self acquired properties and the 3rd defendant had no right to execute the Will and therefore, the Will executed by the 3rd defendant is also not valid under law.



4. It is the further case of the plaintiff that in the year 1984, the 1st defendant sold away the entire joint family properties mentioned in B-schedule and converted the same into cash to an extent of rupees 8.50 lakhs which is Item No.7 in A-schedule. Thus, according to the plaintiff, he is entitled to 1/3 share in both items. Subsequently, on 05.08.1987, the defendants 1 and 3 had jointly executed a registered Will bequeathing a portion of the funds mentioned under item No.1 in A-schedule and the Will is executed by the defendants 1 and 3 is not valid in law. In the above circumstances, the plaintiff has no other option except to file the instant suit for partition and separate possession.

5. The contention of the defendants 1 to 3 in the written statement is that there were no joint family nucleus. They further contended that Item Nos. 3 to 6 in suit A-schedule were the absolute properties of the 3rd defendant mother. The 3rd defendant was doing silk saree weaving work and was also doing money lending business. At times, her parents had also given financial support for her. The 3rd defendant had purchased those properties in her name from out of her own individual income and from out of the sale proceeds of her jewels. Nothing was stated in the plaint in respect of the above properties in the earlier partition. The 1st defendant had acquired the properties described in A, B and C-schedule from out of his self efforts and there was absolutely no joint family nucleus. Those properties were purchased during the year 1955 by the time, the plaintiff was a minor and was 14 years old. In 1962, the plaintiff had completed his collegiate education and he had never involved in any business activities. Though the properties were the self acquired properties of the 1st defendant for the purpose of income tax, as per the advise of the 1st defendant, the same were shown as if they were joint family hotchpot and effected partition. The B-schedule property was also not the joint family property and the same was the self acquired property of the 1st defendant. The 1st defendant had sold the same for a total consideration of Rs.1,75,000/- and divided the sale proceeds among the plaintiff and the 2nd defendant and a small portion of the sale proceeds were given to the sisters of the plaintiff. The 1st defendant worked all along and earned money and from out of such individual income, he had purchased the properties. The 1st defendant as a father had thrown lot of the properties into the joint family hotchpot and divided the same. The plaintiff cannot question the alienation made by the 1st defendant and the sale proceeds were utilized by both the plaintiff and the 2nd defendant.

6. The defendants 1 and 3 had go every right to execute Will in respect of their absolute properties and the plaintiff cannot question the same. The claim for partition in respect of



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Item Nos.3 to 6 in A-schedule is barred by Benami Abolition Act. The 1st defendant had purchased more than 4 Acres of land in Devanur Village from out of his own and individual income in the name of the plaintiff when the plaintiff and the plaintiff had not stated anything about the same in the plaint.

7. The 2nd defendant had filed an additional written statement contending that the plaintiff is a court bird and he is having more than 15 civil cases before various courts besides few other criminal cases. The 2nd defendant further claimed that he is entitled to a share in C-schedule property. The 2nd defendant has also paid necessary court fees towards his share. According to the 2nd defendant, item Nos.3 to 6 in A-schedule property were the self acquired properties of his mother and she had executed a Will on 21.04.1999 bequeathing the same in his favour. In the above said Will the testator had imposed a condition for payment of rupees one lakh each to her daughters and another rupees one lakh to the son (Premkumar) and daughter (Sripriya) of the deceased Kanchana, who is also one of the daughters of the 3rd defendant. The 2nd defendant had fulfilled the condition imposed in the Will and paid rupees seven lakh on 06.08.2000. After the death of the 3rd defendant, the Will executed by her came into force and the 2nd defendant has become the absolute owner of the house properties under Item No.3 to 6 in A-schedule. It is further contended by the 2nd defendant that he has been paying municipal tax and other charges to the Government authorities for more than six years. The suit is bad for non joinder of necessary parties for not impleading the legal heirs of the deceased 9th defendant-Kanchana, who died on 27.01.1999.

8. The 4th defendant filed his written statement contending that the 3rd defendant was doing silk saree weaving and money lending business and item Nos.3 to 6 in A-schedule were purchased by her from out of her own and individual income. During life time, she had executed a Will in favour of the 2nd defendant and his daughters and after her demise, the Will came into force. So far as Item Nos.2 & 8 in A-schedule are concerned, the daughters of the defendants 1 and 3 are entitled to 1/27 share each. They are also entitled for a share in landed property described under C-schedule.

9. On considering the above pleading of either parties, the court below had framed the following issues for trial:-

(1) Whether the plaint schedule properties were purchased from out of the income from the joint family income?

(2) Whether the sale proceeds of the B-schedule properties were divided between the sisters of the plaintiff?



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(3) Whether the properties purchased in the name of the 3rd defendant were purchased only with her own income and by selling her sreedhana properties?

(4) Whether the Will executed by D1 and D3 are legally sustainable?

(5) Whether the plaintiff is entitled for a decree as prayed for?

(6) To what other reliefs the plaintiff is entitled?

Additional Issues:-

(1) Whether the suit is bad for non-joinder of necessary parties?

(2) Whether the quantum of share claimed by the plaintiff is correct?

(3) Whether C-schedule property is not a party of joint family property liable for partition?

(4) Whether B-schedule properties are the joint family properties of the plaintiff and D1 and D2?

(5) Whether plaintiff and other defendants are entitled to a share in B-schedule property?

(6) Whether under Item Nos.3 to 6 in A schedule standing in the name of the 3rd defendant are the joint family properties liable to be partitioned?

(7) Whether Item Nos.2, 7 and 8 are joint family properties?

(8) Whether the C-schedule property is the joint family property liable to be partitioned?

(9) To what share plaintiff and defendants are entitled in plant A and C-schedule properties?

During trial, on the side of the plaintiff, the plaintiff himself was examined as P.W.1 and as many as 5 documents were marked. On the side of the defendants, 2nd defendant himself was examined as D.W.1, one R.Doss was examined as D.W.2 and Tmt.Lalitha was examined as D.W.3 and as many as 66 documents were marked.

10. On considering the pleadings of the parties and both the oral and documentary evidence, the trial court has come to a conclusion that all the properties except Item No.3 to 6 in A schedule properties were self acquired properties of the 1st defendant and there was no proof that the joint family was having nucleus for acquisition of those properties. So far as item Nos.3 to 6 in A-schedule properties are concerned, the trial court has given a specific finding that they were all self



acquired properties of the 3rd defendant and she had purchased the same from out of her own individual income and the plaintiff is not entitled for any partition int he same. However, in respect of Item Nos.2 and 7 in A-schedule and C-schedule, which are self acquired properties of the 1st defendant, the trial court has found they were not covered under the Will and since the defendants 1 and 3 died, the plaintiff and the 2nd defendant are entitled to 10/27 share each and the daughters of the defendants 1 and 3 are entitled to 1/27 share each and accordingly granted preliminary decree for partition. Challenging the above said judgement and decree, the present appeal suit has been filed.

11. The points that arise for consideration in this appeal suit are as follows:-

(1) Whether the suit properties are joint family properties?

(2) Whether the plaintiff had established the existence of joint family nucleus and the suit properties were purchased from out of the income from the joint family nucleus?

(3) Whether suit Item Nos.3 to 6 in A-schedule are joint family properties or self acquired property of the 3rd defendant?

12. For the sake of convenience, the parties in this appeal suit will hereinafter be referred to as per their array before the court below.

Point Nos.1 and 2:-

13. It is the case of the plaintiff that he and the defendants 1 and 2 constituted a Hindu Joint Family and the joint family had possessed some properties and from out of the income from the joint family properties, the suit properties and other properties were purchased by the 1st defendant and the 3rd defendant and some of the properties were already divided between them under a registered partition deed on 17.01.1977, which has been marked under Ex.A.1. It is the further case of the plaintiff that at the time of division of properties, some properties were left out which are now sought to be partitioned by the plaintiff. The defendants contested the suit stating that the suit properties were self acquired properties of the defendants 1 and 3 and they were purchased from out of their own and individual income. There was no joint family nucleus available. The suit Item Nos.3 to 6 in A-schedule were standing in the name of the 3rd defendant (mother) and the same was purchased from out of her own and individual income. Since the properties were self acquired properties of the defendants 1 and 3 they had executed two separate Wills bequeathing their



properties to the 2nd defendant and their daughters who are also parties in the proceedings and the plaintiff cannot question the same.

14. It is the settled law that there cannot be a presumption that a family because it is joint, possessed joint property. The person asserting that the property to be joint has to establish that the family possessed of properties with the income of which the property could have been acquired. When it was established or admitted that the family possessed some joint property which from its nature and relative value may have formed sufficient nucleus from which the property in question may have been acquired, a presumption would arise that it was joint family property and the burden shifts to the party alleging self acquisition to establish affirmatively that the property was acquired without the aid of the joint family nucleus. However, the position is different in case where acquisition was made by the Manager of the joint family. Where the Manager claims that any immovable property was acquired by him from out of his own funds and not from out of the joint family nucleus, the onus is on the Manager to prove the same. In *Mallesappa v. Mallappa*, AIR 1961 SC 1268, the Hon'ble Supreme Court has held as follows:-

"15. In this connection it is necessary to bear in mind that Respondent 1 has not shown by any reliable evidence that the expenses for the said litigation were borne by him out of his pocket. It is true that both the courts have found that Respondent 1 purchased certain properties for Rs 600 in 1925 (Ex. B-4). We do not know what the income of the said properties was; obviously it could not be of any significant order; but, in our opinion, there is no doubt that where a manager claims that any immovable property has been acquired by him with his own separate funds and not with the help of the joint family funds of which he was in possession and charge, it is for him to prove by clear and satisfactory evidence his plea that the purchase money proceeded from his separate fund. The onus of proof must in such a case be placed on the manager and not on his coparceners.

"

15. In *M. Krishnan v. Ramaswami*, 1984 (97) L.W. 406, following the judgement of the Hon'ble Supreme Court in *Mallesappa* case cited supra, a Division Bench of this court has held as follows:-

"11. In this connection, it will be apposite to refer to two other decisions where



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the facts are more akin to the case on hand than the decisions cited by Mr. Jagadeesan. *M. Bondeppa Desai v. Desai Mallappa*, 1962 (2) M.L.J. 154, is a case where an item of property had been purchased by the manager of a joint family in his personal name. The bone of contention in that case was that the item of property was also a joint family property. Naturally the question arose regarding the burden of proof and the degree of proof required to establish the claim that the property was joint family property. The Supreme Court held as follows:-

"The onus of proof must in such a case be placed on the manager and not on his coparcener."

16. This judgement of the Division Bench of this court have been consistently followed in a catena of judgement by this court. However, mere existence of joint nucleus is not the sole criterion to come to the conclusion that such acquisition by the kartha of the joint family is joint family property. But, it should be established that joint family property generated sufficient surplus income and from that income the Manager or Kartha of the Joint Family had acquired the property.

17. Another Division Bench of this court in *Ramakrishnan v. Vishnumoorthi*, AIR 1957 Mad 86 has held as follows:-

"5. The proposition of law is well, established that it is not enough to show that the family had a nucleus of the family property in order that the later acquisitions made by the manager of the family should have the attribute of family character but what is necessary is that the nucleus must be such as to leave sufficient income therefrom after meeting the expenses as would enable the manager to acquire properties with that."

18. Yet another Division Bench of this court in *Kandaswami Chettiar v. Gopal Chettiar*, 1975 (II) MLJ 184 has held as follows:-

"17. .... If a co-parcener desires to establish that a property in the name of a female member of the family or in the name of the manager himself has to be accepted and treated as property acquired from the joint family nucleus, it is absolutely essential that such a co-parcener should not only barely



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plead the same, but also establish the existence of such joint family funds or nucleus. Even if the joint family nucleus is so established, the presumption that the accretions made by the manager or the purchases made by him should be deemed to be from and out of such a nucleus does not arise, if there is no proof that such nucleus of the joint family is not an income-yielding apparatus. The proof required is very strict and the burden is on the person, who sets up a case that the property in the name of a female member of the family or in the name of the manager or any other co-parcener is to be treated as joint family property. Such burden could be said to have been discharged and the usual presumption that such acquisitions are attributable to the joint family nucleus and its income would not automatically arise, but would depend upon proof of the availability of such surplus income or joint family nucleus on the date of such acquisition or purchases. The same is the principle even in cases where moneys were advanced on mortgages over immovable properties. That such a presumption would arise only in the above circumstances, are now very well established."

19. Keeping the above settled principles in mind, let me now consider the instant case. In the instant case, absolutely, there is no material available on record to show that the joint family was having nucleus for acquisition of the suit properties as alleged by the plaintiff. In the absence of any proof for the existence of joint family nucleus, it cannot be held that the properties were purchased by the 1st defendant from out of the income of the joint family nucleus and the plaintiff has miserably failed to establish that the properties were joint family properties.

20. The trial court on considering the entire evidence has come to the conclusion that the properties, except suit item Nos.3 to 6, were self acquired properties of the 1st defendant and the 1st defendant had during his life time executed a Will in favour of the 2nd defendant and his daughters. This finding was based on facts. I find no infirmity in the findings of the trial court warranting interference. Thus, Point Nos.1 and 2 are answered accordingly against the plaintiff.

Point No.3:-



21. It is also an admitted that suit Item Nos.3 to 6 in A-schedule properties were standing in the name of the 3rd defendant mother and the same were purchased by means of registered sale deed right from 1954 to 1958. It is the case of the plaintiff that the 3rd defendant was only a name lender and the properties were purchased from out of the income of the joint family nucleus. But, the defendants contended that the 3rd defendant was engaged in weaving and money lending business and from out of her own and individual income from his business, she had purchased the properties in question. When the plaintiff claimed that the properties standing in the name of the 3rd defendant were purchased from out of the joint family nucleus, the onus is on him to prove the same. In this regard also, there is absolutely, no evidence except the oral evidence of the plaintiff. As already held, in the absence of any such evidence to show that they joint family was having nucleus and that the properties in question were purchased from out of the income derived from the joint family nucleus, it cannot be held that they were joint family properties and the plaintiff is entitled for a share. The trial court on considering the available evidence on facts rejected the claim of the plaintiff in which this court does not find any perversity. Thus, this point is also answered against the plaintiff.

22. On considering the available materials, the trial court has rightly held that the Item Nos.2 & 8 in A-schedule and C-schedule were the self acquired properties of the 1st defendant and as the defendants 1 and 3 died pending suit intestate, the plaintiff, 2nd defendant and the daughters of the defendants 1 and 3 are entitled for shares in the same and accordingly, granted preliminary for 10/27 share each. Thus, this court does not find any infirmity in the judgement of the court below warranting interference at the hands of this court.

23. In view of the foregoing conclusions, the appeal suit fails and the same is liable to be dismissed.

24. In the result, the appeal suit is dismissed and the judgement and decree of the court below are confirmed. No costs.

Sd/-  
Assistant Registrar (CS-V)

//True copy//

Sub Assistant Registrar

kmk



To

The Addl. District Judge,  
Fast Track Court-II,  
Kancheepuram.

Copy To  
The Section Officer,  
VR Section, High Court,  
Madras.

+1cc to Mr.S.Balasubramanian, Advocate SR.No.21640

+2cc to Mr.G.K.Sekar, Advocate SR.No.21622

+2cc to Mr.N.Ramanujam, Advocate SR.No.21850

Appeal Suit No.884 of 2010

SSV(CO)  
GMY(18/09/2019)