

IN THE HIGH COURT OF JUDICATURE OF MADRAS

RESERVED ON : 11.12.2019

PRONOUNCED ON : 20.12.2019

CORAM:

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

Second Appeal No.736 of 2007
and
M.P.No.1 of 2007

Kaveri ...Appellant/Appellant/1st Defenant

Vs.

1.Anandayee ...Respondents 1 & 2/Respondents 1 & 2/Plaintiffs
2.Sampoornam
3.Subramani (Died)
4.Kandayee
5.Lakshmi ...Respondents 3 to 5/Respondents 3 to 5/
Defenants 2 to 4
6.Gowri
7.Manikandan
8.Senthil
9.Vicknesh ...Respondents 6 to 9/LRs of the Deceased R3
[Respondents 6 to 9 brought
on record as LRs of the deceased
R.3 vide M.P.Nos.1 to 3 of 2014
dated 30.10.2019]

Second Appeal filed against the judgement and decree dated 11.09.2006, passed by the Principal District Court, Salem, in A.S.No.30 of 2006, confirming the judgement and decree dated 07.11.2005, passed by the Sub Court, Sankari, in O.S.No.57 of 2004.

For Appellant :: Mr.N.Manokaran
For respondents :: Mrs.J.Prithvi
for M/s.S.Kaithamalai Kumaran
(for Respondents 1 & 2)
No appearance for Respondents 4 to 9
R3-Died

JUDGMENT

This Second Appeal has been filed against the judgement and decree dated 11.09.2006, passed by the Principal District Court, Salem, in A.S.No.30 of 2006, confirming the judgement and decree dated 07.11.2005, passed by the Sub Court, Sankari, in O.S.No.57 of 2004, which is one for partition and permanent injunction.

2.The appellant herein is the first defendant in the suit. The facts and circumstances which gave raise to the filing of the Second Appeal are briefly narrated hereunder:

(a)The plaintiffs, who are respondents 1 to 2 herein, have filed the suit before the Trial Court for partition of the suit properties and for allotment of their share, along with the other legal heirs of their deceased father Kandan @ Kandasamy. The father of the plaintiffs Kandan @ Kandasamy and his wife Kandayammal have two sons and four daughters from their wedlock. The said Kandasamy had purchased several properties between 1951 and 1964, as evidenced by Exs.A1 to A9. The said Kandasamy died on 08.09.1989. After his death, it appears that there was a partition deed in respect of a portion of the suit property, between the wife of the deceased Kandasamy, viz., Kandayeeammal and the defendants 1 and 2 in the suit, on 08.07.1993. As per the partition, defendants 1 & 2 in the suit were allotted certain properties. The said Kandayeeammal died subsequently on 24.12.2003. Thereafter, a demand was made by the plaintiffs for partition of the properties and subsequently a suit was filed in O.S.No.57 of 2004 for partition of the properties in 6 equal shares and for permanent injunction restraining the defendants 1 & 2 from alienating the suit properties.

(b) In the proceedings before the Trial Court, defendant Nos.2 to 4 have not filed any written statement, whereas the first defendant has filed the written statement and contested the suit.

(c)According to the plaintiffs, the properties, which were in the name of their father deceased Kandasamy, were self-acquired properties, as during his life time he was doing Contract work and carried out several contract projects and earned sufficient money to purchase several properties, as evidenced by Exs.A1 to A9 and in view of the fact that those properties, which were the subject matter of the suit, were self-acquired properties, the plaintiffs were entitled to their 1/6 share in the suit properties.

(d) The said claim of the plaintiffs was resisted by the defendants, particularly defendant No.1, who is the appellant herein, on the ground that their father had inherited certain ancestral properties and out of the sale proceeds of certain ancestral properties, other properties were purchased and therefore, the plaintiffs were not entitled to 1/6 share in the suit properties. Moreover, it was pleaded on behalf of the first defendant that the father, being the eldest person in the family, the properties were purchased in his name, since he being the Kartha of the family, and therefore, the same belong to the joint family. It was also pleaded that the suit was hit by non-joinder of necessary parties, since the siblings of their father, who were also joint owners of the ancestral properties, were not made parties to the suit. It was further pleaded that the suit was hit by partial partition, which was entered into between the mother of the plaintiffs and the defendants 1 & 2 in 1993, which was a registered partition deed, and the same was acted upon by the parties.

(e) The Trial Court, after hearing the parties and after perusing the pleadings and evidence placed on record, decreed the suit in favour of the plaintiffs on the ground that there was no recital in the sale deeds Exs.A1 to A9 to show that the properties were purchased from out of the sale proceeds of the ancestral properties. The properties were held in the joint patta in the name of the plaintiffs also, as evidence by Exs.A10 to A15. The Trial Court has also held that the suit was not hit by non-joinder of parties, since, all the joint patta holders need not be added as parties in the suit. The Trial Court further held that as far as the registered partition deed was concerned, cancellation of the same was not required, since it was not binding on the plaintiffs, who were not parties to the partition deed. Moreover, the Trial Court held that the plaint was subsequently amended, pending trial, and therefore, the partial partition of the suit properties cannot be held against the plaintiffs. In consideration of the above conclusion, the Trial Court has decreed the suit in favour of the plaintiffs.

(f) As against the judgement and decree of the trial Court, appeal in A.S.No.30 of 2006 was filed by the first defendant and the Lower Appellate Court, in agreement with the Trial Court, has confirmed the judgement and decree of the Trial Court by dismissing the appeal on 11.09.2006. Aggrieved by the judgements and decrees of both the Courts below, the present Second Appeal has been filed by the first defendant, as stated above.

3. The second appeal was admitted by this Court, on 31.08.2007, on the following following substantial question of law;

"Whether the Courts below have committed an error of law in holding the suit properties as the self acquired properties of the father of the plaintiffs and defendants overlooking the admission of P.W.1 that the properties were purchased in the name of the father from the earnings of all the members."

4.Shri.N.Manokaran, the learned counsel appearing for the appellant/Defendant No.1, would submit that the first defendant has resisted the claim of the plaintiffs stating that the properties held by the deceased Kandasamy, the father, were ancestral properties, particularly, 7th item of the suit properties. The sale deeds were taken in the name of the father, who was the 'Karthā' of the family and therefore, it cannot be described as self-acquired property at all. He would strenuously contend that the character of the suit properties was only ancestral in nature, since several properties were purchased from out of the sale proceeds of the ancestral properties and placed in the common pool for enjoyment of all the joint family members. Therefore, it was contended that the plaintiffs were not entitled to 1/6 share of the suit properties. Infact, it was also contended on behalf of the appellant herein that the said Kandasamy had siblings, who were also in possession and enjoyment of the suit properties and none of them was made party to the proceedings and therefore, the suit was hit by non-joinder of parties.

5.The learned counsel would also submit that the plaintiffs have not even taken any steps to cancel the registered partition deed effected in 1993, wherein a partial partition had taken place between the mother of the plaintiffs and D1 and D2, nor it was the case of the plaintiffs that the said document was not binding on them.

6.The learned counsel would submit that it is a settled legal principle that when there are ancestral properties available, there can be a presumption that the other properties were purchased from out of the income generated from the ancestral properties. In this case, since the father of the plaintiffs and the first defendant was a 'Karthā' of the family, there has to be a presumption that the subsequent purchases were made only from out of the income generated from the joint family properties. Once, the properties were in the name of Karthā, such presumption is legally valid.

7.The learned counsel for the appellant/D1 would also draw the attention of this Court to the deposition of P.W.1, who is one of the plaintiffs, who would admit that her father had ancestral properties. In fact, she has admitted that there were some properties held jointly as ancestral properties, in her

elaborate evidence given before the Trial Court. Infact, she would further admit that there were other persons who were part of the joint family along with her father. She would also depose that the properties were purchased in the name of the father and there were contributions from various others. In all, there was an admission of fact that the said Kandasamy has held properties belonging to various others as ancestral properties or joint family properties and as an elder member of the family, the properties were purchased in his name as Kartha of the family and therefore, the presumption could have been drawn that the properties under sale deeds Exs.A1 to A9 were bought actually from out of the income of the joint family ancestral properties.

8.The learned counsel would submit that the Lower Appellate Court had completely gone wrong in coming to a conclusion that the recitals found in the sale deeds did not indicate that the properties were purchased from out of the income of the ancestral properties. According to the Lower Court, the burden was heavily cast on the defendants to prove that the properties were purchased from out of the ancestral properties and in the absence of such proof, the version of the plaintiffs stood established. The Lower Appellate Court has also held that on behalf of the defendants, no document was produced to show that there was any sale of ancestral property and the purchase of the other properties under Exs.A1 to A9, was from out of the sale proceeds of the ancestral properties. The learned counsel would submit that unfortunately, the Courts below have not referred to the categorical and clear evidence deposed by the first plaintiff herself that several properties were held by the deceased Kandasamy, being a Kartha of the family.

9.The learned counsel for the appellant/D1, in support of his contention would rely on two decisions, viz., (i) the decision of the Hon'ble Supreme Court of India in the case of D.S.Lakshmaiah and another vs. L.Balasubramanyam and another [(2003) 10 Supreme Court Cases 310]. The learned counsel would draw the attention of this Court to the extensive narration of facts and the findings of the Hon'ble Supreme Court of India from paragraph Nos.7 to 20, which are extracted hereunder.

"7.The question to be determined in the present case is as to who is required to prove the nature of property whether it is joint Hindu family property or self-acquired property of the first appellant.

8. There was evidence and it has been established that Item No.2 measuring 15 guntas of land was joint Hindu family property but, admittedly, no evidence has been led that the said joint Hindu family property was yielding any income or that any nucleus was available with the aid whereof Item No.1 property could be purchased by the first appellant. Admittedly, no evidence has been led on behalf of the respondents/plaintiffs to show income from Item No.2 property or value of the property. At the same time no evidence has also been led by the first appellant to prove that he had any separate income so as to acquire Item No.1 property. In absence of evidence either way which party would succeed and which fail, is the question. The legal position is well settled as we will presently notice.

9. In Appalaswami v. Suryanarayanamurti & Ors. [AIR 1947 PC 189], in a partition suit filed against their father by minor sons from the first marriage, the father claimed the properties in question were his self-acquired properties and denied that the plaintiffs had any right to seek partition. The High Court, reversing the judgment of the trial court, held that the view expressed by the trial court that only joint family property was that which the father took under partition Exhibit A was not correct and further held that whole of the property set out in Schedule to the written statement of the appellant/father, which had been acquired after partition Exhibit A was joint family property. The contention accepted by the High Court was that the share which the father took under Exhibit A formed the nucleus from which all his further acquisitions sprang. The plea of the father that was accepted by the Privy Council was that the whole of the property that came to him under Exhibit A was intact and unencumbered except a small portion sold which amount had been debited against household expenditure. The Privy Council held that the Hindu law upon this aspect of the case is well settled. Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property is joint to

establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property. In the case before the Privy Council, on facts, it was held that the burden had shifted to the father to prove self-acquisition of properties as it was established that the family possessed joint property which from its nature and relative value, may have formed the nucleus to acquire the property in question. Those properties were large in number and have been noticed in Privy Council decision. However, on further facts found, it was held that the father had discharged that burden. The properties were held to be self-acquired properties of the appellant.

10. In *Srinivas Krishnarao Kango v. Narayan Devji Kango & Ors.* [AIR 1954 SC 379], the contention that was urged on behalf of the appellant was that the burden was wrongly cast on the plaintiff of proving that the acquisition of the properties were made with the aid of joint family funds, the argument being that as the family admittedly possessed the ancestral Watan lands of the extent of 56 acres, it must be presumed that the acquisitions were made with the aid of joint family funds and, therefore, the burden lay on the defendants who claimed that they were self-acquired acquisitions to establish that they were made without the aid of joint family funds and that the evidence adduced by them fell far short of it and that the presumption in favour of the plaintiff stood un rebutted. It was noticed by this Court that on the question of the nucleus, the only properties which were proved to belong to the joint family were the Watan lands of the extent of about 56 acres bearing an annual assessment of Rs.49/-. There was no satisfactory evidence about the income which these lands were yielding at the material time. Under these circumstances, noticing with approval the aforesaid Privy Council decision, it was held that whether the evidence adduced

by the plaintiff was sufficient to shift the burden which initially rested on him to establish that there was adequate nucleus out of which the acquisition could have made is one of fact depending on the nature and extent of the nucleus. The important thing to consider is the income which the nucleus yields. A building in the occupation of the members of a family and yielding no income could not be a nucleus out of which acquisitions could be made, even though it might be of considerable value. On the other hand, a running business in which the capital invested is comparatively small might conceivably produce substantial income which may well form the foundation of the subsequent acquisitions.

11. In *Mudi Gowda Gowdappa Sankh v. Ram Chandra Ravagowda Sankh* [(1969) 1 SCC 386], noticing the observations of Sir John Beaumont in *Appalaswami's case* (supra), it was reiterated that the burden of proving that any particular property is joint family property in the first instance is upon the person who claims it to be so. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. This is, however, subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate. We are unable to accept the contention of learned counsel for the respondents that the aforesaid later observations have been made without reasons or that the Privy Council's decision does not hold so. The observation that only after possession of adequate nucleus is shown that the onus shifts also get support from *Srinivas Krishnarao Kango's case* (supra) where, while considering the question of shifting of burden, it has been held that the important thing to consider is the income which the nucleus

yields.

12. In *Baikuntha Nath Paramanik (dead) by His L.Rs. & Heirs v. Sashi Bhusan Pramanik (dead) by his L.Rs. & Ors.* [(1973) 2 SCC 334], this Court again held that when a joint family is found to be in possession of nucleus sufficient to make the impugned acquisitions then a presumption arises that the acquisitions standing in the names of the person who were in the management of the family properties are family acquisitions.

13. In *Surendra Kumar v. Phoolchand (dead) through LRs & Anr.* [(1996) 2 SCC 491], this Court held that where it is established or admitted that the family which possessed joint property which from its nature and relative value may have formed sufficient nucleus from which the property in question may have been acquired, the presumption arises that it was the joint 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 funds.

14. We may now refer to three decisions whereupon reliance has been placed by learned counsel for the respondents. In *Mallesappa Bandeppa Desai & Anr. V. Desai Mallappa alias Mallesappa & Anr.* [AIR 1961 SC 1268], this Court held 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 in such a case has to be placed on the manager and not on his coparceners. It is difficult to comprehend how this decision lends any support to the contention of the respondents that in absence of leading any evidence, the claim of appellant No.1 of the property being self-acquired has to fail. In the cited decision, the manager was found to be in possession and in charge of

joint family funds and, therefore, it was for him to prove that despite it he purchased the property from his separate funds. In the present case, admittedly, no evidence has been led by the respondents that the first appellant was in possession of any such joint family funds or as to value or income, if any, of Item No.2 property. In

15. Achuthan Nair v. Chinnammu Amma & Ors. [AIR 1966 SC 411], it was noticed that there were number of properties owned by joint family which were received at the time of separation under a decree passed in a partition suit. The claim of the defendants in the written statement was that the property in question had been purchased from the private funds of defendant No.1 and her son defendant No.4. In this decision too, it was reiterated that when it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is a joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus. After noticing this settled propositions, it was observed that if a property is acquired in the name of a karanvan, there is a strong presumption that it is a tarwad (joint Hindu family) property and the presumption must hold good unless and until it is rebutted by acceptable evidence. This Court did not hold that if a property is acquired in the name of karta, the law as to presumption or shifting of onus would be different. The question of presumption would depend upon the facts established in each case. In the present case, no evidence of nucleus having been led, onus remained on the respondents and, therefore, there could be no question of presumption about the property being joint family property.

16. The last decision relied upon is Malappa Girimallappa Betgeri & Ors. v. R. Yellappagouda Patil & Ors. [AIR 1959 SC 906]. It cites with approval the earlier decision in

the case of Srinivas Krishnarao Kango (supra). On facts, it was noticed that the courts below had held that the property provided a sufficient nucleus of joint family property out of which the properties in question might have been acquired and the sufficiency of nucleus is again a question of fact. In view of those circumstances, there was presumption of the properties being properties of joint family and the said presumption had not been displaced.

17. In view of the aforesaid discussion, the respondents having failed to discharge the initial burden of establishing that there was any nucleus in the form of any income whatsoever from Item No.2 property and no other nucleus was claimed, the burden remained on the respondents to establish that Item No.1 property was joint family property. In this view, the fact that the first appellant has not led any evidence to establish his separate income is of no consequence insofar as the claim of the respondents is concerned. Under these circumstances, for failure to lead evidence, the respondents' claim of Item No.1 to be joint family property would fail as rightly held by the first appellate court.

18. 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.

19. Another contention urged for the respondents was that assuming Item No.1 property to be self-acquired property of appellant No.1, he blended the said property with the joint family property and, therefore, it has become the joint family property. Assuming the respondents can be permitted to raise such a plea without evidence in support thereof, the law on the aspect of blending is

well settled that property separate or self-acquired of a member of joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by the owner into the common stock with the intention of abandoning his separate claim therein but to establish such abandonment a clear intention to waive separate rights must be established. From the mere fact that other members of the family were allowed to use the property jointly with himself, or that the income of the separate property was utilized out of generosity to support persons whom the holder was not bound to support, or from the failure to maintain separate accounts, abandonment cannot be inferred, for an act of generosity or kindness will not ordinarily be regarded as an admission of a legal obligation {see Lakkireddi Chinna Venkata Reddy v. Lakkireddi Lakshamama [1964 (2) SCR 172] and K.V. Narayanan v. K.V. Ranganadhan & Ors. [(1977) 1 SCC 244]}.

20. In the present case, respondents have not led any evidence on the aforesaid aspects and, therefore, it cannot be held that the first appellant blended Item No.1 property into the joint family account."

10. The above narration of facts and finding ultimately rendered by the Hon'ble Supreme Court would disclose that if there is a presumption that the property being joint, the onus would shift on the person, who claims it to be a self acquired property, to prove that he purchased the property with his own funds and not out of the joint family nucleus that was available.

11. In this case, the learned counsel for the appellant/D1 would submit that the factum of ancestral property/joint family was clearly established even according to the evidence of P.W.1, particularly, item No.7 of the suit scheduled properties. But despite the existence of clinching material, the Courts below have held in favour of the plaintiffs, by overlooking the crucial aspect.

(ii) The decision of this Court in the case of Malla Naicker @ Singari and two others vs. Jeeva (minor) and two others [2012 (1) CTC 128. The learned counsel would draw the attention of this Court to paragraph No.18, which is extracted hereunder:

"18. Therefore, the law recognizes two standards of burden of proofs, one for the Kartha of the joint family and another for a co-parcener, when they claim that certain properties are their separate properties and not joint family properties. Admittedly, the joint family possessed of some nucleus, eventhough no evidence was adduced by the respondents/plaintiffs about the nature of income from that nucleus, in the absence of any source of independent income by the other co-parcener, in whose name, the property was purchased, it can be presumed that the joint family properties would have provided the consideration for the purchase of the suit properties."

12. In the above case, the learned Judge of this Court has dealt with the concept of 'presumption' in regard to the joint family properties in extenso and observed that unless it is established by the person, who claims that the properties were purchased with an independent source of income, in case of existence of joint family properties, the presumption always is that any subsequent purchase shall be deemed to be a purchase from out of the income derived from the ancestral property.

13. In the said circumstances, the learned counsel for the appellant/D1 would contend that both the Courts below have erred in allowing the claim of the plaintiffs by overlooking the legal aspects and also the factual senario, which was established beyond any doubt by the appellant/first defendant.

14. Per contra, the learned counsel appearing for the respondents/plaintiffs would submit that the father of the plaintiffs was an able person and the so called ancestral property, which was shown as item No.7 of the suit scheduled properties, was a small portion of the property and out of the sale proceeds of such small extent of property, father could not have purchased the large extent of property, as evidenced in Exs.A1 to A9. Being a successful Contractor, the father had sufficient income on his own for purchase of these properties. The learned counsel would also contend that no averments were found in the written statement that the suit properties were purchased immediately after the sale of ancestral property. According to the learned counsel, all the properties stood in the name of the father alone and not in the name of members of the joint family.

15. As regards the contention regarding the registered partition between the mother of the plaintiffs and D1 and D2,

the learned counsel would submit that it was not acted upon. As evidenced by the documents the patta stands in the name of the legal heirs, including the plaintiffs and the respondents herein. The learned counsel would draw the attention of this Court to the evidence of P.W.1, which was to the effect that her father was acting as Railway contractor and also a contractor for laying roads. Moreover, her brothers were also involved in the contract business. She would also categorically deny the stand that the suit scheduled properties were purchased from out of the sale proceeds of ancestral properties. The learned counsel would also draw the attention of this Court to the evidence of D.W.1, wherein D.W.1 admits that the properties were purchased in the name of the father alone. This statement was made by D.W.1 on the basis of the recitals in the sale deeds Exs.A1 to A9. However, D.W.1 denied the stand that the properties were purchased out of independent source of income of the father.

16.As far as the non-joinder of parties is concerned, the learned counsel for the respondents/plaintiffs would submit that the plaint was subsequently amended and there was an insertion of Paragraph No.V-A. According to the averments in Paragraph No.V-A of the plaint, the father purchased item No.7 of the suit properties out of his own funds and his Pangalis also purchased the properties in the said Survey Number separately. Therefore, the suit cannot said to be hit by non-joinder of parties. The factum of item 7 of the suit scheduled properties, being ancestral property, was also contested by the plaintiffs in their plaint. In these circumstances, the learned counsel for the respondents/plaintiffs would submit that the Courts below were right in decreeing the suit in favour of the plaintiffs, since the defendants have failed to establish their case beyond any doubt that the purchase of suit properties was from out of the sale proceeds of ancestral properties.

17.By way of reply, the learned counsel for the appellant/D1, Mr.Manoharan, would submit that the contention raised on behalf of the plaintiffs is contrary to the pleadings of the plaint as well as the evidence. According to the learned counsel, a mere mutation in the Revenue Records cannot be the basis for deciding the rights of the parties. According to him, the properties were purchased between 1951 and 1964 and there was no evidence on behalf of the plaintiffs to show that at the time of purchase of the properties, the deceased father was doing contract business. Finally, the learned counsel for the appellant/D1 would submit that as per Sub-Section (5) of Section 100 of C.P.C., this Court has the power to decide the Substantial Question of Law, at the time of final hearing.

18. Considered the arguments of learned counsel for the appellant/D1 and the respondents/plaintiffs. As far as the other defendants in the suit are concerned, according to the learned counsel for the appellant/D1, they did not contest the suit at all nor the appeal and they were also not represented before this Court. The contest is only between the appellant/D1 and the respondents/plaintiffs.

19. The said fact has also not been disputed by the learned counsel for the respondents/plaintiffs.

20. The entire case of the appellant herein rests on the averment and contention that the plaintiffs were not entitled to 1/6 share in the suit scheduled properties because of the fact that the suit properties were purchased by their father through income from out of the ancestral properties and therefore, the question of grant of any share to the plaintiffs did not arise at all.

21. In regard to the averment about the ancestral property held by the father of the appellant and the respondents/plaintiffs, as rightly contented by the learned counsel for the appellant/D1, P.W.1, in her evidence itself, has admitted that there were certain properties belonging to the joint family and in fact, P.W.1 has admitted that there were several other properties, other than what is described in item No.7 of the Suit scheduled properties, which were held jointly by the family members, but ofcourse, in the name of the deceased father alone, being a kartha of the family. In that case, the burden of proving the independent source of income, while purchasing the suit scheduled properties, as evidenced in Exs.A1 to A9, was shifted on the plaintiffs.

22. In this case, this Court has to decide as to whether the respondents/plaintiffs have discharged their burden to prove that the suit properties were purchased from out of the personal income of their father, particularly, in the face of the fact that once ancestral properties were admitted, there is always a presumption that any subsequent purchase would always be from the income generated from out of the sale of the joint family properties, as held in the two judgements cited supra. This Court is perfectly in agreement with the submission made on behalf of the appellant/D1 in regard to the legal aspect, particularly, with reference to the ratio laid down by the Courts, as extracted above.

23. In the said circumstances, this Court needs to see as to whether these respondents/plaintiffs have proved their case for claiming their share in the property.

24.From the materials placed on record and the evidence produced before the trial Court and also before the appellate Court, this Court does not see that the respondents/plaintiffs have discharged their burden successfully. Unfortunately, both the Courts below erroneously shifted the burden on the defendant to prove the contrary, to the exclusion of the claim of the plaintiffs. Such a course adopted by the Courts below, is completely at variance with the legal principle as enunciated by the Courts, as found in the above two decisions cited supra. Therefore, both the Courts below have erred in misdirecting itself by not appreciating the fact that the properties were indeed joint family properties/ancestral properties and in which event, the onus is completely on the plaintiffs to prove their claim, which unfortunately, the plaintiffs appeared to have not proved at all. Moreover, there were other legal contentions, which were raised on behalf of the appellant/D1, which were grossly overlooked by the Courts below, which ultimately rendered the judgements and decrees unsustainable.

25.Firstly, the non-joinder of parties was discountenanced by the Courts below on the ground that all the pattadars need not be made parties to the suit. Such finding by the Courts below was legally impermissible for the fact that P.W.1 admits that there were several persons belong to the joint family of their father, who were having title to various properties held by their father, in which event, it was legally imperative for the plaintiffs to implead those parties, before they could stake their claim in the suit properties. The conclusion reached by the trial Court as well as the appellate Court that those persons need not be made parties, cannot be countenanced in law as those parties were not only necessary, but proper parties in the proceedings. In the absence of their impleadment in the proceedings below, the suit was hit by non-joinder of parties and both the Courts below have failed to address this legal issue in proper perspective. Therefore, this Court is of the considered view that the suit was liable to be dismissed on this ground alone.

26.Secondly as regards the issue of partial partition by way of registered sale deed, Ex.B1, dated 08.07.1993, the Courts below have not taken the contention seriously, though it was a contention which was raised on behalf of the appellant/D1. As rightly contended by the learned counsel for the appellant/D1, no steps were taken by the plaintiffs to cancel the partition deed nor any plea was made that the said partition deed was not binding on them. In the absence of such action on the part of the plaintiffs, they cannot wish away the partition deed, which was a registered document. Unfortunately both the Courts below have woefully overlooked this crucial aspect and brushed aside

such contention as against the appellant/D1. This Court, in the said circumstances, is of the opinion that the Courts below have erred in overlooking such a crucial aspect while dealing with the partition deed.

27.Thirdly, the learned counsel for the appellant/D1 is right in contending that a mere mutation of the Revenue records will not be the legal basis for claiming share in the property, particularly, in the face of the Registered partition deed effected by the mother of the plaintiffs in favour of D1 and D2. Whether the partition deed was acted upon was not a issue framed by the Courts below and therefore, it was not a valid piece of argument on behalf of the plaintiffs that it was not acted upon, as there was no finding of fact on that aspect. When a partition deed is executed and registered, the presumption is always that it was acted upon unless the contrary is shown by the person, who is asserting so. In this case, a mere contention cannot give rise to the factum of the partition deed not being acted upon by the parties to the suit. Therefore, such contention, raised on behalf of the plaintiffs, is to be rejected outright as being devoid of merits.

28.Fourthly, as far as the finding of the Courts below that there were no recitals found in Exs.A1 to A9 (Sale deeds) to the effect that the purchase of suit properties being out of sale proceeds from the ancestral properties is concerned, it is to be noted that the absence of recitals cannot decide the character of the properties purchased. The Courts have the responsibility to independently look at the facts and circumstances of the case to ascertain the position whether there was a presumption of purchase of those properties out of the sale proceeds or income from the ancestral properties.

29.In this case, as held supra, there is always a presumption that the properties were purchased from out of the income generated from the ancestral properties, when the factum of existence of ancestral properties was established. In fact, the burden to be shifted on the person who asserts that the properties were purchased from out of income generated from the nucleus family. Therefore, the Courts below have grossly erred in coming to the conclusion that the recitals were not found in the sale deeds (Exs.A1 to A9) and therefore, the presumption in law, as held by the Courts, need not be drawn. Such conclusion by the Courts below is unacceptable in law. Therefore, this Court has come to an irresistible conclusion that both the Courts below have completely erred in ignoring the presumption, thereby given a go-by to the settled legal principle on this aspect.

30. In the conspectus of the above narrative, the decrees and judgements of both the Courts below cannot be countenanced either in law or on facts and the same need to go lock, stock and barrel.

31. For the above said reasons, the Second Appeal is allowed and the judgement and decree, dated 11.09.2006, passed by the Principal District Court, Salem, in A.S.No.30 of 2006, confirming the judgement and decree, dated 07.11.2005, passed by the Sub Court, Sankari, in O.S.No.57 of 2004, are hereby set aside. The question of law framed is answered in favour of the appellant/D1. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

Msk

To

1. The Principal District Judge,
The Principal District Court, Salem.
2. The Sub Judge, Sub Court, Sankari.
3. The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.N.Manokaran, Advocate SR.No.106325

+1cc to Mr.S.Kaithamalai Kumaran, Advocate SR.No.106124

S.A.No.736 of 2007

BR(CO)
GMY(01/10/2020)

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