**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

Date of Reserving the Judgment	Date of Pronouncing the Judgment
23.04.2019	10/06/19

WEB COPY

CORAM**THE HONOURABLE MR. JUSTICE R.PONGIAPPAN****A.S(MD) No.19 of 2014****and****M.P(MD) No.1 of 2014****and****CMP(MD) No.11776 of 2017**

P.Subbaiah

...Appellant/ Defendant

Vs.

G.Meenammal

... Respondent/Plaintiff

Prayer: This Appeal is filed under Section 96 of Civil Procedure Code, against the Judgment and decree dated 25.03.2013 made in O.S.No.145 of 2011 on the file of the Principle District Court, Viruthunagar District at Srivilliputhur praying to set aside the same.

For Appellant

: Mr.R.Vijaya Kumar
for Mr.P.Subbaraj

For Respondent

: Mr.P.Subbiah
Senior Counsel
for M/s.Jessi Jeeva Priya**J U D G M E N T**

The unsuccessful defendant in O.S.No.145 of 2011 on the file of the Principle District Court, Viruthunagar District at Srivilliputhur is the appellant herein. Before the trial Court, the respondent/plaintiff in this appeal G.Meenammal filed a suit and seeking the relief of declaration declaring that the suit second schedule property is the absolute property of the respondent and for the recovery of possession directing the appellant/defendant to hand over the possession within a period fixed by the Court. The learned Principle District Judge, Srivilliputhur, Viruthunagar District, by judgment and decree dated 25.03.2013, decreed the suit as the respondent/plaintiff is the absolute owner of the suit second schedule property and directed the defendant/appellant to hand over the possession of the suit property within a period of three months to the plaintiff/respondent. Aggrieved over the same, the appellant/defendant filed this appeal.



2. For the sake of convenience, the parties are referred to as, as described by the trial Court.

3. The averments made in the plaint, in brief, are as follows:-

(i) The plaintiff is the sister of the defendant. Along with the plaint the rough sketch was appended for the purpose of easy understanding of the suit schedule properties. The plaint 'ABCD' covered property is the first schedule property in which the portion marked as 'EFGH' is the second schedule property. The second schedule property is the portion of the separate room included in the first schedule of property. On 25.01.1968, the father of the plaintiff P.K.S.Palanisamy Nadar purchased the vacant land and thereafter, in 1972 by using his personal earnings, he constructed a house. When at the time of constructing the said house, the plaintiff, defendant and other sons of the said P.K.S.Palanisamy Nadar were studying in the school.

(ii) After constructing the said house, the father of the plaintiff paid house tax to the panchayat and also obtained electricity service connection in his name. The door number was allotted as 1/199f. In fact, the father of the plaintiff permitted the defendant for occupying the second schedule property and permitted one Guruswamy, who is the another brother of the plaintiff for occupying the portion styled as 'LJFE'. After the said permission, all of them were residing in separate portion. Thereafter, the said P.K.S.Palanisamy Nadar has settled his personal property in favour of his sons name through separate settlement deed. In respect to the suit second schedule property, he executed the Will on 07.06.2006 in favour of the plaintiff. In this regard, on 04.07.2006, a consent deed was executed between the family members of the plaintiff. In the said consent deed all are admitted about the content of settlement deed executed by the P.K.S.Palanisamy Nadar and about the details of Will stands in the name of the plaintiff. In the said consent deed, both the Guruswamy and the defendant undertake to vacate the respective residential portion on or before 16.12.2006. Subsequently, they were not ready to vacate the said portion. So, on 12.02.2007, the said P.K.S.Palanisamy Nadar sent a advocate notice to the Guruswamy and the defendant. The said notice was received by the Guruswamy on 14.02.2007 and immediately, he handed over the possession to the said P.K.S.Palanisamy Nadar.

(iii) On the other hand, the defendant received the said notice and did not response to the same. In the mean time, the plaintiff requested her father to execute the settlement deed in respect to the suit second schedule property instead of Will already executed. Considering the request made by the plaintiff on 19.02.2007 the father of the plaintiff P.K.S.Palanisamy Nadar



executed the settlement deed in favour of the plaintiff. Immediately, the said deed was came into effect and thereafter, on 01.03.2007, the plaintiff approached the defendant for vacating the suit second schedule property. But the defendant refuse to hand over the property as requested by the plaintiff. Hence the suit.

4.The averments made in the written statement filed by the defendant, in brief, are as follows:-

It is true that on 25.01.1968 itself the vacant site now with the constructed house was purchased by the father of the plaintiff. The sale amount, which was paid to the vendor was the income derived from the ancestral property. Only from the income derived from the ancestral property, the father of the plaintiff constructed the house in 1970. Before that on 1965 itself the mother of the plaintiff and defendant was died. After the demise of their mother, all are under the care and custody of their grandparent. In the partition made between the brothers of P.K.S.Palanisamy Nadar, the property measuring an extent of 1 acre 74 cents comprised in S.F.Nos.304 and 305 were allotted in favour of the P.K.S.Palanisamy Nadar and thereafter, the said P.K.S.Palanisamy Nadar developed the same and derived the income. In the same way, S.F.Nos.298/1B, 298/10B were allotted in favour of the said P.K.S.Palanisamy Nadar. The said partition was effected in the family of P.K.S.Palanisamy Nadar before 45 years. Apart the said partition the said Nadar running power loom and doing the business. He sold out the 65 sovereigns of gold, which was brought up by her wife and kept the same for his personal use. In fact, the said Nadar harassed his sons. Due to the harassment, one of the sons namely Pon Irulappan left away from the village house. Only in the capacity as a member of the Hindu joint family, the defendant and his brother were residing in the suit schedule property. The consent deed dated 04.07.2006 is not valid in the eye of law. From the ancestral property, the property to an extent of 13 cents were settled by the said P.K.S.Palanisamy Nadar in favour of three sons each. The portion allotted in favour of the said the Nadar was sold out for a consideration of Rs.50,000,00/- and the said amount was now in the hands of the said P.K.S.Palanisamy Nadar.

5.From the above pleadings, the learned Principal District Judge, Viruthunagar at Srivilliputhur, had framed the following issues and tried the suit:-

(i) Whether the plaintiff is entitled the relief of declaration and recovery of possession?

(ii) Whether the plaintiff is entitled for the relief on the ground that the suit property was purchased from the income derived from the ancestral property?

(iii) Whether the father of the plaintiff is entitled to ~~consent deed~~ and settlement in favour of the plaintiff?

(iv) Whether the plaintiff is entitled the relief of partition?



(v) What other relief?

6. Before the trial Court the suit pertaining to this appeal was tried along with O.S.No.149 of 2007, which was filed by the father of the either party i.e., P.K.S.Palanisamy Nadar for the relief of partition. During the time of trial, the father of the plaintiff was examined as P.W.1 and one Meenammal, who is the plaintiff in this suit was examined herself as P.W.2. Further on the side of the plaintiff, 15 documents were marked as EX.A.1 to Ex.A.15. on the side of the defendant, the defendant examined himself as D.W.1 and marked seven documents as Ex.B.1 to Ex.B.7.

7. Having considered all the above, the learned Principal District Judge, Srivilliputhur, Viruthunagar, decreed the suit in which he granted the relief of declaration and recovery of possession in favour of the plaintiff. Feeling aggrieved over the said finding, the defendant has filed this present appeal.

8. From the divergent pleadings set out by either side, this Court has formulated the following issues for deciding the appeal:-

i) Whether the suit second schedule of property was purchased by the father of the plaintiff from the income derived from his ancestral property ?

ii) Whether the father of the plaintiff having the right to execute the settlement deed in favour of the plaintiff?

(iii) Whether the judgment and decree passed by the Court below is legally sustainable and to what other reliefs?

Issue No.1:-

9. Admittedly, the father of the plaintiff P.K.S.Palanisamy Nadar gave birth to three sons and one daughter through his wife Thangammal. The name of the sons are Gurusamy, Subbiah and Pon Irulappan. Further the name of the daughter is Meenammal. She is the plaintiff in the suit. She filed a suit against his brother Subbiah. It is the specific case of the plaintiff that the vacant land comprised in first and second schedule properties were purchased by her father P.K.S.Palanisamy Nadar and thereafter, by his personal income, the said P.K.S.Palanisamy Nadar constructed the house in the said property.

10. Per contra, it is the specific case of the defendant that the said property was purchased by his father by using the income derived from the ancestral property. In this regard, it is relevant to see the judgment of this Court reported in **2000 (2) MLJ 508 (Guruvapandaram (died) Vs. G.Guruswamy)**. In the said judgment, this Court has clearly held that if the person claims the particular property of the joint family, he has to prove the same. In this regard, this Court has held as follows:-

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It is settled law that when a party claims in a suit

that any particular item is a joint family property, the burden of proving the same rests on the party asserting it.

11. So the said proposition is very clear that the defendant, who claims that the suit schedule properties is joint family properties, the burden is on him to prove the same. In this regard, before the trial Court, the defendant was examined as D.W1 and he has specifically stated that his father P.K.S.Palanisamy Nadar is having the ancestral properties measuring an extent of 94 Ares in Survey No.305/1A, 44.50 Ares in Survey No.304/1A and also he is having punja land in Survey Nos.798/B, 10B. The said fact was not disputed on the side of the plaintiff.

12. In this regard, the learned counsel appearing for the plaintiff would contend that mere possession of the agricultural land alone is not sufficient to show that the father of the plaintiff is derived sufficient income from the said property. It is true, now-a-days mere owning the agricultural property alone is not sufficient to hold that the person who is having the said land derived income from the property. In general, for determining the income derived from the agricultural property, it is necessary to see which crop was raised in the said property. Further, we have to calculate whether the said crop gives sufficient income to the person who cultivated the same. More than that, it is necessary what amount was spent for raising the said crop. Only the balance from the sale of crop after deducting the cultivation expenses, is the income from the agriculture. More than that, the agricultural income is depending upon the climatic condition and other natural calamities. So, mere holding agricultural land alone is not sufficient to hold that the person, who is the kartha of the family, earned much income from the agricultural property. In this case, in order to prove the said fact no relevant documents were produced on the side of the defendant particularly to establish that the father of the plaintiff is having much income from the said property. More than that, the extent holding by the father of the plaintiff is very meagre. So, from the income derived from the said agricultural land, it cannot be possible to construct the house as stated by the defendant.

13. In this occasion, it is relevant to see the evidence given by the plaintiff. She has stated that her father doing a business of power loom and only from the income derived from the said power loom, the house was constructed. She specifically told that at the time of purchasing the said land both herself and her brother were studying in the school. In the trial Court, the father of the plaintiff has also been examined as P.W.1 and corroborated the evidence given by the plaintiff. More than that, before the trial Court the sale deed in respect to the purchase of vacant land was marked as Ex.A.3. The entire recital found in the said sale deed dated 25.01.1968 did not



disclose the fact that the sale price mentioned in the said sale was accumulated from the agricultural income. Further, as per the said sale deed, the said property was purchased by the P.K.S.Palanisamy Nadar in the year of 1968 itself.

14. Now, on going through the plaint averments, it is found that at the time of filing the suit in the year 2007 both the plaintiff and defendant are having age of 45 and 50 respectively. So automatically in the year 1968, they are only the school going students and not otherwise. So, we cannot hold that the plaintiff and defendant are known the entire details in respect to the earnings of their father. In this regard, in order to prove the earnings from the agricultural property, no evidence was let on the side of the defendant.

15. So, from the above, I am of the considered opinion that the defendant has not proved the fact that the suit schedule properties were purchased from the income derived from the ancestral nucleus. Accordingly, issue No.1 is answered as above.

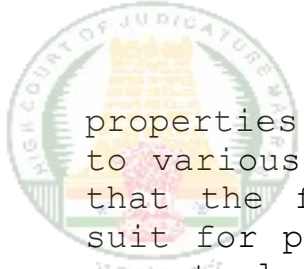
Issue Nos:-2 and 3:-

16. It is also admitted on either side that in respect to the suit second schedule, the father of the plaintiff executed the settlement deed dated 19.02.2007 (Ex.A.8) in favour of the plaintiff through which he bequeathing the second schedule property in favour of the plaintiff. Further, it is also admitted on either side that before executing the said settlement deed, the father of the plaintiff on 07.06.2006 executed the will in respect to the same purpose. As already discussed in Issue No.1, since the suit schedule property is the personal property of P.K.S.Palanisamy Nadar, he is having every right for alienating the same in any manner.

17. In this regard, the learned counsel appearing for the defendant would contend that along with the suit, the father of the plaintiff P.K.S.Palanisamy Nadar filed one another suit in O.S.No.149 of 2007 for the relief of partition. Further, at the time of marriage itself, some agricultural property was allotted in favour of the plaintiff and thereafter, the same was sold out through Ex.B.3 to Ex.B.5. Even after receiving the family property from the parents, now the plaintiff attempted to grab one another property which is a joint Hindu family property. The trial Court without considering the said aspect, granted decree in favour of the plaintiff by saying that the defendant has not proved the fact that the suit schedule property is purchased from the ancestral nucleus. Accordingly, he prayed to allow this appeal.

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18. It is admitted on the side of the plaintiff and also proved on the side of the defendant that in earlier some of the

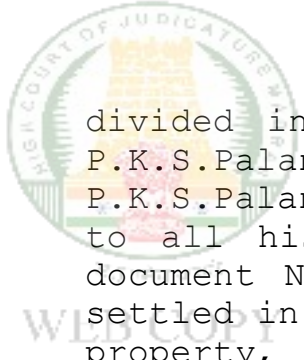


properties were handed over to the plaintiff and the same was sold to various persons through Ex.B.3 to Ex.B.5. Further, it is true that the father of the plaintiff P.K.S.Palanisamy Nadar filed a suit for partition against his sons and claiming $\frac{1}{4}$ th share in the ancestral property. As already stated, the defendant in this appeal has not proved that the suit 'B' schedule property is purchased from the income derived from the ancestral properties. Further, it is already held by this Court in the judgment reported in **2001(1) MLJ 561 (Sellammal and another Vs. Natarajan and others)** that the onus of proof heavily on the person who claims that the property is a joint family property. In this regard, this Court has already held in the said judgment and the same reads as follows:-

In such a situation the onus of proof is heavily on the plaintiffs to prove the existence of the joint family, the availability of the joint family properties and yield from out of the said properties and the source money for purchase having been acquired from the funds from out of the joint family nucleus. Even prima facie, the onus of proof is heavily on the plaintiffs since they have come forward to institute the suit claiming the properties to be the joint family properties.

19. So, repeatedly the same proposition was adopted by this Court and applying the said principle, as already discussed no substantial evidence and relevant documents produced by the defendant to prove that the suit property is a joint Hindu family property. Further decided as only because of the said reason we are in a position to conclude that the suit second schedule property is a self-acquired property of the father of the plaintiff. Being the owner of the said property he is having the right to alienate as per his wish. In this case also, even though in earlier the Will was executed in favour of the plaintiff, subsequently the settlement deed dated 19.02.2007 was executed in favour of the plaintiff and the same was acted upon on the same day. Even though as per the recital found in the said settlement deed as the possession was not handed over to the plaintiff since right of title was transferred to the name of the plaintiff on the strength of the same she filed this suit.

20. Apart from that, before the trial Court the consent deed executed in between the family of the plaintiff and defendant was marked as Ex.A.5. Even though the said consent deed was denied on the side of the defendant, as a false one it should be noted that the signature found in the said document is not specifically denied by the defendant. As per the said document, the Will dated 25.01.1968 was admitted as a genuine. Further, it is also admitted that as per the Will, the suit second schedule property was given in favour of the plaintiff. The contention of the said document further reflects that the suit 'A' schedule property was



divided in several parts and settled in favour of the sons of P.K.S.Palanisamy Nadar. So the intention to the said P.K.S.Palanisamy Nadar is nothing, but to hand over his property to all his heirs and not only to the plaintiff. Through the document No.1239/2006, some portion of 'A' schedule property was settled in favour of the defendant. Even after receiving the said property, denying the right of the plaintiff by the defendant is not a appreciated one. The lower Court has already held and discussed the above situation and allowed the suit in favour of the plaintiff. So, interference is not necessary in the findings arrived at by the Court below. Accordingly, the issue Nos.2 and 3 are answered as above.

21.In the result, this Appeal Suit is dismissed confirming the Judgment and Decree dated 25.03.2013 passed in O.S.No.145 of 2011 by the learned Principal District Judge, Srivilliputhur, Viruthunagar District. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

// True Copy //

Sub Assistant Registrar(CS)

cp

To:

1. The Principal District Judge,
Srivilliputhur,
Viruthunagar District at Srivilliputtur.

2. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

+ 1 CC TO Mr.P.Subbaraj, ADVOCATE IN SR No.67565

+ 1 CC TO M/s.P.Jessi Jeeva Priya, ADVOCATE IN SR No.67814

Judgment Made in
A.S(MD)No.19 of 2014

and

M.P(MD) No.1 of 2014

and

C.MP(MD) No.11776 of 2017

10.06.2019