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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.11.2021

PRONOUNCED ON : 08.12.2021

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A. No.480 of 2010

Baby ...Appellant /Plaintiff

versus

1.A.Chinnasamy ...1st Respondent /1st Defendant

2.C.Arumugham

3.Parameswari ...Respondents 2 & 3 /Defendants 2 & 3

[R-2 and R-3 set ex parte before the First Appellate Court. The presence of R-2 and R-3 is dispensed with as per memo dated 23.11.2021 vide order dated 30.11.2021 made in S.A.No.480 of 2010]

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 20.07.2009 made in A.S.No.52 of 2008 on the file of the Principal Subordinate Court, Tirupur, reversing the judgment and decree dated 12.06.2008 made in O.S.No.272 of 2005 on the file of the District Munsif, Tirupur.

For Appellant : Mr.S.Mukunth
for M/s.Sarvabhauman Associates

For Respondent No.1 : Mr.V.P.Sengottuvel

For Respondent

Nos.2 and 3 : No Appearance

J U D G M E N T

The present appeal is directed against the judgment and decree dated 20.07.2009 passed in A.S.No.52 of 2008 on the file of the Principal Subordinate Court, Tirupur, reversing the judgment and decree dated 12.06.2008 passed in O.S.No.272 of 2005 on the file of the learned District Munsif, Tirupur.



2.The appellant / plaintiff has filed the suit before the learned District Munsif, Tirupur, in O.S.No.272 of 2005, seeking the relief of partition, dividing the suit properties into 4 equal shares and also allot 1 such share to the plaintiff and for costs. The learned District Munsif, Tirupur, by judgment and decree dated 12.06.2008, had allowed the suit and gave direction for effecting the partition.

3.Aggrieved over the said findings, the first defendant, preferred an appeal, in A.S.No.52 of 2008 on the file of the Principal Subordinate Court, Tirupur, praying to set aside the judgment and decree dated 12.06.2008, passed by the learned District Munsif, Tirupur. By judgment and decree dated 20.07.2009, the learned Principal Subordinate Judge, Tirupur, had allowed the appeal and dismissed the suit filed by the plaintiff. Being dissatisfied over the same, the plaintiff in the suit, preferred this Second Appeal.

4.For the sake of convenience, hereinafter, the parties, are referred to, as per their litigative status before the trial Court.

5.The averments found in the amended plaint in brief, are as follows:

(i) The plaintiff and the defendants 2 and 3, are the daughters and son of the first defendant. Both the plaintiff and the third defendant have got married after Hindu Succession Amended Act. The suit properties, are joint family properties of the plaintiff and the defendants. Out of the joint family income derived from their ancestral properties, the suit properties and other properties have been purchased jointly on 11.12.1972 by the first defendant along with his brothers, namely, Subramaniam and Velusamy. At that point of time, the brothers of the first defendant lived as joint family and enjoyed the ancestral properties jointly. They have partitioned their joint family and ancestral properties only on 13.01.1995.

(ii) Subsequent to that, there was a partition among the first defendant and his brother Subramaniam on 05.03.1993 and in that partition, the suit properties have been allotted to the plaintiff and the defendants family. Ever since from the date of partition, the plaintiff and the defendants, are in joint possession and enjoyment of the suit properties.

(iii) The plaintiff is entitled to 1/4th share and the defendants are each entitled to 1/4th share in the suit properties. The defendants are refused for partition, hence, the



plaintiff has caused a lawyer notice on 17.03.2005 to come forward for amicable partition. After receipt of the said notice, the first defendant sent reply dated 29.03.2005 with false and frivolous allegations. Hence, the suit.

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6.The case of the first defendant, is as follows:

(i) It is true that the plaintiff and the defendants 2 and 3, are the sons and daughters of the first defendant. The suit properties are the self-acquired properties of the first defendant and his two brothers, Subramaniam and Velusamy. They purchased the suit properties on 11.12.1972 from and out of their earnings. The alleged joint family had no income of any kind.

(ii) The first defendant and his two brothers worked in Metal Factories at Tirupur and Angeripalayam from the year 1960 and from which, they have saved considerable amount and by using the same, they purchased the suit properties. The first defendant and his brothers were engaged in brass vessels business at Perumanallur during 1970 and were making good profit.

(iii) It is true that a partition between the first defendant and his brother Subramaniam took place on 05.03.1993. The plaintiff was not a party in the said partition. It is not correct to state that, the plaintiff is in the joint possession of the suit properties along with the defendants. The first defendant alone, is the absolute and exclusive owner of the suit properties. The plaintiff had issued a notice dated 17.03.2005 for the purpose of blackmailing and harassing the first defendant. All the contentions raised in the reply dated 29.03.2005, are true and there is no cause of action for the suit. Hence, the suit filed by the plaintiff, is liable to be dismissed.

7.Based on the above said pleadings, the learned District Munsif, Tirupur, framed necessary issues and tried the suit. On the side of the plaintiff, 2 witnesses were examined as P.W.1 and P.W.2 and 7 documents were marked, as Ex.A.1 to Ex.A.7. Similarly, on the side of the defendants, 2 witnesses were examined as D.W.1 and D.W.2 and 8 documents were marked, as Ex.B.1 to Ex.B.8.

8.Having considered the materials placed before him, the learned District Munsif, Tirupur, vide judgment and decree dated 12.06.2008, concluded that, the plaintiff is entitled the relief of partition. In the appeal filed by the first defendant in A.S.No.52 of 2008, the learned Principal Subordinate Judge,



Tirupur, reversed the findings and held that, the plaintiff has not proved her case and accordingly, the suit was dismissed.

9. Feeling aggrieved over the said findings of the Court below, the plaintiff, is before this Court with the present Second Appeal. The Second Appeal was admitted on file after formulating the following substantial questions of law;

"(i) Whether the Lower Appellate Court is correct in law in coming to the conclusion that the appellant had failed to prove that the suit properties are purchased from joint family nucleus overlooking Exs.A1, A2, A6 & A7 and the evidence of DW1 ?

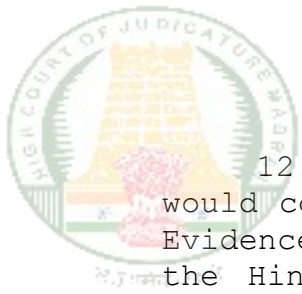
(ii) Whether the Lower Appellate Court is correct in law in placing the onus on the appellant to prove that the suit properties are purchased from out of the joint family funds even after the admission by the 1st respondent about such existence ?

(iii) Has not the Lower Appellate Court erred in not shifting the onus of proof on the 1st respondent to prove that the suit properties were purchased from out of the self acquired funds ?

(iv) Whether the Lower Appellate Court is right in law in accepting Ex.B5 which is dated subsequent to the filing of the suit ?"

10. Heard Mr.S.Mukunth, learned counsel for M/s.Sarvabhauman Associates appearing for the appellant and Mr.V.P.Sengottuvel, learned counsel appearing for the first respondent and also perused the materials available on record.

11. The learned counsel for the appellant / plaintiff would contend that the First Appellate Court, while at the time of disposing the appeal, placing the onus of proof on the appellant, to prove that, the suit properties were purchased from and out of the joint family funds, which is an error committed by the First Appellate Court. He would further submit that, it is necessary to place the onus of proof on the first respondent to prove that, the suit properties were purchased from and out of self-acquired funds and accordingly, after misdirected himself, the First Appellate Court shift the onus of proof and came to the wrong conclusion that, the plaintiff is not entitled the relief of partition.



12. Per contra, the learned counsel for the first respondent would contend that, in view of Sections 101 to 103 of the Indian Evidence Act, 1872, since the plaintiff alleges the existence of the Hindu Undivided Family (HUF), it is for her to prove the same. In this regard, the First Appellate Court has correctly rest the onus of proof on the plaintiff and came to the conclusion that, the plaintiff has not proved her case by adducing specific evidence and accordingly, set aside the findings arrived at by the trial Court, which is well within the law already settled by various Courts.

13. In support of his contentions, the learned counsel for the first respondent relied on the judgment of our Hon'ble Apex Court in BHAGWAT SHARAN vs. PURUSHOTTAM reported in (2020) 6 SCC 387 wherein, it has held as follows;

"The law is well settled that the burden lies upon the person who alleges the existence of the Hindu Undivided Family (HUF) to prove the same. It is clear that not only jointness of the family has to be proved but burden lies upon the person alleging existence of a joint family to prove that the property belongs to the joint Hindu family unless there is material on record to show that the property is the nucleus of the joint Hindu family or that it was purchased through funds coming out of this nucleus."

14. Now, applying the principles set out in the above referred judgment to the case on hand, here, it is a case, while at the time of giving evidence as P.W.1, the plaintiff has filed a proof affidavit stating that, the suit properties had been purchased on 11.12.1972 by the first defendant along with his two brothers, Subramaniam and Velusamy vide Ex.A.1 Sale Deed. Subsequent to that, the said Velusamy, one of the brother settled his 1/3 share in favour of the first defendant and one Subramaniam. The said settlement Deed exhibited on the side of the defendants as Ex.B.2. Later on 05.03.1993 vide Ex.A.2 both the first defendant and Subramaniam partitioned the said property among themselves in which the suit properties allotted to the first defendant.

15. Now, on going through the recital found in those documents, nothing has been averred that the suit properties have been purchased by utilising the funds derived from the ancestral properties.



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16. Even assuming that the evidence given by P.W.1 is found correct, to find out the truth, it is necessary to hear the said Subramaniam and Velusamy, who are the brothers of the first defendant. Therefore, on that score alone, the suit filed by the plaintiff is bad in law.

17. It is true that the first defendant in his cross examination gave evidence as his father is having two brothers and they are all doing the agricultural work in Perumanallur. Further, he has stated that in 1995, there was a partition effected among the 12 members [vide Ex.A.6] wherein, 4 out of 25 shares alone, was allotted to his family.

18. In otherwise, he did not mention the income derived by the joint Hindu family property. All are aware, without any specific evidence in respect to the income derived, it cannot be held that, the suit properties were purchased from the income derived from the ancestral properties. Though the first defendant admitted that, his family is an agricultural family and derived income from the agriculture, that alone, is not sufficient to accept the case of the first defendant.

19. It is the case of the plaintiff that the suit properties had been purchased by the first defendant by utilising the income derived from the Joint Hindu family. In this occasion, it is necessary to see the judgment relied on by the learned counsel for the first respondent [stated supra], wherein, our Hon'ble Apex Court has held that, an admission made by a party is only a piece of evidence and not conclusive proof of what is stated therein. Therefore, mere admission made by the first defendant in respect to the possession of ancestral properties alone, would not sufficient to believe that, the suit properties had been purchased by the first defendant, by utilising the funds derived from the Hindu Joint family property.

20. In this occasion, the first defendant has produced the copy of Account Book maintained by him in his business as Ex.B.6. Though the contents of the said document has been disputed on the side of the plaintiff, the said document is sufficient to accept the case of the first defendant as, he is doing some other work for his livelihood, apart from agriculture. Therefore, without producing the relevant documents in respect to the cultivation particularly and also, in respect to the income details, we cannot hold that, the suit properties had been purchased only from the income derived from the ancestral properties as alleged by the plaintiff.



21.As rightly pointed out by the learned counsel for the first respondent that, without any material on record to show that the particular property is the nucleus of the joint Hindu family or that it was purchased through funds coming out of this nucleus, we cannot held that, the suit properties had been purchased as alleged by the plaintiff. In this regard, the First Appellate Court has correctly placed the onus of proof on the plaintiff and came to the conclusion that the plaintiff has not proved her case.

22.The said findings arrived at by the First Appellate Court, is concurrence with the judgment relied on by the learned counsel for the first respondent. Therefore, I am of the considered view that the findings arrived at by the First Appellate Court, is perfectly within the law and accordingly, the substantial questions of law, are all answered in favour of the respondents. The judgment and decree dated 20.07.2009 passed in A.S.No.52 of 2008 on the file of the learned Principal Subordinate Judge, Tirupur, is hereby confirmed. The Second Appeal is dismissed. However, there is no order as to costs.

SD/-
ASSISTANT REGISTRAR

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SUB ASSISTANT REGISTRAR

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To

1.The Principal Subordinate Court,
Tirupur.

2.The District Munsif,
Tirupur.

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

+1cc to Mr.V.P.Sengottuvel, Advocate Sr.65403
+1cc to M/s.Sarvabhauman Associates, Advocate Sr.65151

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srg 05/01/2022