



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 12.03.2021

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S.(MD)No.139 of 2019

and

C.M.P.(MD)No.7183 of 2019

1.M.Arumugam

2.M.Sivakumar

...Appellants/Plaintiffs

Vs.

1.Mooka Mudaliyar (died)

..1st defendant

2.M.Shanmugasekar

..Respondent/2nd defendant

PRAYER: This Appeal Suit is filed under Section 96 of the Civil Procedure Code, to set aside the judgment and decree dated 20.02.2019 made in O.S.No.21 of 2012 on the file of the First Additional District Judge, Tirunelveli.

For Appellant : Mr.R.Devaraj

For Respondents : Mr.M.P.Senthil

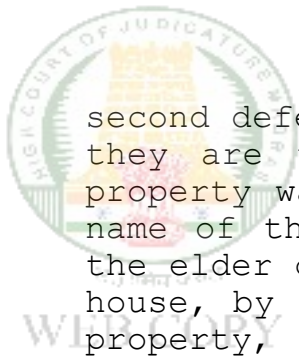
JUDGMENT

Aggrieved over the dismissal of the suit filed for partition, this appeal is filed.

2. For the sake of convenience, the parties are referred to herein, as per their rank before the Trial Court.

3. The brief facts, leading to the filing of this Appeal Suit, are as follows:-

The plaintiffs and the second defendant are the sons of the first defendant. The parties were residing as joint family. The mother of the plaintiffs died on 18.10.2009. The first schedule property originally belonged to the grandparents of the plaintiffs namely, Muthiah Mudaliar and Muthammal. They have executed a conditional sale on 01.03.1946 for himself and as guardian for the first defendant along with plaintiffs' aunt Pitchaiammal in favour of one Gomathy Mudaliar. The said Gomathy Mudaliar also executed an agreement dated 09.03.1946 agreeing to execute the reconveyance on 08.03.1961. Since she had failed to do so, the first defendant had filed a suit in O.S.11 of 1961 before the District Munsif Court, Tirunelveli and the suit has been decreed and the property has been registered in favour of the first defendant. After the purchase, he made improvements and put up construction in the first schedule property out of the joint family income. The plaintiffs and the



second defendant also contributed money for construction of house as they are the sons of the first defendant. The second schedule property was purchased on 26.09.1994 from Solaiappa Mudaliar in the name of the first defendant from the joint family income as he is the elder of the family. The second plaintiff has constructed a new house, by spending a sum of Rs.5 lakhs. Now, in the first schedule property, the first plaintiff is residing in one portion and the second defendant is residing in another portion. The second plaintiff is residing in the second schedule property. Both the properties are joint family properties and each are entitled to share in the property. The first defendant has no right to execute the settlement deed in favour of the second defendant in respect of the entire property. Hence, the suit.

4. Before the trial Court, on the side of the plaintiffs P.W.1 to P.W.4 were examined and Exs.A1 to A10 were marked and on the side of the defendants D.W.1 was examined and Exs.B1 to B12 were marked.

5. The first defendant admitting the relationship between the parties stated that there is no joint family. The second schedule property was purchased by the first defendant out of his own income and savings. After the marriage of the plaintiffs, the first defendant allowed the first plaintiff to reside in one portion of the first schedule property and in another portion the first defendant is residing along with the second defendant. Similarly, the first defendant allowed the second plaintiff to reside in the second schedule property. After the death of his wife, the first defendant was residing with the second defendant and he has executed the settlement deed in favour of the second defendant in respect of the first and second schedule properties. The plaintiffs have no right to question the same. The second defendant took a stand that there is no joint family property. The settlement deed is valid one. The property was absolutely settled in his favour by his father. After the execution of the settlement deed, with the permission of the first defendant, the plaintiffs are residing in the suit property. Hence, the plaintiffs are not entitled to any relief as prayed for.

6. On the basis of the above pleadings, the following issues are framed before the trial Court:-

- 1) *Whether the plaintiffs are entitled to get preliminary decree for partition and separate possession of their 1/2 share in the suit schedule properties as prayed for?*
- 2) *Whether the plaintiffs are entitled to get declaration as prayed for?*
- 3) *Whether the suit schedule properties are joint family properties or not?*
- 4) *Whether court fee paid is correct or not?*



5) To what other relief the plaintiffs are entitled to?

Additional Issue:-

(1) Whether the settlement deed executed by the first defendant in favour of the second defendant is binding on the plaintiffs?"

7. The trial Court having found that as the first schedule property was repurchased by the first defendant through the Court of law, it should be only the self acquired property of the first defendant and the second schedule property was also purchased by him, non-suited the plaintiff recording that there is no joint family property. Aggrieved over the same, the present first appeal has been filed.

8. The learned counsel appearing for the appellants vehemently contended that the first schedule property was originally sold not only by the grandfather of the plaintiffs but also the father of the plaintiffs/namely the first defendant herein. As the reconveyance deed has not been executed by the purchaser as a seller, the first defendant has got back the property by filing a suit. Hence, it is the contention that the property conveyed by the joint family has returned back to the family. Further, the father and the sons alone constituted a joint family along with the mother and residing in the suit property, ever since the date of reconveyance under Ex.A2, dated 19.06.1974. The construction has been put up in the first schedule property by the contribution of the sons, who are earning income by way of their jobs. Hence, his contention is that when the father and sons are living as joint family, merely because the property was registered in favour of the first defendant through the process of the Court, the same cannot be construed to mean that, it is a separate property of the first defendant.

9. The second item of the property was also purchased in the name of the first defendant out of the joint family income. The evidence of P.W.1, makes it very clear that for the construction in the first schedule property, more than Rs.1.5 lakhs has been spent. The father had a separate income of his own, but he was earning only a meagre income by working in a textile shop. Spending such huge amount for purchasing the second schedule property is possible only by the contribution of the sons, who are earning income by way of their jobs. Hence, it is his contention that once the property had been purchased as a joint family property and held in common, execution of the settlement deed, Ex.A4 in favour of the second defendant is not permissible under law. The same would not convey any title to the second defendant. The very factum that all the sons are residing in one house, indicates that they are residing as joint family. The settlement came to be executed after the death of the mother of the parties taking advantage of the old age of the



father. Hence, the burden is on the second defendant to prove the good faith of the transaction also. Even the settlement deed was executed voluntarily, the same would not convey any title to the property. Hence, prayed for allowing the appeal.

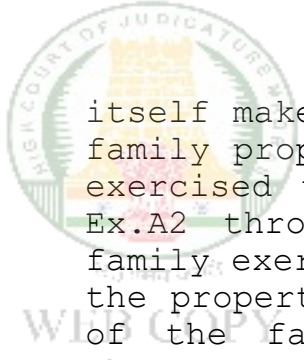
10. The learned counsel appearing for the respondents contended that though the property was originally owned by Muthiah Mudaliar and Muthammal, grandparents of the plaintiffs and the second defendant they have infact sold the property in favour of one Gomathy Mudaliar. As the said Gomathy Mudaliar has failed to execute the reconveyance deed, the first defendant has got the document registered in his favour by the process of the Court. Hence, after such purchase, the property will lose the character of joint family and become a self acquired property. The second schedule property also purchased by the first defendant out of his own money. There is no evidence to show that the joint family had sufficient income. Hence, he submitted that merely because the plaintiffs and the second defendant are residing in the same house, that itself would not be sufficient to presume joint family. Hence, the trial court has rightly concluded that the property being a self acquired property, the first defendant is entitled to deal with the same. Accordingly, the plaintiffs have no right in the property. Hence, prayed for dismissal of the appeal.

11. In the light of the above submissions, now the points arise for consideration in this appeal are:

1.Mere repurchase of the family properties by one of the members in his individual name would change the character of property automatically?

2.Whether the first and second suit schedule properties are the joint family properties and if it is so, whether the plaintiffs are entitled to claim decree for partition?

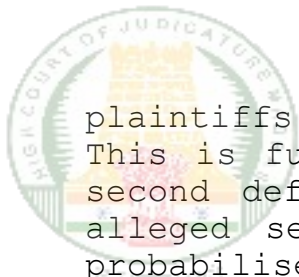
12. The relationship between the parties is not in dispute. The first item of the property originally owned by the grandparents of the plaintiffs and the second defendant. These facts are not in dispute. In fact they have dealt the property under Ex.A1 in favour of Gomathy Mudaliar, wherein the first defendant, minor son of Muthiah Mudaliar also made as party. The very factum that the minor was made as a party in Ex.A1, makes it very clear that the property was all along treated as joint family property by Muthiah Mudaliar. It is the case of both sides that despite Ex.A1, there was a reconveyance agreement executed by the said Gomathy Mudaliar for reconveyance of the property for a sum of Rs.900/-. However, the reconveyance was refused by the said Gomathy Mudaliar. Thereafter, the first defendant after attaining majority has pursued the said agreement of reconveyance and brought the property back through the Court of law. It has been admitted by both sides. When Ex.A1



itself makes it very clear that the property was treated as a joint family property and then the minor, who was a co-nominee party, had exercised the right of repurchase and got back the property under Ex.A2 through the process of Court. Therefore, when the joint family exercised such right to retrieve the property, merely because the property was registered only in the name of one of the members of the family, it cannot be stated that it will acquire the character of self acquired property. By the time of repurchase agreement was enforced, the elder of the family is not available. Therefore, only the first defendant as a member of the joint family had to take such steps. Such view of the matter, it cannot be stated that the property got through repurchase agreement has become a self acquired property of the first defendant.

13. It is to be noted that the plaintiffs and second defendant are the sons of the first defendant and they are all along residing in the suit property. This fact is also not disputed. In fact, the first defendant is residing in one portion of the first item of property and the second plaintiff was residing in the another portion of the first item of property. It is to be noted that it is the case of the defendants that the second schedule property is a self acquired property of the first defendant. Though the property was purchased in the name of the first defendant, the fact remains that all of them are residing together in the same house. The evidence of D.W.1 makes it very clear that the brothers were residing together till their marriage and only after their marriage, the second defendant was staying in the first item of the suit property, the plaintiffs are residing in some other portions. It is also to be noted that the evidence of D.W.1, makes it very clear that after the repurchase of the first item of property, more than 1.50 lakhs have been spent for the construction of the house. Feign ignorance has been shown by D.W.1 as to how the father has spent such amount. The evidence also indicates that the father of the plaintiffs was getting a meagre income by working in a textile shop. Such being the matter, spending huge amount for purchasing the property and for constructing a house is highly improbable. Such thing would be possible only by way of contribution by the sons, who are also employed. Therefore, having regard to the nature of the above position in the family, it could be presumed that the property is a joint family property. It is also well settled principle of Hindu Law that there lies a legal presumption that every Hindu family is a joint in food, worship and estate and in the absence of any proof of division, such legal presumption continues to operate in the family. The burden, therefore, lies upon the member, who claims it as a separate property, to show that the properties are self acquired property.

14. Evidence of D.W.1, makes it very clear that the father had no sufficient income till his last stage. Such view of the matter, the father acquiring the property by his own income is improbable. This in fact probalilise the case of the



plaintiffs that they have contributed money out of their salaries. This is further fortified by the fact that the plaintiffs and the second defendant are residing in the same house, even after the alleged settlement deed of the year 2011. These fact in fact probabilise the theory of contribution.

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15. Ex.A3 itself indicated that the property was purchased for more than Rs.62,000/-. Whereas the evidence of P.W.1 makes it very clear that the father had no income except Rs.100/- as monthly salary in a textile shop. Evidence of D.W.1 further shows that the partition was already effected in the family with regard to the property situated in Vembadi street. However, there is no evidence for that. If really, the property was not treated as joint family property, there should not be partition in respect of properties stand in the name of the father of the plaintiffs. All these facts clearly indicate that the property was all along treated as joint family property. Therefore, merely because of the first defendant due to some dispute with other sons, had executed a settlement deed that too when he lost his wife, it cannot be stated that the entire title is vested with the second defendant. The contention of the second defendant that after the settlement deed, the plaintiffs are residing in the portion of the suit property with the permission of the first defendant is highly improbable. The evidence and documents clearly indicates that they were residing in the suit properties much prior to the settlement deed, Ex.A4. All the receipts of water tax and Electricity charges paid in the name of the first defendant were produced by the plaintiffs. These facts clearly indicate that the parties are residing in the joint family. Such view of the matter, this Court holds that the trial Court has not appreciated the evidence properly and the settlement deed in respect of the joint family property cannot be given any effect. Accordingly, the points are answered.

16. In the result, this Appeal Suit is allowed. The plaintiffs and the second defendant are entitled to 1/3 share each in the suit schedule properties. Since the first defendant died and no other female legal heirs is also available, preliminary decree is passed for dividing the suit property into three equal shares. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)



To

1.The First Additional District Judge,
Tirunelveli

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

+1 CC to M/s.M.P.SENTHIL, Advocate (SR-10953[F] dated 15/03/2021)

+1 CC to M/s.R.DEVARAJ, Advocate (SR-10993[F] dated 15/03/2021)

A.S.(MD)No.139 of 2019
12.03.2021

KB(25.06.2021) 7P 6C