



A.S.No.508 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.09.2022

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

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Amirtham

... Appellant

Versus

1. Muthusamy

2. Major Jeeva

*Respondent No.2 declared as Major and his
guardianship discharged viz (Vijayalakshmi)
as per memo, dated 15.02.2022 in S.R.No.5138
vide Court order, dated 07.03.2022 made in
A.S.No.508 of 2015 ... Respondents

Prayer: Appeal Suit filed under Section 96 of the Code of Civil Procedure to set aside the judgment and decree, dated 01.09.2014 passed in O.S.No.231 of 2022 on the file of the learned III Additional District Judge, Salem.

For Appellant : M/s.J.Prithvi
for Mr.A.K.Kumaraswamy

For R1 : Exparte

For R2 : Notice refused



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JUDGMENT

WEB COPY This Appeal Suit arises out of the judgment of the learned III Additional District and Sessions Judge, Salem, dated 01.09.2014 in O.S.No.231 of 2012, in and by which, the suit filed by the appellant herein for partition of the two items of the suit property and to declare that the settlement deed, executed by the first defendant in favour of the second defendant in respect of the part of the first item of the suit property, as null and void, was dismissed by the Trial Court.

2. The case of the appellant is that she is the daughter of one *Chinna Gounder*. The said *Chinna Gounder* and the first defendant *Muthusamy* are both sons of one *Chinna Tambi Gounder*. All the three of them formed the Hindu undivided joint family. While so, thirty years ago, the appellant's father went missing and his whereabouts are not known continuously from then on. The appellant's mother also died long back. While so, the appellant's grandfather, the first defendant and the appellant jointly sold their ancestral property at Thukkiyampalayam on 27.04.1981 vide **Ex.A-5**, sale deed and out of the sale proceeds, the A-schedule property in the suit was purchased on 14.05.1981, however in the name of the first defendant. Even though the property was purchased in the name of the first defendant, the property was under the joint



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possession and cultivation of the joint family. Since the appellant was married and living with her husband in or about the year 2012, she issued a legal notice, dated 30.07.2012 as the first defendant was not forthcoming for partition of the suit properties. Only during the first week of June, 2012, she came to know that the first defendant also executed a deed of settlement, dated 02.12.2003 in favour of the second defendant. The same is without any right by the first defendant and therefore liable to be declared as null and void.

3. Similarly, it is the case of the appellant that the B-schedule property in the suit is also assigned by the Government in the name of the first defendant and at that time, even the grand-father was alive and the same was also only in the cultivation and enjoyment of the joint family and therefore, both the properties, being the joint family properties and since the appellant's grand-father having died thirteen years ago, the appellant is entitled for the half share belonging to her father, being the sole legal heir of the *Chinna Gounder*, whose whereabouts are not known for the past thirty years ago.

4. The first defendant, *Muthusamy*, remained exparte and did not contest the suit. The second defendant, namely *Jeeva*, who was minor during the pendency of the suit and was represented by his mother, *Vijayalakshmi*, filed a



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written statement. In the written statement, it is only pleaded that the property was purchased by the first defendant. But, it is specifically pleaded that on 02.12.2003, to the knowledge of everybody, an extent of about one acre was settled in the name of the second defendant and she was in cultivation of the same. Therefore, he prayed for dismissal of the suit.

5. The Trial Court framed the following five issues:-

(i) Whether the plaintiff (appellant herein) is entitled for a share in the suit properties?

(ii) Whether the settlement deed, dated 02.12.2003 is valid?

(iii) Whether the suit properties are the separate properties of the first defendant?

(iv) Whether the plaintiff (appellant herein) is entitled for preliminary decree as prayed for by the plaintiff (appellant herein)?

(v) To what other reliefs, the plaintiff (appellant herein) is entitled to?



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6. On the said issues, the appellant examined herself as P.W.1. One of the purchasers of the joint family properties, namely *Kumaravel*, who is aged about 77 years, was examined as P.W.2. The seller of the A-schedule mentioned property to the suit, namely *Sivaprakasam*, who is aged about 63 years, was examined as P.W.3. On behalf of the appellant, the sale deed, by which, A-schedule property was purchased in the name of the first defendant, dated 14.05.1981, as **Ex.A-1**. The settlement deed, executed by the first defendant, in favour of the second defendant, dated 02.12.2003, was marked as **Ex.A-2**. The legal notice, issued by the appellant, dated 30.07.2012, is marked as **Ex.A-3** and the acknowledgment card as **Ex.A-4**. The sale deed, in respect of the sale of the joint family property, dated 27.04.1981, is marked as **Ex.A-5**. On behalf of the second defendant, *Vijayalakshmi*, the mother of the second defendant, was examined as D.W.1. Again, the same **Ex.A-1** is marked as **Ex.B-1** and **Ex.A-2** is marked as **Ex.B-2** and the order for change of patta, dated 28.10.2005 is marked as **Ex.B-3** and the patta in the name of the second defendant in respect of the extent of one acre settled on the second defendant is marked as **Ex.B-4**.

7. Thereafter, the Trial Court proceeded to hear the learned Counsel on



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appellant. Even though notice is served, there is no appearance on behalf of the

respondent No.2. The first respondent was set exparte in the Trial Court itself.

9. The learned Counsel for the appellant, taking this Court through the evidence on record, would submit that in this case, the case of the appellant is that the schedule mentioned properties are joint family properties. The competent person to deny the same is the first defendant. The first defendant remained exparte. However, even though the appellant, by marking **Ex.A-5**, the sale deed for sale of joint family properties, which is dated 27.04.1981 and the immediate subsequent purchase of the A-schedule property on 14.05.1981, had proved that even though the A-schedule property was purchased in the name of the first defendant, it was purchased out of the joint family nucleus. This apart, the first defendant did not file any written statement claiming any independent income. Even D.W.1, the mother of the second defendant, who was only the daughter-in-law, who came into the family subsequently, had denied any knowledge about the affairs of the family and she has also not deposed about any independent income of the first defendant. Even in the written statement, except for the bare denial, there is no specific averment as to the source of income or the independent purchase by the first defendant. Over and above this documentary evidence and circumstances on record, the appellant also



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examined P.W.2, one of the purchasers of the joint family property, who had clearly and categorically deposed that the sale consideration was passed on and out of the sale consideration, the A-schedule property was purchased and the appellant's grand-father, the first defendant and the appellant were in joint possession and cultivation of the same. Similarly, the person, who sold the A-schedule property to the first defendant was also examined as P.W.3, who had also spoken to on the same lines that the purchase was made on behalf of the joint family and that after the purchase, the joint family was in joint possession and cultivation. Therefore, he would submit that this is a case, in which, the appellant has proved that the suit schedule property is from the joint family nucleus.

10. The learned Counsel also relied upon the judgment of this Court in ***Malla Naicker @ Singar and Ors. Vs. Jeeva (minor) and Ors.***¹, more-fully relying upon the paragraph Nos.17 and 18 and it is useful to extract the same which reads as hereunder:-

" 17. Therefore, having regard to the presumption as per the law laid down by the Hon'ble Supreme Court as well as our High Court as referred to above, and as stated in Mulla's Hindu Law that when a Kartha claims certain properties as a

¹ 2012 (1) CTC 128



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separate properties and the joint family admittedly possessed of some nucleus, the burden is on the Kartha to prove that the properties are his separate properties and not purchased out of the joint family properties' income. On the other hand, if the co-parcener claims certain properties as his separate properties, then the burden is cast on the other co-parcener, who claims that the property is a joint family property to prove that property purchased in the name of one of the co-parceners was purchased out of the joint family properties' income and it was not a separate property.

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, even though 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."

11. The learned Counsel would submit that the factum as to in whose name the property stands is not conclusive and it is only the burden of proving otherwise which is material. The appellant alleged that the property in the name of the first defendant, being the coparcenary property, the appellant had discharged her onus and burden of proof, especially when the first defendant



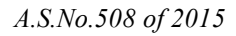
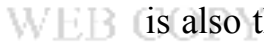
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had not contested the suit and there is no other contra evidence on record.

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12. I have considered the said submissions and perused the material records of this case. As far as the B-schedule property is concerned, except for a settlement in the complaint, there is absolutely no other evidence to suggest that B-schedule property was in joint possession or cultivation. Even as per the case of the plaintiff, B-schedule property was granted in the name of the first defendant by way of assignment patta. It cannot be contended that said assignment/patta granted by the Government is on behalf of the undivided family and therefore, the Trial Court has rightly dismissed the suit in respect of the B-schedule property.

13. As far as the A-schedule property is concerned, there are two prayers. Firstly, the plaintiff prays that the settlement deed in respect of the second defendant be set aside and it is prayed that the entire property be partitioned. As far as the settlement deed is concerned, admittedly, the deed of settlement is dated 02.12.2003. In this regard, as rightly taken into account by the Trial Court, the plaintiff, in her legal notice, had claimed that in the first week of July, 2012, she came to know that the settlement deed is executed. But, in her evidence, she has deposed that she came to know of the same about four or five



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14. Now, coming to the remaining extent of 2.8 acres is concerned, I am of the view that the decision of the Trial Court is unsustainable for the following reasons:-

(i) The plaintiff has categorically pleaded that the joint family property was sold on 27.04.1981 and out of the sale proceeds, A-schedule property is purchased. There is no contrary pleading even in the written statement filed by the second defendant. The first defendant remained exparte;

(ii) In discharge of her burden, the plaintiff has got into the box and since she was also one of the sellers who signed **Ex.A-5**, had categorically deposed that they got the money and have purchased the property;

(iii) P.W.2, who is one of the purchasers under **Ex.A-5**, the elderly person has got into the box and has categorically deposed that he purchased the property from the joint family and the money was used by them to purchase A-schedule property and that the A-schedule property under joint cultivation;

(iv) Similarly, P.W.3, the seller of A-schedule property was also examined on behalf of the plaintiff, who also categorically deposed that he accepted the sale consideration on behalf of the joint family property and after purchase of the property, the same was under joint cultivation and possession;

(v) Above all, the recital in **Ex.A-5** clearly states about the purpose of the purchase of another land for the first defendant. Therefore, on a cumulative



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reading of all the evidence on record, it can be seen that the plaintiff has discharged her onus, establishing that even though the remaining extent of the A-schedule property stands in the name of the first defendant, it is not his individual property, but, being the joint family property, purchased out of the joint family nucleus. It is once again necessary to reiterate that the first defendant had remained exparte before the Trial Court as well as before this Court. In that view of the matter, to that limited extent, the plaintiff is entitled to succeed.

15. The Appeal Suit is accordingly partly allowed on the following terms:-

(i) The judgment and decree, dated 01.09.2014 of the learned III Additional District Judge, Salem in O.S.No.231 of 2012 is confirmed inasmuch as it dismissed the suit in respect of the B-schedule property;

(ii) The judgment and decree, inasmuch as it refuses the relief of declaration that the settlement deed, dated 02.12.2003 as void and unenforceable, and holding that the said one acre extent of A-schedule property will not be available for partition, is also upheld;

(iii) The decision and findings in respect of the rest of the 2.8 acres of A-schedule property are set aside and it is held that the plaintiff be entitled for one



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half share in the 2.8 acres of the A-schedule property, leaving out the one acre extent covered by the **Ex.A-2** and the preliminary decree is be and hereby granted; and the plaintiff will be entitled to move such application for final decree for partition and separate possession of the same;

(iv) The suit in respect of the relief of permanent injunction also stands dismissed;

However, there shall be no order as to costs.

13.09.2022

Index : yes/no
Speaking order/Non-speaking order
grs

To

The III Additional District Judge, Salem.

D.BHARATHA CHAKRAVARTHY. J.,

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