IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.08.2022

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

S.A. No. 385 of 2013

Murugan,
S/o. Idumban ... Appellant

Vs.

1. Meenakshi,
   D/o. Idumban

2. Chinnapappa @ Pachaiammal

3. Palaniammal,
   D/o. Idumban ... Respondents

PRAYER: Second Appeal filed under Section 100 of Code of Civil Procedure, to set aside the judgment and decree of the Court of District Judge, Dharmapuri in A.S.No.8 of 2011 dated 27th February 2012 in confirming the judgment and decree of the Court of Subordinate Judge, Dharmapuri in O.S.No. 125 of 2006 dated 29.04.2011.

For Appellant : Mrs.V.Srimathi

For Respondents : Mr.P.Valliappan for R1

Mr.C.Prabakaran for R2 & R3

JUDGMENT

The appellant herein is the 3rd defendant in the suit in O.S.No. 125 of 2006 filed by his sister against her another sister/1st defendant, her mother/2nd defendant and her brother/appellant herein claiming the relief of partition claiming 1/4th share in the suit properties contending that all are joint family properties.

2. For the sake of convenience, the parties are referred as per the ranking in the suit.

3. The 3rd defendant's mother and another sister, the 1st and 2nd defendants remained exparte. The 3rd defendant contested the suit denying the nature of properties as joint family properties and also contended that the properties in Item Nos.4 and 5 of 'B' schedule are self-acquired

properties, which are purchased by him out of his own income and also contended that the properties in item Nos.7, 8 and 9 of 'C' schedule are not joint family properties. So also, Item No.10 not belong to the family and also contended that the deposit receipts mentioned in 'D' schedule are belong to him as it is his self-acquired properties. The Trial Court framed two issues and on considering the oral and documentary evidence of both sides, the trial court held that all the properties are joint family properties. Aggrieved over that, the 3rd defendant preferred an appeal in A.S.No.8 of 2011, wherein the lower appellate court framed eight issues and analysed the evidence and documents, also concludes that the properties are joint family properties and dismissed the appeal by confirming the trial court findings.

4. Aggrieved over the concurrent findings of the courts below, the 3rd defendant, brother of plaintiff preferred this Second Appeal contending that item Nos.4 and 5 of 'B' schedule properties are his self-acquired properties and also the deposit receipts shown in the 'D' schedule, but without any independent evidence on the side of plaintiff, the courts below erroneously

held that since the family had joint family properties, presuming that these items of properties were purchased out of joint family nucleus without any materials, thereby the findings rendered by the courts below totally unjust and erroneous one. Hence, he prays to set aside the same. Accordingly, this Second Appeal has been filed and the same is admitted on the following question of law :-

> "1) Whether the courts below are right in holding that the plaintiff/1st respondent is entitled to enforce share, having regard to the pleading of the 1st respondent that the properties are joint family properties and Idumban died prior to the enforcement of the Tamil Nadu Act (1) of 1990?
>
> 2) Whether the Courts below are right in holding that the properties standing in the name of the appellant are the joint family properties?
>
> 3) Whether the courts below are right in holding that the properties are self-acquired properties of Idumban and granted partition to the plaintiff, when the pleading is otherwise?"

5. Brief facts of the case is as follows :-

One Idumban is the husband of 1st defendant and father of 2nd and 3rd defendants and plaintiff. He had one more daughter Peruma and she died in the year 1990 as unmarried. She, being an unmarried daughter, she lived along with her father, mother/1st defendant and her brother/3rd defendant. Another sister/2nd defendant got married in the year 1984 and all were treated as Hindu joint family. The 'A' schedule properties are the joint family properties and the 'B' schedule properties are purchased out of income derived from the grocery shop by the plaintiff's father. In the year 1989, Idumban died leaving behind plaintiff and defendants as his legal heirs. During his life time, he runs a grocery shop and also owned joint family properties. Out of income derived from that, he purchased the properties in the name of her brother/3rd defendant, which is shown as 'B' schedule property and after his demise, the 3rd defendant/her brother, being elder male member of joint family, out of income derived from the ancestral properties as well as grocery business, the amounts were deposited in the name of 3rd defendant as shown in 'D' schedule. The plaintiff is a Teacher by profession and another sister/2nd defendant also employed in the hospital and out of joint family earnings, the properties were maintained, but her brother/3rd defendant attempted to alienate the properties denying their share. Hence, the Suit.

6. The plaintiff's mother and another sister remained exparte. Her brother alone contested the suit submitting that from 'A' schedule properties there was no joint family ancestral nucleus and item Nos.4 and 5 of 'B' schedule were purchased by him out of his self-acquisition by doing grocery business. Item No.6 of 'C' schedule is the odai poramboke land, which was in enjoyment of one Amsaveni. After her demise, the 3rd defendant is in possession and enjoyment of the properties, and hence, it became as separate property. Item Nos. 7 and 8 of 'C' schedule are belongs to his father Idumban and his mother and now it is a vacant site. Item No.9 of 'C' schedule is a separate property of his mother and father Idumban and the same was mortgaged by his father, which was redeemed by him by repaying the loan amount of Rs.12,000/-. Item No.10 of 'C' schedule belong to his step-mother Muthuvedi and after her demise, it is enjoyed by the 3rd defendant. Further, he claimed that deposit receipts shown in 'D' schedule

are made by him out of income derived from his grocery business and claimed it as separate properties.

7. Before the trial court, the plaintiff alone was examined as P.W.1 and on the side of defendants, D.W.1 to 5 were examined. On the side of plaintiff, the documents Exs.A1 to A15 were marked and on the side of defendants, Exs.B1 to B43 were marked. The trial court as well as lower appellate court held that 'A' schedule properties are self-acquired properties of his father Idumban and Item Nos.4 and 5 of 'B' schedule are concerned, those properties stand in the name of 3rd defendant/appellant. At the time of alleged purchase, he was a minor, hardly 21 years, so there is no possibility of purchasing the properties independently, and thereby concludes that the properties were purchased out of income derived from joint family properties. So also, the deposit receipts shown in the 'D' schedule also made out of joint family income. The other items, though claimed by the 3rd defendant as separate properties, both the courts below not accepted and concludes that those properties are also belong to joint family properties, thereby, granted 1/4th share in favour of plaintiff.

8. The learned counsel for appellant submitted that 'A' schedule properties (item Nos.1 to 3) were purchased by his father Idumban. So, till his demise, in the year 1989, he enjoyed the properties. After his demise, it equally devolves upon his legal heirs. Before that, no ancestral nucleus in the family, but both the courts below erroneously concludes that the properties are joint family in nature and granted relief in favour of plaintiff. Normally, the concurrent findings of the courts below with regard to the facts needs no interference, but when the courts below misconstrued the facts and law, then it could be looked into. Accordingly, the sale deeds stand in the name of Idumban, marked as Ex.B37 to 39, reveals that 'A' schedule properties purchased by him were the self-acquired properties. So, it is not ancestral joint family properties and till the demise of Idumban in the year of 1989, these properties are deemed as self-acquired properties of father of plaintiff. The trial court also accepts this fact and concludes that it is a separate and self-acquired properties of deceased Idumban.

9. As per the contention of plaintiff, after the death of her father, as a male member, her brother/3rd defendant had managed the joint family

properties and the grocery business. Out of income derived from the joint family properties as well as the said business, item Nos.4 and 5 of 'B' Schedule were purchased in his name, thereby claims those properties are also joint family properties. But, the 3rd defendant contended that he independently had a grocery business and out of his own earnings from the said business, he purchased the properties in the year 1992 and 2001. Those documents were marked as Exs.A2 and A3. Pattas were also marked as Exs.4 and 5. When the plaintiff claimed that there was a joint family nucleus, the initial burden is on her to prove that there was no sufficient income to purchase the properties in the name of 3rd defendant. But, except her evidence, no other independent evidence to show the income derived from the ancestral properties. Mere existence of 'A' schedule properties alone is not sufficient to conclude that the family had sufficient joint family nucleus income. But, both the courts below accepts that 'A' schedule properties are self-acquired properties of plaintiff's father, but gave a finding that at the time of purchase of Item Nos.4 and 5 of 'B' schedule, the 3rd defendant is aged about 21 years old. So, there is no possibility of separate income for him. Admittedly, the father of plaintiff was died in the year 1989 and there is no proof that his father running a grocery business. But, the contention of 3rd defendant is that he had a separate business of grocery upto the year 2001, and he lived along with his mother and sisters. After his marriage, due to misunderstanding, he was set out from the family. Therefore, in the year 2001, he has got married and before that, he had separate business of running a grocery shop. His father-in-law was also examined through this aspect on the side of 3rd defendant. But, except P.W.1's evidence, the plaintiff not adduced any contra evidence to disprove the 3rd defendant's contentions. As discussed above, mere existence of 'A' schedule properties is not sufficient to conclude that the family had joint family nucleus and the plaintiff failed to prove this aspect independently. But, both the courts below simply relied on the evidence of P.W.1 and concludes that item Nos.4 and 5 of 'B' schedule properties are also purchased out of joint family income. When the plaintiff failed to discharge her liability to prove that family had sufficient joint family income, then the properties in item Nos.4 and 5 assumes the character of self-acquired properties. So, item Nos.4 and 5 are deemed to be the separate properties of 3rd defendant/appellant herein. To that effect, the findings rendered by the courts below is set aside. Accordingly, the question of law (2) and (3) are answered.

10. With regard to 'D' schedule deposit receipts, as per the contention of plaintiff, all these deposits were made out of joint family income, but, as discussed above, there is no proof that the family has sufficient income, on the other hand, in the year 2001, these deposits were made in the name of 3rd defendant, who was at that time, 21 years old and running a grocery business. So, he had sufficient income. Hence, when there is no proof for joint family income, these deposits assumes the character of separate properties of 3rd defendant, in which the plaintiff has no share at all. To that effect, the trial court findings are erroneous and liable to be set aside.

11. With regard to Item No.6 of 'C' schedule of property, it is odai poramboke, but there is no proof that it is separately enjoyed by the 3rd defendant and all the parties are entitled to enjoy their share, but it will not confer any title for the reason that it belongs to the Government. With regard to item Nos.7, 8 and 9 of 'C' schedule, the properties are belong to his father Idumban and his mother. So, they are separate properties, in which

this defendant cannot claim absolute right. Likewise, item No.10 of 'C' schedule also belong to Idumban's step-mother, after her demise, as legal heirs of Idumban, all are having share. So, with regard to item Nos.7, 8 and 9, all the legal heirs of Idumban having equal share as it is a separate properties of Idumban. To that effect, the findings rendered by both the courts below are sustainable one.

12. Based upon Act 1 of 1990, as an unmarried daughter, the plaintiff claims share in the property, but as discussed above, 'A' schedule property (item Nos. 1 to 3) are the self-acquired properties of her father and after his demise, she along with other legal heirs equally entitled. So also, item No.6 of 'C' Schedule, it is the Government odai poramboke land, they can enjoy the property as per their share not perfected any title. To that effect, the trial court findings are sustainable. Accordingly, the question of law (1) is answered. As there is no ancestral joint family nucleus, Act 1 of 1990 need not be discussed here because the properties are self-acquired properties of her father. Hence, the findings with regard to these items are sustainable in law. Accordingly, the question of law (1) is answered. But, with regard to item Nos. 4 and 5 of 'B' schedule, the properties are separate properties of

appellant/3rd defendant. To that effect, the findings rendered by the trial court is erroneous and misconception of law and on facts. Accordingly, it is liable to be set aside and this Second Appeal is partly allowed with regard to item Nos.4 and 5 of 'B' schedule and 'D' schedule deposit receipts. With regard to Item Nos.1,2,3,7,8,9 and 10 of 'A' and 'C' schedule respectively, the plaintiff is entitled to 1/4th share, since the properties are separate properties of her father Idumban and the defendants 1 to 3 also having equal 1/4th share on payment of court fee. Accordingly, the findings of the court below is set aside and the suit is partly decreed in respect of item Nos.1 to 3 of 'A' schedule and item Nos. 7 to 10 of 'C' schedule and the preliminary decree is granted allotting 1/4th share to the plaintiff. With regard to item Nos.4 and 5 of 'B' schedule, the suit is dismissed. With regard to item No.6 of 'C' schedule, it is a odai poramboke, the plaintiff is entitled to enjoy only 1/4th share along with others. In the result, this Second Appeal is partly allowed. There is no order as to costs.

18.08.2022

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To
Sub-Judge,
Dharmapuri.

T.V.THAMILSELVI, J.

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Pre-delivery judgment in
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