



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.03.2022

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.57 of 2010

WEB COPY

1.Rosammal

2.Sivajarani ... Appellants / Appellants / Plaintiffs

-Vs-

1.Selvan

2.Sundarraaj

3.Krishnan

4.Chellachi

5.Kamaraj

6.Dharman

7.Duraiaraj

8.Neelakandan

9.Arjun ... Respondents / Respondents /
Defendants 2, 3, 5 to 11

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 17.04.2009 passed in A.S.No.11 of 2006 on the file of the II Additional Subordinate Judge, Kuzhithurai, confirming the Judgment and decree dated 13.09.2005 passed in O.S.No.220 of 2004 on the file of the I Additional District Munsif Court, Kuzhithurai.

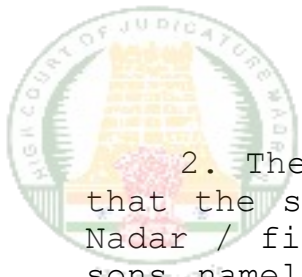
For Appellants: Mrs.J.Anandhavalli

For R2 & R4 : Mr.P.Thiagarajan

For R8 & R9 : no appearance

JUDGMENT

The plaintiffs in O.S.No.33 of 1991 on the file of the Sub Court, Kuzhithurai are the appellants in this second appeal.

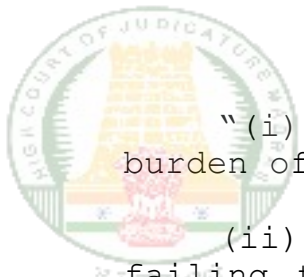


2. The suit was for partition. The case of the plaintiffs was that the suit properties are joint family properties. Velayuthan Nadar / first defendant was the kartha. He was blessed with three sons namely Thangaraj, Chellan and Sundarraaj. The plaintiffs are the wife and the daughter of Thangaraj. Thangaraj had passed away. Seeking partition of 1/4th share in the suit items, the plaintiffs issued notice. The first defendant replied that the plaintiffs have no right to seek partition. Since their request was not complied with, the suit came to be filed. During the pendency of the suit, Velayuthan Nadar passed away. Therefore, the plaintiffs amended the suit prayer. They now claim 1/3rd share in the suit item. The third defendant Sundarraaj filed written statement controverting the plaint averments. Based on the divergent pleadings, the trial court framed the necessary issues. The suit came to be decreed as prayed for. Aggrieved by the same, the contesting defendants filed A.S.No.1 of 1997 on the file of the Additional District Court, Kanyakumari, Nagercoil. The first appellate Court came to the conclusion that the suit was bad for non-joinder of necessary parties. It also took the view that the suit was bad for partial partition. In that view of the matter, the decision of the trial court was reversed and the matter was remanded. After remand, the court below framed the following four issues:-

- "1. Whether the suit properties are joint family properties?
2. Whether the suit is bad for partial partition?
3. Whether the suit is bad for non joinder of necessary party?
4. What is the share of the 2nd and 3rd defendants ? "

The first plaintiff examined herself as P.W.1 and marked Ex.A1 to Ex.A3. Chellan / second defendant examined himself as D.W.1, while Sundarraaj examined himself as D.W.2. Ex.B1 to Ex.B20 were marked originally. After remand, the plaintiff marked Ex.A4 to Ex.A6, while the defendant marked Ex.B21 to Ex.B23. After consideration of the evidence on record, the trial court by judgment and decree dated 13.09.2005 held that the suit was not bad for partial partition or non-joinder of necessary parties. It decreed the suit as prayed for in respect of items 6 to 16. The suit was dismissed in respect of items 1 to 5. Challenging the same, the plaintiffs filed A.S.No.11 of 2006 before the Sub Court, Kuzhithurai. By the impugned judgment and decree dated 17.04.2009, the first appellate court confirmed the decision of the trial court and dismissed the appeal. Challenging the same, this second appeal came to be filed.

3. The second appeal was admitted on 09.02.2022 after framing the following substantial questions of law:-



"(i) Whether the Courts below are right in shifting the burden of proof on the appellants?

(ii) Have not the Courts below committed an error in failing to presume the nature of the property as joint family property, when the same stands in the name of kartha of the family and in the absence of evidence let in by the respondents to prove it as his self-acquisition?"

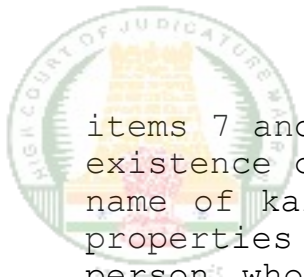
4. The learned counsel appearing for the appellants reiterated all the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial questions of law in favour of the appellants and set aside the impugned judgment and decree and decreed the suit as prayed for.

5. Per contra, the learned counsel appearing for the contesting respondents submitted that the impugned judgments and decrees are well reasoned and that they do not call for any intervention.

6. I carefully considered the rival contentions and went through the evidence on record.

7. Against the granting of relief in favour of the plaintiffs in respect of items 6 to 16, the contesting defendants have not filed any appeal. Preliminary decree passed in respect of those items has since become final. The contesting defendants had filed Ex.B21 to Ex.B23 which indicate that certain properties were purchased in the name of Thangaraj and that they were not included in the suit schedule. But the trial court did not accept the said contention and the defendants did not file any cross- appeal. Therefore, the finding of the trial court that non-inclusion of the property covered under Ex.B21 to Ex.B23 will not render the suit bad for partial partition has also become final. Now the only question that arises for consideration is whether the plaintiffs can be granted preliminary decree in respect of items 1 to 5.

8. On a careful perusal of the judgments of the courts below, it is seen that the courts below went primarily by the fact that the first defendant Velayuthan had executed Ex.B1 and Ex.B6 in favour of his sons namely Chellan & Sundarraaj and therefore, the suit deserves to be rejected insofar as items 1 to 5 are concerned. The courts below have also rendered a finding that the plaintiffs have failed to establish that the suit items 1 to 5 are joint family properties. The approach adopted by the courts below is not correct. Preliminary decree for partition was granted in respect of items 6 to 16. Items 7 and 16 are the properties belonging to the mother of Velayuthan Nadar. Except those two items, the remaining items bore the character of joint family properties. The defendants have not taken the plea that those items did not generate any income. Therefore, one can safely conclude that the items 6 to 16 excluding



items 7 and 16 generated income. The plaintiffs had established the existence of joint family nucleus. When the properties stand in the name of kartha, the burden to show that they are the self acquired properties of kartha and not the joint family properties lies on the person who makes the said assertion. This proposition has been categorically laid down by the Hon'ble Supreme Court in the decision reported in **(2003) 10 SCC 310 (D.S.Lakshmaiah and another Vs. L.Balasubramanyam)**, in the following terms:-

"18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available."

9. Respectfully applying the aforesaid proposition, I hold that the defendants did not discharge the burden cast on them. The courts below ought to have presumed that items 1 to 5 are also joint family properties. Of-course, the defendants were at a disadvantage. The learned counsel appearing for the contesting respondents would point out that Velayuthan Nadar was a taper by profession and that the fact that he had purchased properties in the names of his sons would clearly show that he was capable of acquiring properties on his own and that therefore, items 1 to 5 should also be considered as self acquisition of Velayuthan Nadar. But they were handicapped because of the demise of Velayuthan Nadar. This cannot be taken advantage by the plaintiffs. I cannot accept this contention. The courts below were obliged to see whether the contesting defendants discharged the burden cast on them. Unfortunately, the courts below shifted the burden on the plaintiffs. This was incorrect.

10. The learned counsel appearing for the respondents would submit that Ex.B1 & Ex.B6 should not be ignored. I am not persuaded by the said contention. Ex.B1 & Ex.B6 were executed in April 1991. The defendants had not put forth any contention that items 1 to 5 are co-parcenary properties. Since I have now come to the conclusion that they are joint family properties, the plaintiffs also would step into the shoes of the deceased Thangaraj. The kartha of the joint family could not have executed documents settling the properties in favour of some members of the joint family. The kartha if at all could have released his share in favour of the entire remaining body. He had not done so. He had chosen to adopt a selective approach. Therefore, Ex.B1 & Ex.B6 have to be ignored.



11. I answer the substantial questions of law in favour of the appellants and modify the impugned judgment and decree. I hold that the items 1 to 5 are also the joint family properties. The second appeal is allowed. No cost.

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Sd/-

Assistant Registrar(CS-III)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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To

- 1.The II Additional Subordinate Judge, Kuzhithurai.
- 2.The I Additional District Munsif Court, Kuzhithurai

Copy To

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

+1 CC to M/s.J.ANANDHAVALLI, Advocate SR-13399[F] dated 22/03/2022

Judgment made in
S.A.(MD)No.57 of 2010
21.03.2022

KM(CO)

TR(27.04.2022) 5P 6C