



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
RESERVED ON : 16.02.2022
DELIVERED ON : 21.02.2022
CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

S.A(MD)No.12 of 2019
and
C.M.P(MD)No.750 of 2019

Murugesan

... Appellant/
Appellant/3rd Defendant

Vs.

1.Ayyavu

... 1st Respondent/
1st Respondent/Plaintiff

Chellammal (Died)

... Nil 2nd Respondent/
1st Defendant

2.Nagammal

3.Katturani

... Respondents 2 & 3/Respondents 3 & 4/
Defendants 2 & 4

PRAYER : Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree, dated, 22.10.2018, made in A.S.No.30 of 2017 on the file of Additional District and Sessions Judge, Virudhunagar, partly allowing the judgment and decree, dated, 16.03.2012, made in O.S.No.70 of 2010 on the file of Subordinate Judge, Aruppukottai.

For Appellant : Mr.R.Suriya Narayanan, Advocate

For Respondents : Mr.T.Balaji, Advocate
for R1

JUDGMENT

The 3rd defendant is the appellant.

2. The plaintiff has filed a suit for partition claiming 5/12th share in the suit schedule properties. The trial Court decreed the suit as prayed for. The 3rd defendant filed A.S.No.30 of 2017 before Additional District and Session's Court, Virudhunagar. The learned District Judge modified the decree to the effect that plaintiff will be entitled to 1/4th share in 'A' and 'B' schedule properties. As against the same, the present second appeal has been filed by the 3rd defendant. The plaintiff had contended that 'A' schedule items 1 to

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4. The plaintiff further contended that his father Azhagu Moopar had passed away on 29.06.2005, leaving behind his wife Chellammal(1st defendant), 2 sons, namely, Murugesan and Ayyavu(3rd defendant and plaintiff) and 2 daughters, namely, Nagammal and Katturani, who are arrayed as 2nd and 4th defendants. Hence, according to the plaintiff, all the legal heirs of Azhagu Moopar are entitled to a share in the suit schedule properties and the plaintiff is entitled to 5/12th share.

5. The defendants filed written statement contended that 'B' schedule properties are the self-acquired properties of the 3rd defendant. The 3rd defendant further contended that himself and the plaintiff have orally partitioned all the items in 'A' schedule property in the year 2009, in which, western portion was allotted to the 3rd defendant and eastern portion was allotted to the plaintiff. Since already oral partition has taken place, the present suit for partition is not maintainable.

6. The trial Court after going through the oral and documentary evidence, arrived at a finding that the 3rd defendant has not established the plea of oral partition. Though the 3rd defendant has pleaded oral partition, no public documents have been produced on the side of the 3rd defendant to establish that mutation of revenue records have taken place in his name. The trial Court also arrived at a finding that the defendant had no independent income when the 'B' schedule properties were purchased in his name. The trial Court relied upon the deposition of D.W.1 to arrive at a finding that he was not employed and he has no source of income while the properties in 'B' schedule were purchased in his name. Hence, the trial Court arrived at a finding that 'B' schedule properties have been purchased from and out of the income from the 'A' schedule properties. Hence, the 'B' schedule properties will have the character of joint family properties. Based upon the said findings, the trial Court granted 5/12th share to the plaintiff in both 'A' and 'B' schedule properties.

<https://hcservices.courts.gov/is/hcservicesh>



plaintiff and defendants 2 to 4 are each entitled to 1/4th share in the suit schedule properties. The plea of oral partition was rejected by the First Appellate Court. As against the same, the present second appeal has been filed by the 3rd defendant.

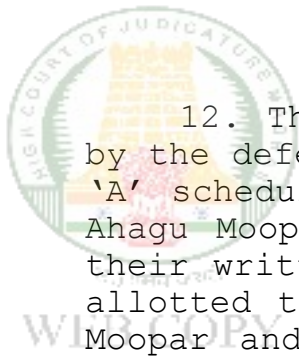
8. The second appeal has been admitted on the following substantial question of law:

"Whether the Courts below is correct in holding that the 2nd item of the suit property is a joint family property, when there is no rebuttal evidence against the sale deeds in the name of the appellant?"

9. The learned counsel for the appellant contended when the plaintiff has pleaded that from and out of the income from 'A' schedule properties, 'B' schedule property has been purchased in the name of the 3rd defendant, the entire burden is upon the plaintiff to establish the same. He further contended that the 3rd defendant was having an independent business and from and out of the income from the said business, he has purchased all the items in the 'B' schedule property. He further contended that the plaintiff has not established that there was a joint family nucleus and surplus income was available from the said joint family nucleus. Apart from that, the plaintiff has to establish that the said surplus was utilized for purchasing the 'B' schedule properties. Unless all the 3 ingredients are pleaded and proved by the plaintiff, the plaintiff will not be entitled to a decree for partition over the 'B' schedule properties, which are standing in the name of the 3rd defendant. Hence, he prayed for allowing the appeal.

10. Per contra, the learned counsel for the respondents/plaintiff contended that the plaintiff has specifically pleaded in the plaint that from and out of the income from items 3 to 7 in the 'A' schedule property, item 8 and 9 were purchased in the name of the 1st defendant. Similarly, from the income from 'A' schedule properties, all the items in 'B' schedule property have been purchased. The defendants have not specifically disputed the joint family nucleus or the surplus income from 'A' schedule properties in their written statement. The learned counsel for the respondents further contended that the defendant in his deposition has categorically admitted that he is not having any independent income of his own. Hence, a combined reading of the written statement and the deposition of the defendant will result in only one conclusion that 'B' schedule properties are also joint family properties purchased from and out of the income from 'A' schedule properties. Hence, he further prayed for dismissal of the second appeal.

11. I have carefully considered the submissions made on either side.



12. The Genealogy projected by the plaintiff has been admitted by the defendants. The plaintiffs had contended that items 1 to 7 of 'A' schedule properties are joint family properties of their father Ahagu Moopar. The said fact is also admitted by the defendants in their written statement by contending that the said properties were allotted to the share of Azhagu Moopar in partition between Azhagu Moopar and his brothers. Hence, there cannot be any dispute that items 1 to 7 of the 'A' schedule properties are the ancestral properties in the hands of Azhagu Moopar.

13. The plaintiff has specifically contended that the items 8 and 9 in 'A' schedule property have been purchased from and out of the income from items 1 to 7 of the 'A' schedule property. Though the defendants have contended that items 1, 2, 8 and 9 are the self-acquired properties of Azhagu Moopar, there is no specific denial that the income from items 3 to 7 were not utilized to purchase the rest of the items in the 'A' schedule property. The defendants have not specifically contended that there was no family nucleus or there was no sufficient surplus from items 3 to 7 of 'A' schedule property in order to purchase items 1, 2, 8 and 9 of 'A' schedule property in the name of Azhagu Moopar. Hence, we can safely conclude that items 1, 2, 8 and 9 of 'A' schedule properties were purchased only from and out of income from items 3 to 7, 10 and 11 of 'A' schedule property.

14. The learned counsel for the appellant contended that the 3rd defendant had independent source of income and utilizing the said income, he had purchased all the items in 'B' schedule property. When the plaintiff has pleaded that the 'B' schedule properties were purchased from and out of the income from 'A' schedule, the entire burden is upon him to establish the same. According to the learned counsel for the appellant, the plaintiff has to plead and prove the joint family nucleus and the surplus from the said nucleus and also the utilization of the said surplus for purchasing the 'B' schedule properties in the name of the 3rd defendant. In the present case, apart from pleading, the plaintiff has not produced any oral or documentary evidence to establish all the 3 ingredients required to brand a particular property as a joint family property though standing in the name of one of the co-sharers.

15. The learned counsel for the appellant also relied upon a Division Bench of our High Court reported in **2018 (3) CTC page 381** and **2022 1 L.W page 105** impress upon the Court that the burden is upon the plaintiff to establish all the required 3 ingredients for branding the 'B' schedule properties standing in the name of the 3rd defendant as joint family properties. There is specific averment in the plaint that from and out of the income from items 1 to 7 and 'A' schedule property, items 8 and 9 of 'A' schedule property was purchased in the name of the father of the plaintiff. Hence, we could find that items 8 and 9 in the 'A' schedule property are standing in the name of the father of the plaintiff, which are also

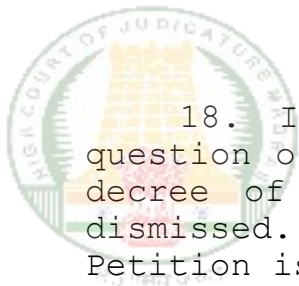


branded as a joint family property. The defendant in his deposition has admitted that they have no objection what so ever for partitioning all the items in the 'A' schedule property.

16. It is true that the burden is upon the plaintiff to establish joint family nucleus, surplus from the said nucleus and utilization of the said surplus for purchase of the properties in the name of the 3rd defendant in order to get a partition decree for the properties in the 'B' schedule property. In the present case, the 3rd defendant has simply stated that items 8 and 9 of 'A' schedule properties are the self-acquired properties of Azhagu Moopar. The 3rd defendant has also simply averred that all the items in the 'B' schedule properties are his self-acquired properties. He has not specifically disputed the plaint averment that the income from 'A' schedule property was not utilized for purchasing the 'B' schedule properties. There is no denial on the part of the defendants to the effect that there is no surplus from 'A' schedule property or the 3rd defendant has not utilized the said income from 'A' schedule property for purchasing 'B' schedule properties. In fact, in his deposition, he has categorically admitted that he has not having any avocation during the period, in which, the properties in the 'B' schedule properties were purchased. It is also to be noted that while the 'B' schedule properties were purchased in the name of the 3rd defendant, he was the eldest son. All other siblings were minors during the relevant period. Hence, the contention of the plaintiff that the father Azhagu Moopar had purchased the 'B' schedule properties in the name of the 3rd defendant only from and out of the income from 'A' schedule property has to be believed. That apart, when these properties in the 'B' schedule were purchased, the 3rd defendant was a college student. The disputed properties in the 'B' schedule have been purchased between 1990 to 1997. When the 3rd defendant has not specifically denied about the surplus income or the non-utilization of the said surplus income, the Courts below cannot be faulted with, for fixing the burden of proof upon the 3rd defendant. Only if the defendant had specifically disputed the joint family nucleus, surplus and utilization of the said surplus, the burden will be upon the plaintiff to establish the same.

17. In view of the above said discussion, the substantial question of law is answered as follows:

The 3rd defendant has not specifically denied the joint family nucleus or the existence of the surplus from the said nucleus or the utilization of the said surplus for purchasing 'B' schedule properties. The Courts below were right in holding the 'B' schedule property are joint family properties and have rightly granted a decree for partition.



18. In view of the above said discussion, the substantial question of law is answered against the appellant. The judgment and decree of the Courts below are confirmed. The Second appeal is dismissed. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

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Assistant Registrar (C.S.II)

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/ /2022

Sub Assistant Registrar(CS)

Note :In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

- 1.The Additional District and Sessions Judge,
Virudhunagar.
- 2.The Subordinate Judge,
Aruppukottai.

Copy To:

The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.(2 Copies)

+1 cc to Mr.T.BALAJI, Advocate, SR.No.7842

Pre-delivery Judgment made in

S.A(MD)No.12 of 2019

21.02.2022

SA(15.03.2022) 6P 6C