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A.S.No.653 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.07.2023

PRONOUNCED ON : 09.08.2023

CORAM

THE HONOURABLE **MR.JUSTICE K.KUMARESH BABU**

A.S.No.653 of 2016

- 1.Kalaiyarasi
- 2.Sathyabama
- 3.Mugundan Madhavan
- 4.Aravindan
- 5.Malathi

... Appellants/Defendants 1-5

Vs.

- 1.M.Mathesu
- 2.Susheela
- 3.Maharani

... Respondents

PRAYER: Appeal filed under Section 96 read with Order 41 Rule 1 of CPC against the judgment and decree dated 30.08.2016, in O.S.No.318 of 2013 on the file of the II Additional District Judge, Salem.

For Appellant : Ms.B.S.Mitranshaa for
M/s.V.Srimathi

For Respondents : Mr.T.S.Vijaya Ragavan for RR1 & 2



A.S.No.653 of 2016

Mr.M.Suresh Kumar for R3

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JUDGMENT

The instant appeal had been filed as being aggrieved against the judgment and decree of the Court below in granting a decree of partition and also a consequential injunction restraining the defendants 1 to 5 from alienating and encumbering the suit property.

2. The brief facts of the case is that one Late Marappa Goundar had inherited an ancestral property which he had sold in the year 1964 and out of the sale proceeds he had established a Tobacco business and due to his success in the business, he was popularly known as Tobacco Marappa Goundar. He died in the year 1969 and thereafter the sons of the Marappa Goundar had been carrying on the said business. The properties purchased pursuant to the death of Marappa Goundar were either from the sale proceeds that were retained by Marappa Goundar or from the profits of the business that was started by Marappa Goundar. Apart from the above, the earnings of the plaintiff who is one of the son of Marappa Goundar and other sons were also infused into the joint family corpus and purchases had been made. After the death of elder brother Gandeeban, disputes arose and



therefore, a Suit had been initiated by the second son of Marappa Goundar seeking for a division of the suit schedule properties and to allot him 1/5th share. The suit was resisted by the defendants 1 to 5 claiming that the allegations in the plaint as regards the existence of the joint family is false and that there were no proceeds left by the Marappa Goundar from the sale of the property in the year 1964 and all the suit properties which were purchased either by late Gandeeban first son of the Marappa Goundar and Aravindan, 3rd son of the Marappa Goundar, were all from the independent earnings of them as they were beneficially employed.

3. The trial court has framed three issues for consideration which are as follows:

- a) whether the plaintiff is entitled for 1/5th share in the suit schedule property?*
- b) whether the 4 and 5 defendants are entitled for the relief of permanent injunction not to create encumbrance over the suit property in any way?*
- c) what are the other reliefs?*

4. The Court below after considering the pleadings and evidences



A.S.No.653 of 2016

allowed the Suit, as being aggrieved against the same, the legal heirs of the first son and the 3rd son of Marappa Goundar are before this Court.

5. Heard Ms.B.S.Mitraneshaa learned counsel for Ms.V.Srimathi, learned counsel appearing for the appellants, Mr.T.S.Vijaya Ragavan learned counsel appearing for the respondents 1 and 2 and Mr.M.Suresh Kumar learned counsel appearing for the third respondent.

6. Ms.B.S.Mitraneshaa learned counsel appearing on behalf of the appellants would at the outset submit that the issues as framed by the Court below itself is wholly erroneous. The issues have been framed based on the prayers made in the suit and not on the pleadings in the suit. She would submit that the claim for partition is based upon the claim of the plaintiff/first respondent that the properties would have to be treated as a joint family properties. When that be so, the Court below would have to necessarily frame an issue whether the suit schedule properties were originally a joint family property and should have given a finding to that effect. Only thereafter, the Court below ought to have proceeded with the Suit to decide the right of the first respondent/plaintiff. She would further contend that admittedly under Ex.A.15, the father Marappa Goundar had



A.S.No.653 of 2016

WEB COPY sold the property on 09.07.1964. She would take this Court to the recitals of the said document wherein she would further submit that as per the recitals of the said document, the late Marappa Goundar had sold the property to close a loan that he had taken and also for family expenditure. She would submit that the recitals do not postulate that late Marappa Goundar had sold the property for starting a business, particularly a Tobacco business. She would submit that till the death of Marappa Goundar, he had not established any business muchless the Tobacco business and had not left any property. After the death of the Marappa Goundar, the elder son of Marappa Goundar namely Gandeeban had been beneficially appointed in the Government services and he had purchased a property on 26.12.1973. She would submit without admitting that even assuming that the said property was purchased out of the residuary of the sale proceeds of the year 1964 and the income from the tobacco business i.e., alleged to have been run by late Marappa Goundar. The said property had not been shown as the property i.e., subject to partition. Therefore, on that ground alone, the suit should not have been entertained by the Court below, as it is a partial partition and being hit by Order 2 Rule 2 CPC.

7. She would further contend that item Nos.1 & 2 of the suit schedule



A.S.No.653 of 2016

properties were purchased in the year 1992, which is evidenced by Exs.A2 & A3. Item No.3 of the suit schedule property was purchased in the year 2007 and is evidenced by Ex. B4. She would submit that the first son Gandeeban was working as a school teacher and has an independent source of income and Aravindan, who is the third son of the Marappa Goundar is working as an employee in the Transport Corporation and at the time of initiation of the suit was working as Assistant Manager. She would submit that Marappa Goundar had not established any Tobacco business. The plaintiff had not produced any documentary evidence to substantiate such a claim. She would also vehemently contend that the plaintiff had not pleaded in his affidavit in particular that even assuming that late Marappa Goundar had established Tobacco business that after the death of Marappa Goundar, business continued and flourished for it to enable the sons of Marappa Goundar to purchase the suit schedule properties.

8. She would also refute the claim of the first respondent/plaintiff that there existed a joint family. According to her, the first respondent/plaintiff had got married to an elderly person against the wishes of the family in the year 1983. He was also employed in a place away from where the elder son of Marappa Goundar and was staying elsewhere. He had not contributed



anything to the purchase of the suit schedule properties. She would submit that the suit schedule properties are independent properties of the appellants 3 & 4. She would submit that item Nos.2 & 3 of the suit schedule properties were independently purchased by the first son Gandeeban and after his demise, the appellants 1 & 2 had executed release deeds in favour of the third appellant, who is the son of Gandeeban. Item No.1 of the suit schedule property was independently purchased by the fourth appellant herein in the name of his mother Janaki Ammal in the year 1992 from his earnings in the Transport Corporation, where he was appointed much prior to the purchase of the said property. The mother Janaki Ammal had executed a settlement deed in favour of the fourth appellant and he had also executed a further settlement deed in favour of his wife 5th appellant for certain purposes and thereafter she had also executed a settlement deed in favour of her husband, fourth appellant. She would submit that these settlement deeds have also not been challenged by the appellant nor he had sought for a declaration to declare that the suit schedule properties belonged to a joint family.

9. She would heavily contest the reasonings and findings of the Court below by contending that there was no finding of the Court below as to



what was residuary that had been left after the sale of the property in the year 1964 and what was the income from the business, late Marappa Goundar was yielding to purchase the suit schedule properties. She had also submitted that there was no pleadings as to what was the contribution of the first respondent/plaintiff to the joint family and how much of such contribution of him was used for the purpose of purchase of the property. When that being so, the Court below should not have given a finding that there has been a contribution by the first respondent/plaintiff from his income and that there has been a contribution from the family business. She would submit that the Court ought to have seen that after their employments in the respective jobs, the sons of Marappa Goundar have not been living jointly and due to avocation they have been residing at their independent places.

10. She would also draw attention of this Court to the plaint to contend that the first respondent herein resides in a different address and the appellants 1 to 3 and appellants 4 and 5 are residing at a different place. Conveniently the plaintiff has given an office address for appellants 4 & 5 which itself would show that the first respondent/plaintiff has not come with clean hands to the Court.



A.S.No.653 of 2016

WEB COPY

11. She would further contend that the injunction as prayed for by the first respondent/plaintiff in the Suit is only against the 4th and 5th appellants herein, but however, the Court had gone beyond the prayer of injunction and had granted a permanent injunction as against the appellants who are defendants 1 to 5 in the Suit. On that ground alone, she would submit that such a relief granted should be set aside. Finally she would contend that the suit schedule properties are not joint family properties which could have been subject matter of partition. Hence, she prays this Court to set aside the judgment and decree impugned in this appeal.

12. Further she placed reliance upon the judgment of the Hon'ble Apex Court in the case of ***Srinivas Krishnarao Kango vs. Narayan Devjis Kango & Ors.***, reported in ***1954 SC 379*** and contend that the plaintiff had made a claim that out of the residuary of the sale of the ancestral property certain of the properties have purchased along with the joint nucleus, she submit that firstly, the first respondent/plaintiff has failed to prove that the property which had been purchased, there has been a blending of the ancestral property with the joint family as held in the aforesaid judgment. She would further rely upon the judgment of the Hon'ble Apex Court in the



A.S.No.653 of 2016

case of ***D.S.Lakshmaiah & Anr., vs. L.Balasubramanyam & Anr.***, reported

in ***2003 10 SCC 310*** to contend that presumption should not have been

drawn that the property is a joint family property and the onus is on the

persons on who asserts so. When the property is claimed to a joint family

property then the persons who claims the property to be joint family

property should prove the same only, then the burden of proof would shift

upon the other, who claims that the property is a self acquired property. In

the present case, she would submit that the Court below had erred in

holding that the defendants namely appellants 1 to 5 had failed in providing

any evidence to substantiate that the property is a self acquired property.

She further relied upon the judgment of this Court in the case of

G.Mohandoss & Ors., vs. G.Shanmugham & Ors., reported in ***2014 (4)***

LW 695 and contend that the first respondent/plaintiff had not proved by

way of any documentary or oral evidences that the tobacco business of

Marappa Goundar was continued by the family members and their

contribution of labour service or money into such business, when that be so,

the Court below ought not to have entertained the claim made by the first

respondent that the tobacco business started by Marappa Goundar had

continued even after the death of Marappa Goundar and that even during the

life time of Marappa Goundar that there was a contribution by the family



members to hold that the said business is a joint family business.

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13. Countering her arguments, Mr.T.S.Vijaya Ragavan, learned counsel appearing on behalf of the respondents 1 & 2 would submit that it is an admitted fact that late Marappa Goundar had ancestral properties, which he had sold in the year 1964. He would submit that two independent witnesses particularly PW-2 & PW-3 were examined before the Court below to substantiate that Marappa Goundar was carrying on Tobacco business during his life time and that he had also been popularly called as Tobacco Marappa Goundar which would itself show that the business carried upon by the late Marappa Goundar was a flourished business. He would submit that taking into consideration of the success in business the sons of Marappa Goundar had continued to carry on business even though they had been employed beneficially elsewhere. He would further submit that there was no contra evidence let in by the defendants to drive home their claim that there was no joint family nucleus. He would submit that he and his wife are beneficially employed and they had been contributing to the joint family nucleus. He would specifically rely upon Ex.A18 & Ex.A19, a letter addressed by the fourth defendant/fourth appellant herein and contend that the fourth appellant had been addressing the first respondent/plaintiff about



A.S.No.653 of 2016

the difficulties faced by him, and sought his help to get a job. If that be so, he would submit that there has been a joint family, as claimed by the applicant atleast till that date and therefore, presumption has to be drawn that the suit schedule properties had been purchased out of the joint family income. He would further contend that the eldest brother Gandeeban had died on 15.09.2009, after the purchase of the item no.3 in the suit schedule property he had built three houses for each of the brothers namely, the first respondent/plaintiff for himself and the fourth appellant herein. After the death of the said Gandeeban, they had changed their colours and had refused the rightful share of the first respondent/plaintiff. He would further submit that only after the death of the elder brother Gandeeban, the mother namely Janaki ammal had settled the property in favour of the fourth defendant and to only create a further cloud on the title the fourth appellant had executed a settlement deed in favour of his wife, who is the 5th appellant and the 5th appellant had again executed a settlement deed in favour of the 4th appellant. Therefore, he would contend that the Court below had rightly allowed the suit filed by the first respondent. He would further submit that while dealing with the issue No.1, as to the entitlement of the first respondent of 1/5th share in the suit schedule properties, the Court below had given a finding that the suit schedule properties are joint family



A.S.No.653 of 2016

properties having been purchased out of the joint family nucleus and therefore, he would contend that the Suit has been rightly allowed by the Court below and no interference is warranted by this Court.

14. Mr.M.Suresh Kumar, learned counsel appearing for the third respondent would adopt the arguments of the learned counsel appearing for the respondents 1 & 2.

15 . I have heard the learned counsel appearing for the respective parties and perused the materials placed on record.

16.The following issues arise for consideration in this appeal:-

1) whether the Court below was right in framing any issues on the pleadings that the suit schedule properties are joint family properties?

2)if so, whether the Court below was right in concluding that the suit schedule properties are joint family properties?

3) whether the Court was right in granting a decree of partition and the consequential permanent injunction?

Issue No.1:-



17. The case of the first respondent/plaintiff is that the suit schedule properties were joint family properties. However, this seems to have been stoutly disputed by the defendants 1 to 5 who are the appellants herein. The Court below had framed three issues based upon the prayer in the Suit. However, the pleadings to seek such prayer the first respondent/plaintiff had admittedly made a claim that the properties are suit schedule properties. Therefore, as rightly contended by the learned counsel appearing for the appellants that the Court below ought to have framed an issue at the first instance as to whether the suit schedule properties are joint family properties. The Court below had failed to do so, but however incidentally went upon to the said issue and had given a finding that the suit schedule properties are joint family properties.

Issue Nos.2 & 3:-

18. Admittedly the elder son Gandeeban, the predecessor in interest of appellants 1 to 3 had purchased a property in the year 1973. The said property had not been included as a property to the suit, which would only pre-suppose that the plaintiff recognise that the property has been purchased independently by Gandeeban his elder brother even as early as in the year 1973. In such circumstances, it would be relevant to analyse the reasonings



A.S.No.653 of 2016

and findings given by the Court below in coming to the conclusion that there was an existence of joint family nucleus for the purchase of the suit schedule property. Item Nos.1 & 2 of the suit schedule properties had been purchased in the year 1992 in the name of Janaki ammal and in the name of Gandeeban.

19. The case of the first respondent is that the purchase of item No.1 suit schedule property, the funds of the joint family nucleus had been used. He had not pleaded or in evidence placed any materials towards his contribution to the joint family.

20. It is an admitted case that the fourth appellant had been appointed in the Transport Corporation as early as in the year 1988. A reading of Ex.A.19, would also support the said fact where the fourth appellant had addressed the first respondent about the training that he has been undergoing at Chennai. That would presuppose that even four years prior to the purchase of the said property, which has been shown as item no.1 to the suit schedule property, the fourth appellant had been employed.

21. Further strong reliance had been placed by the learned counsel appearing for the respondents 1 & 2 on Ex.A18 & Ex.19 to drive home his



A.S.No.653 of 2016

contention that the joint family was in existence even at that point of time and further when the suit schedule properties were purchased. It is relevant to note that the address to which the aforesaid exhibits have been addressed to. The addressee viz., the first respondent/plaintiff is given as Nadupatty Post, Kadayampatty, Salem District, which is the same in the plaint. The address of appellants 1 to 3 have been shown to be at Pannapatty Post, behind post office and with regard to appellants 4 & 5, the office address of the 4th appellant had been given which would indicate, they were working in Dharmapuri and obviously they would also be residing at Dharmapuri. Hence, it could be seen that from the date of employment of the fourth appellant has been residing in Dharmapuri and even in the year 1987/88, the first respondent/plaintiff was residing elsewhere. This itself would be sufficient to hold that there was no joint family that was in existence as claimed by the appellants. Further a perusal of the deposition of PW-2 & PW-3, who are independent witnesses, who are examined to substantiate that Marappa Goundar carried on Tobacco business, do not in specific speak that after the death of Marappa Goundar, the business was continued by the sons of Marappa Goundar to substantiate the claim of the plaintiff that there was a substantial income from the business, which had been used to purchase the property. As I have already given a finding that the property



which was purchased in the year 1973 by Gandeeban had not been included in the schedule of properties to the suit. If the first respondent/plaintiff included the said property which was purchased under Ex.A1 and sought for the partition on the said property atleast then it could have been understood that the property had been purchased either from the income or from the joint family nucleus at that relevant point of time, since wife and children of Marappa Goundar were living in the said place. Since this is further supported by the pleadings of both the sides that after the death of Marappa Goundar, it was only Gandeeban who was an earning member of family, who had given education to the first respondent as well as fourth appellant and had got married the daughters of Marappa Goundar, who are the respondents 2 & 3 herein.

22. When that being so, it could only be taken that Gandeeban the elder son of Marappa Goundar had his own source of income and that item Nos.2 & 3 of the suit schedule properties would have been only purchased by him. Likewise item No.2 of the suit schedule properties as contended by the fourth appellant would have been purchased by him in the name of his mother and thereafter been settled in his name. If the contention of the first respondent is assumed to be correct, then the appellants 1 to 3 who are the



A.S.No.653 of 2016

legal heirs of the Marappa Goundar through Gandeeban the eldest son would have also made a claim for share in the item No.1 of the suit schedule property.

23. From what had been deduced supra, it is conclusive that the suit schedule properties are not joint family properties and they are independent properties of the third and fourth appellants and therefore, the first respondent/plaintiff cannot seek the relief for partition of the suit schedule properties. For the same reasons, he would not be entitled to seek for a permanent injunction restraining the defendants 4 & 5 from alienating or encumbering the suit properties, as they cannot be restrained from dealing with the properties which belonged to them. Therefore, I am of the view that the judgment and decree granted by the Court below is wholly erroneous without any basis and contrary to the material facts available on records.

24. In fine, the Appeal Suit is allowed and the judgment and decree of the Court below in O.S.No.318 of 2013 on the file of the II Additional District Judge, Salem, is set aside. However, there shall be no order as to costs.



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A.S.No.653 of 2016

09.08.2023

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To

II Additional District Judge, Salem



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A.S.No.653 of 2016

K.KUMARESH BABU,J.

pbn

A.S.No.653 of 2016

09.08.2023