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S.A.No.180 of 2005

IN THE HIGH Court OF JUDICATURE AT MADRAS

DATED : 18.04.2023

CORAM

THE HONOURABLE JUSTICE Mr.V.LAKSHMINARAYANAN

S.A.No.180 of 2005

Kandasamy ...Appellant.

Vs.

1.Minor Saranya rep.by
Guardian Mother Lakshmi.

2.Lakshmi

3.M.Kaja Mohideen

4.Bairaj Begum

5.M.Saithappa

6.Nurual Bacheeriyammal ...Respondents.

PRAYER:Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 25.10.2004 made in A.S.No.16 of 2004 on the file of the Additional District Court, Erode, confirming the judgment and decree dated 19.11.2002 made in O.S.No.472 of 1997, II Additional Sub Court, Erode.

For Appellants : Mr.Ma.P.Thangavel

R1 & R2 : Mr.Dheeraj for
Mr G R.M.Palaniappan

R3 to : NA-Served



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JUDGMENT

The first defendant in O.S.No.472 of 1997 on the file of the II Additional Sub Court at Erode, is the appellant. The suit was filed by respondent Nos.1 & 2. They are the minor daughter and the wife of the appellant. The marriage between the appellant and the second respondent took place on 13.07.1986. From the wedlock, the first respondent was born on 15.12.1987. The marriage fell into hard times and the parties separated soon thereafter. On 03.06.1989, the appellant claims that the 2nd respondent had given up her right for maintenance, after receipt of Rs.25,000/-.

2. There are totally three Items of properties. Item Nos.1 & 2 are situated in Vellodu village and Kangeyam village. According to the appellant, Item Nos.1 and 2 are his self-acquisitions. On the contra, it was the case of the respondent Nos.1 & 2 that Item No.3 which is also situated in Kangeyam village, belong to the joint family of the father of the appellant, Pachiappan and his brother Nachimuthu. They would plead that from and out of the income available from Item No.3, Item



Nos.1 & 2 were purchased. It is pertinent to note that on the date on which Item Nos.1 and 2 were purchased, the appellant was aged about 18 years and 23 years respectively.

3.To torpedo the case of the respondent Nos.1 & 2, the appellant would plead that there was self-acquisition by him in the nature of running lorry business, running a rice mill as well as earned income from money lending business. Sadly, for the appellant, he has not established any of the sources of income as pleaded by him.

4.Mr.Ma.P.Thangavel, learned Counsel for the Appellant would vehemently argue, that the burden of proof to show that the properties were joint family properties is heavily on the respondents Nos.1 & 2 and both the Courts below have wrongly misplaced the burden on the appellant. He would further submit that the wife having executed Ex.B.13, the document of relinquishment of maintenance, she is not entitled to claim maintenance. Therefore, he would submit the Court has to accept his plea, that Items Nos.1 & 2 are self-acquisitions and the wife is not entitled to be maintained by the husband as she has



executed Ex.B13.

5.The following substantial questions of law arises for consideration in this second appeal:-

" (i) When the nature of properties, in respect of which the relief of partition is asked for, is disputed by the contesting party as not joint family properties and when admittedly, the documents of title relating to those disputed properties (2 Items) stand in the name of the contesting party, is there not a legal burden on the parties asserting them as joint family properties to show the source for such purchase and when such a legal burden is not discharged by the parties concerned, have not the Courts below committed an error of law in giving a decree for partition in respect of those two Items also?

(ii) Can Ex-B13, the document under which the plaintiffs have received a lumpsum payment towards their maintenance be a bar for the plaintiffs maintain their claim for maintenance."

6.Mr.Dheeraj, Mr.G.R.M.Palaniappan learned Counsel appearing for the respondents 1 and 2 would submit that the mother, sister and the brother of the appellant had executed release deed with respect to the Item No.3 of the properties which would show that they have a pre-existing right in and over the properties. According to him,



the judgments of the Courts below are not perverse and have been rendered in a right manner after appreciation of the evidence and does not require interference by this Court, especially under Section 100 of the Civil Procedure Code, 1908.

7.I have carefully considered the arguments raised by Mr.Ma.P.Thangavel, learned counsel for the appellant and Mr.Dheeraj for Mr.G.RM.Palaniappan, learned counsel for respondent Nos.1 and 2. I have gone through the records in particular Ex.B13. I have perused the judgments of the Trial and the Lower Appellate Courts and I feel that this case does not require acceptance by this Court.

(i) The appellant has categorically admitted that Item No.3 of the suit schedule property is a joint family property. He has also graciously agreed to give 1/4th share to his daughter, who is the first respondent herein. It is his case that there were other sources of income on the basis of which he had purchased Item Nos.1 & 2 of the suit schedule properties.



8.Mr.Ma.P.Thangavel, learned counsel for the appellant would bring to the notice of this Court the subsequent development that on 23.09.2015, the appellant together with the first respondent had alienated Item No.3 in favour of the 3rd party by way of a registered sale deed. Therefore, Item No.3 is not available for partition. Insofar as Item Nos.1 & 2 are concerned, they have been purchased at a time when the appellant was hardly an adolescent/ teenager aged 18 and 24. The availability of joint family property has been established by marking Ex.A2 partition deed dated 04.07.1983. Therefore, during the relevant period of purchase of Item Nos.1 & 2 i.e., in the year 1974 and 1979 respectively, the joint family was very much in-existence. There is also an admission by the appellant during his cross-examination by the counsel for respondent Nos.1 & 2 that there was agricultural income from Item No.3.

9.This is sufficient to shift the burden of proof from the plaintiffs/respondent Nos. 1 & 2 on to the shoulders of the appellant/first defendant. The first defendant though has pleaded that



he was indulging in several business activities, as already pointed out, not given any proof of the same. This becomes looms large because the family had separated in the year 1989. The marriage took place in 1986. The helpless lady, that is the second respondent, cannot be called upon to produce records which are exclusively within the knowledge of the appellant, as the purchases were made before the marriage in 1974 and 1979 and also before the partition in the year 1983. She has given sufficient evidence to show the existence of the joint family and has managed to extract admission as pointed out above with respect to the income generated from the agricultural land that is Item No.3.

10. Thereafter, the burden shifts to the appellant would show that he had sufficient income from his own efforts to purchase the property. That evidence not being available, I am constrained to confirm the judgments of the trial Court and the lower appellate Court. I do not find any perversity with respect to the finding that Item Nos.1 and 2 in Kangeyam and Vellodu villages were purchased from



and out of the income generated in Item No.3.

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11.Now turning to the argument that the wife has given up her right under Ex.B13, a perusal of the lower appellate court judgment shows that the appellant, who is the husband of the second respondent, has been called upon to maintain his wife only from the date of the suit alone. For the period commencing from 13.07.1986 till the presentation of the plaint which is 18.09.1987, the Courts have not granted any relief.

12.To expect a lady who has been deserted by her husband to survive on an one time payment of Rs.25,000/-, when she was aged hardly 32 years for the rest of her life, to say the least, is cruel. It is in that light that the Trial Court and the Lower Appellate Court have granted the decree for the maintenance and in default have also direct creation of a charge over the assets of the appellant. I do not find any error in this. The amount that has been granted is less than Rs.30/- per day, which is in my view is highly insufficient for a lady to survive. I am not in a position to enhance the amount because the second



respondent has not preferred cross-appeal. Ex.B13 has been rightly interpreted, as not putting an end, to the right of maintenance of the wife. The additional factor is that the appellant has not only deserted his wife, but has also taken another lady in marriage and has begotten two children. It is the duty of the husband to maintain his wife and I am not willing to accept the technical plea that Ex.B13 puts an end to her right for maintenance.

13. There being no other questions of law projected before this Court, I answer the two questions framed against the appellant and in favour of respondent Nos.1 and 2. The appeal stands dismissed. Costs throughout.

18.04.2023

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Index : Yes/No

Speaking : Yes/No

Neutral Citations : Yes/No

To:

1. The District Judge



S.A.No.180 of 2---

Erode.

2. Additional Subordinate Judge,
Erode.

3. Record Keeper
VR Section
High Court of Madras
Chennai.

V.LAKSHMINARAYANAN. J,
nst



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