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S.A. No. 76 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.10.2023

CORAM

THE HONOURABLE MRS. JUSTICE T.V.THAMILSELVI

S.A. No.76 of 2018
and
C.M.P.No. 1653 of 2018

Kaliyaperumal
S/o. Marimuthu

.. Appellant

Versus

- 1 Sundari
- 2 Navneetham
- 3 Uma
- 4 Santhi
- 5 Manikandan

Lakshmi (died)

- 6 Nagalingam
- 7 Panchalakshmi @ Lakshmi
- 8 N.Padmanabhan
- 9 N.Karthikeyan
- 10 N.Kavitha

... Respondents

Prayer:- Second Appeal filed under Section 100 C.P.C., against the judgment and decree passed in A.S.No.13 of 2014 dated 28.11.2014 on the file of the Principal District Judge, Cuddalore confirming the judgment and



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decree passed in O.S.No. 148 of 2010 dated 10.01.2014 on the file of the II

Addl. Subordinate Judge, Cuddalore.

For Appellant : Mr.A.Kumanaraja

For Respondents : Mrs.Hema Sampath,
Senior Advocate for
Mrs. R.Meenal to R1 to R5

Mr.A.S.Mothilal Babu for R7

R6 & R8 to R10 – No appearance

JUDGEMENT

The appellant herein is the 1st defendant in the suit in O.S.No. 148 of 2020, which was filed by the respondents/plaintiffs 1 to 5 for the relief of partition and separate possession claiming 1/5th share in the suit property.

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

3. Before the trial court, the appellant/1st defendant stated that the suit properties are not joint family properties, more particularly, item Nos.1 and 2 properties were purchased by him by way of separate sale deeds AND



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other items are not belong to joint family. Before the trial court, issues were framed, i.e. (1) whether the plaintiffs are entitled for partition and also in respect of item nos. 1 and 2? (2) whether the 1st defendant is the absolute owner of the property?

4. Both parties have adduced their evidence. On the side plaintiffs, the 2nd plaintiff was examined as P.W.1 and documents Ex.A1 to A8 were marked. On the side of defendants, the 1st defendant was examined as D.W.1 and documents Ex.B1 and B2 were marked. On considering both side submissions, the trial judge held that all the items of properties are joint family property and there is no proof that item Nos.1 and 2 was purchased by the 1st defendant out of his own income, on the other hand, the plaintiffs proved that there is a joint family income from the properties, thereby held that in all the properties, the plaintiffs are having 1/5th share. Accordingly, a preliminary decree was passed. Challenging the same, the 1st defendant preferred first appeal in A.S.No. 13 of 2014. The lower appellate judge independently analysed the evidence on record and framed issues, more particularly, in respect of item Nos.1 and 2 of the suit properties are self-



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acquired properties of 1st defendant and it does not come under the purview of joint family properties. In respect of item Nos.3 to 5 of suit properties, those properties were relinquished by the 1st plaintiff's husband in favour of other sharers. Considering the evidence on record, the lower appellate judge held that in respect of item nos.1 and 2 of the suit properties, through Ex.B1 and B2 the 1st defendant claiming right over the same stating that the same was purchased by him out of his self income while he was working as Office Assistant in the National Highways department and through the said salary, he purchased two items, but the same was not proved by the 1st defendant nor the description of property found in Ex.B1 and B2 tallied with item Nos.1 and 2. Accordingly, the lower appellate judge held that suit properties in respect of item nos. 1 and 2 is the joint family properties and in respect of other items, there is no proof on the side of 1st defendant that Gandhi @ Kalyanasundaram has relinquished their share, but it was not proved by the 2nd plaintiff that his father Gandhi @ Kalyanasundaram relinquished his right over item Nos.3 to 5 by receiving a sum of Rs.8600/- in the year of 1991. If at all, any such relief made by the 2nd plaintiff's father, the same ought to have been proved through the document, but there is no such



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document was produced and hence, the alleged relief made by the plaintiffs is unsustainable one. Further, the lower appellate judge held that as per 'A' register and patta, suit item nos.2 to 5 stands in the joint patta. Therefore, those properties are joint family properties and 2nd plaintiff's possession also deemed to be constructive possession, though she got married long back. Accordingly, the appeal suit is dismissed as no merit confirming the findings of the trial judge. Challenging the concurrent findings of the courts below, the present Second Appeal has been filed.

5. The learned counsel for appellant would submit that based on assumption and presumption, the courts below arrived conclusion in respect of entire suit properties that those are joint family properties, but the same cannot be entertained for the reason that the plaintiffs are bound to establish that there was an ancestral joint family property as well as out of the income derived from those properties, they purchased the suit properties, but before the courts below, the plaintiffs not adduced any evidence to that effect, without which, the courts below erroneously concludes that all the items of properties are joint family properties as such is totally unfair, unjust and



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liable to be set aside. He would further submit that nearly about four decades, plaintiffs not raised any objections nor claimed right over the properties, however the suit filed by the plaintiffs after 20 years, as such is totally barred by limitation, but the same was not properly appreciated by the trial judge. Hence, he prayed to set aside the findings of the courts below. The learned counsel would also submit that out of his salary, he purchased item Nos. 1 and 2 of the properties and the same was established by him, but it was not properly appreciated by the trial judge. Furthermore, the trial judge failed to take note of the fact that when the 1st defendant able to establish his income, the burden is casted on the plaintiffs to prove that there was a joint family nucleus to purchase the property, but no such evidence was adduced on the side of plaintiffs, inspite of that, suit was decreed in favour of plaintiff as such is erroneous and liable to be set aside.

6. By way of reply, the learned counsel for respondents/plaintiffs 1 to 5 would submit that the plaintiffs are the legal heirs of deceased Gandhi @ Kalyanasundaram, who is brother of defendants 1 and 2 and sons of one Marimuthu and they constituted a Hindu joint family and out of the income



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derived from the joint family property, item no.1 of the property was purchased in the name of 1st defendant, who was the eldest son, but the said property was also enjoyed along with other joint family properties by the said Marimuthu. After his demise 19 years prior to the filing of the suit, as an elder member, the 1st defendant managed the properties. Thereafter, father of plaintiffs died intestate leaving them as his legal heirs. As the defendants 1 and 2 have not cooperated for amicable division, the plaintiffs have filed a suit for partition and also established that all the properties are joint family properties and the same was rightly appreciated by the trial judge by allowing a preliminary decree. He would also submit that the 1st defendant failed to establish that item nos.1 and 2 were purchased out of his self-earnings, thereby the suit is decreed in favour of plaintiffs, which needs no interference. Hence, he prayed to dismiss this Second Appeal as no merit.

7. Considering both side submissions, this Second Appeal is admitted on the following substantial question of law:-



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“(A) Whether the courts below is correct in arriving the conclusion on their presumption when the assuming and presumption of the courts are no ground for rendering judgment without any factual material to prove their case of partition at a belated stage?

(B) Whether the courts below is correct in not discussing the limitation aspect, when one of the plaintiff having admitted the fact that the right to sue accrues 15 years ago itself?

(C) Whether courts below is correct in coupling the documents viz., the sale deed executed in favour of the appellant and which has been purchased in his individual capacity as ancestral property while passing a preliminary decree without even knowing the contents of the sale deed constituted therein?

(D) The Courts below has not adduced the document viz., the Ex.B1 and B2, which has been purchased under the individual capacity of the appellant, but on its own presumption that it has been from and out of the ancestral property whether such presumption of the courts below is



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correct when categorically the narration of the sale deed is entirely different and it has not been considered by the courts below before arriving such presumption?

8. Considering the facts and circumstances, the relationship between the parties are admitted. The contention of plaintiffs that entire suit item nos. 1 to 6 are the joint family properties, in which, all the plaintiffs are entitled 1/5th share in the entire suit properties along with defendants 1 and 2. Defendants admitted the relationship, but denied the plaintiffs claim in the entire suit properties, according to him, he was worked as Office Assistant in the Highways Department from the year of 1964 to the year of 2002. During that time, he arranged marriage for his brothers and all were separated. Thereafter, out of his own salary, he purchased item No. 1 of the property on 04.05.1988 for a sum of Rs.4500/- and also purchased item No.2 of property from one Sakthivel in the year of 1986 for a valid consideration, thereby item nos.1 and 2 are self-acquired properties, in which the plaintiffs have no share. But the plaintiffs would submit that one Marimuthu and his brothers have divided the family property among themselves and thereafter,



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sons and daughters of Marimuthu jointly enjoyed the property and after the demise of the said Marimuthu, his three sons viz., Gandhi @ Kalyanasundaram and defendants 1 and 2 have constituted a Hindu joint family and as an eldest son, the 1st defendant maintained entire properties and out of the income derived from the joint family properties, item nos. 1 and 2 were purchased in the name of 1st defendant. After the demise of the said Gandhi @ Kalyanasundarm, as legal heirs of the plaintiffs, have demanded for partition, but it was denied. Hence, the suit was filed.

9. The contention of the plaintiffs 1 to 5 is that out of joint family income, item nos.1 and 2 were purchased in the name of 1st defendant. The learned counsel for appellant would submit that mere existence of joint family properties is not sufficient to conclude that there was a sufficient income derived from the said family properties and the plaintiffs are bound to prove that there was sufficient nucleus to purchase the properties out of joint family income. But the courts below without considering the same granted the relief in favour of plaintiffs as such is erroneous one. In support of his contentions, he relied on the ratio laid down in the case of *Achuthan*



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Nair vs. Chinnamu Amma and others reported in **1966 (1) CR 454 :**

AIR 1966 SC 411, wherein the Apex Court held that under Hindu law, when a property stands in the name of a member of a joint family, it is incumbent upon those asserting that it is a joint family property to establish it. When it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might have made the acquisition, the law raises presumption that it is a joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus.

10. By way of reply, the learned counsel for appellant would submit that though there was a joint family property, but the 1st defendant was employed as Office Assistant in Highways department, in which he earned considerable income and out of the same, he purchased item nos.1 and 2. To that effect, he relied the recitals of Ex.B1 and B2 Sale deeds. As per the recitals of Ex.B1 and B2, admittedly, these two items of properties are stand in the name of 1st defendant, which were purchased during the year of 1986 and 1988. At that time, he worked in the highways department and drawing



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salary. Therefore, the 1st defendant is able to establish that he had considerable independent income. Furthermore, the recitals of Sale deeds shows that the vendor received the amount in liquidation from the 1st defendant by way of hand loan, as they were not able to repay the same, they have executed the sale deed in favour of 1st defendant. Therefore, the 1st defendant able to establish that he had independent income to purchase the properties. Furthermore, though there was joint family properties, there is no proof on the side of plaintiffs that there was sufficient surplus from joint family property, through which, item nos.1 and 2 purchased in the name of 1st defendant. To support his contention, the appellant relied the ratio laid down in the authority held in the case of ***Kamalesh Babu vs. Lajpat Rai Sharma*** reported in ***2008 (12) SCC 577*** and also the ratio laid down by this court in the case of ***C.R.P. (Pd) (MD) No. 2535 of 2018 dated 29.10.2021*** in the case of ***D.Rajkumar and others vs. Rajeswari and others***. Relying the said proposition, he would submit that the duty is casted upon the defendants to prove that it is his separate property. As discussed above, at the time of purchase, he was employed in Government service and had a sufficient income. Therefore, the item Nos.1 and 2 are separate properties of



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1st defendant. The plaintiffs failed to establish that there was sufficient surplus nucleus to purchase the property. Therefore, those properties were not purchased with the help of joint family funds. But, the courts below without appreciating the said legal proposition as well as evidence on record, erroneously presumed that mere existence of joint family property is sufficient to conclude that item nos. 1 and 2 were purchased out of joint family income and also wrongly conclude that there was no considerable income for the 1st defendant. Based on the presumption and assumption, those findings were given by the courts below in respect of item nos. 1 and 2 as such is unsustainable one and the same is liable to be set aside. Accordingly, question of law (A) is answered.

11. Furthermore, through Ex.B1 and B2, the 1st defendant able to establish those properties are not joint family property, in which the plaintiffs have no share. Therefore, the findings rendered by the courts below is set aside and in respect of item Nos.1 and 2, those properties are separate properties of 1st defendant and the plaintiffs are not entitled to claim any share in those properties. In respect of other items of properties, the 1st



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defendant would submit that it was not concerned with the joint family, but no evidence was adduced to establish those facts. On the other hand, plaintiffs' father Gandhi @ Kalyanasundaam and 2nd defendant received an amount of Rs.8600/- on 11.02.1991 and relinquished their share by oral relinquishment is not permissible under law, which was rightly appreciated by the courts below. Therefore, those item Nos.3 to 6 are joint family properties, which was admitted by the 1st defendant. As the legal heirs of Marimuthu, the plaintiffs and defendants are entitled to their lawful share. In respect of item No.1 and 2, the findings rendered by the trial judge is liable to be set aside and item Nos.3 to 6 are joint family properties. Accordingly, the question of law (C) and (D) are answered. In respect of limitation aspect, as the properties are joint family in nature, the plaintiffs possession also deemed to be constructive possession. Therefore, they are entitled to file a suit for partition claiming their lawful share. However, the issue with regard to the fact that the suit is barred by limitation, as such is unsustainable one. Hence, the question of law (B) is answered. Accordingly, this Second Appeal is partly allowed and in respect of Item Nos.1 and 2 of suit properties, suit is dismissed, as it is purchased by the appellant/1st



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defendant. In respect of other items, the plaintiffs are entitled to 1/5th share in those properties. Accordingly, the suit is partly decreed. Preliminary decree passed in respect of Item Nos.3 to 6 in favour of plaintiff and dismissed in respect of item Nos.1 and 2. No costs. Consequently, connected C.M.P. is closed.

20.10.2023

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To

Principal District Judge, Cuddalore.



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T.V.THAMILSELVI, J.

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Pre-delivery judgment in
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