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S.A.No.386 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.12.2023

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.No.386 of 2017
and
CMP.No.8991 of 2017

1.V.M.Munirathinam (Died)
2.M.Vasanth
3.Murali Vapati
(A1-Died, A2 & A3 are brought on record
as LR's of the deceased A1 vide Court
order dated 22.11.2023 made in
CMP.Nos.603, 605 & 607/2023 in
S.A.No.386 of 2017)

...Appellants

Vs.

1.V.R.Munusamy Naidu
2.V.M.Babu
3.M.Loganathan

4.Minor L.Jagadeesh
Rep.by his father/guardian
Loganathan.

5.Baby Ammal (Died)

... Respondents

(memo recorded dated 29.11.2023
R5-Died, R3 is sole legal representatives
of the deceased R5 vide Court order
dated 22.11.2023 made in S.A.No.386/2017)



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Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 21.11.2016 made in A.S.No.178 of 2014 on the file of the learned Sub-Court, Arakkonam, confirming the judgment and decree dated 26.08.2014 made in OS.No.185 of 2008 on the file of the learned District Munsif Court, Arakkonam.

For Appellants : Mr.N.Manokaran

For Respondents : Mr.S.Saravana Kumar
for Mr.I.Abrar Md.Abdullah
for R1 & R3
Mr.P.Krishnan for R2
R4- Minor represented by R3
R5- Died

JUDGMENT

The unsuccessful plaintiff is the appellant. He filed a suit for partition claiming 1/3rd share in the suit 'A' Schedule property and 1/4th share in the suit 'B' and 'C' Schedule properties. The trial Court granted a preliminary decree for partition of 1/3rd share in respect of 'A' Schedule property and the suit was dismissed in respect of 'B' and 'C' Schedule properties. Aggrieved by the same, the appellant preferred an appeal and the same was dismissed. Hence, he is before this Court.



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

3. The appellant/plaintiff and the second defendant are the sons of the first defendant through his first wife Sarojammal. The second wife of first defendant has been arrayed as fifth defendant in the suit. The third defendant is the son of first defendant through his second wife viz., Baby Ammal who was arrayed as fifth defendant. The fourth defendant is the son of third defendant.

4. According to the appellant/plaintiff, the suit 'A' Schedule properties are absolute properties of his mother Sarojammal as she purchased the same through a registered sale deed dated 01.12.1963. She died intestate on 17.10.1965 leaving behind her sons namely plaintiff and second defendant, and her husband/first defendant as legal representatives. Therefore, the plaintiff claimed 1/3rd share in the suit 'A' Schedule properties. It was also claimed by the plaintiff that he along with defendants 1 & 2 constituted Hindu Joint Family and 'B' & 'C' Schedule properties were joint family properties. He claimed that suit 'B' Schedule properties were ancestral properties of family



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and the suit 'C' Schedule properties were purchased out of income earned from 'B' Schedule ancestral properties. It was also claimed that in any event 'C' Schedule properties which were purchased in the name of first defendant was thrown into in common hotch pot and hence blended together with the joint family properties. Therefore, the plaintiff claimed 1/4th share in 'B' & 'C' Schedule properties along with defendants 1 to 3.

5. The second defendant filed a written statement supporting the case of the plaintiff. The first defendant and defendants 3 & 4 filed a separate written statement and contended that 'B' and 'C' Schedule properties were self acquired properties of first defendant and hence, those properties were not available for partition. It was also contended by the first defendant that Sarojammal had no source of income, therefore, 'A' Schedule properties were not absolute property of Sarojammal and the first defendant purchased 'A' Schedule properties out of his funds in the name of said Sarojammal. Therefore, they pleaded that 'B' and 'C' Schedule properties were not ancestral properties. Thus, the contesting defendants resisted the claim of the plaintiff over the suit 'B' and 'C' Schedule properties. On these pleadings, they sought for dismissal of the suit.



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6. The trial Court on appreciation of oral and documentary evidence available on record came to the conclusion that 'A' Schedule properties were the self acquired properties of Sarojammal and therefore, the plaintiff, the first defendant and the second defendant were entitled to 1/3rd share each. As far as 'B' and 'C' Schedule properties were concerned, the trial Court came to the conclusion that the plaintiff failed to prove his plea that these properties were ancestral properties of the family. Therefore, the suit was dismissed in respect of 'B' and 'C' Schedule properties. Aggrieved by the dismissal of the suit in respect of 'B' and 'C' Schedule properties, the plaintiff preferred an appeal in A.S.No.178 of 2014 on the file of the Sub-Court, Arakkonam. The First Appellate Court also affirmed with the findings of the trial Court. Challenging the said judgment and decree, the plaintiff has come up with this Second Appeal.

7. At the time of admission, this Court formulated the following substantial question of law:

“ Whether the Courts below have committed an error in dismissing the suit for partition in respect of suit B and C Schedules, especially when the law presumes that the properties stood or purchased in the name of the



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Kartha are presumed to be purchased out of the joint family properties?"

8. The learned counsel for the appellant submitted that the first defendant is the Kartha of the property of the family and hence any purchase made in the name of the first defendant presumed to be joint family properties. The learned counsel for the appellant further submitted that the contesting defendants resisted the suit on the ground that the suit 'B' and 'C' Schedule properties were self acquired properties. As far as 'B' Schedule properties are concerned the contesting defendants failed to lead any evidence to show that these properties are self acquired properties of the first defendant Munusamy Naidu. Therefore, the Courts below by applying presumption under law ought to have held that 'B' Schedule properties are ancestral properties. Since it is established that 'B' Schedule properties are ancestral properties of the family, 'C' Schedule properties which were purchased in the name of first defendant under Ex.A2 to Ex.A7 shall be treated as properties purchased out of jointly family funds earned from 'B' Schedule properties.

9. The learned counsel for the appellant further submitted that joint patta stands in the name of first defendant and his brother clearly proved



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that at least item No.1 of 'B' Schedule properties is the joint family schedule property and hence, the Courts below ought not to have dismissed the suit at least in respect of item No.1 of 'B' Schedule properties.

10. The learned counsel for the respondents submitted that in the absence of availability of sufficient joint family nucleus, the purchase made in the name of the first defendant cannot be treated as one purchased out of joint family funds. In the case on hand, there is no sufficient joint family nucleus. Therefore, presumption of law available under the Hindu law that any acquisition by Kartha is only out of joint family funds cannot be applicable to the facts of the present case.

11. Both the Courts below based on the evidence available on record came to the conclusion that the suit 'A' Schedule properties purchased in the name of Sarojammal, first wife of first defendant under Ex.A1 were self acquired properties of Sarojammal. In the absence of any acceptable evidence to show that the first defendant, out of his own funds or joint family funds, purchased 'A' Schedule properties in the name of Sarojammal that too for his own benefit, the acquisition of property in the name of Sarojammal shall be



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treated as her self acquisition. Even assuming that there is evidence to show that consideration was paid by the first defendant, by virtue of presumption available under Section 3 (2) of the Benami Prohibition Act, as it stood on the date of filing of the present suit, it should be presumed that the property was purchased for the benefit of female member of the family namely Sarojammal.

12. In such circumstances, the findings of the Courts below that the suit 'A' Schedule properties were self acquired properties of Sarojammal requires no interference. In fact the trial Court granted a preliminary decree for partition of 1/3rd share in respect of 'A' Schedule properties and the same has not been challenged.

13. As far as 'B' and 'C' Schedule properties are concerned, it is the specific case of the appellant that 'B' Schedule properties are joint family properties and 'C' Schedule properties were purchased in the name of first defendant out of joint family funds. However, the appellant failed to prove any evidence to show that 'B' Schedule properties are joint family properties. The appellant produced Ex.A15 joint patta in the name of first defendant and his brother. Therefore, the learned counsel for the appellant submitted that at least



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item No.1 of 'B' Schedule properties shall be treated as joint family property.

In respect of remaining items of 'B' Schedule properties there is no evidence available on record to show that other items of 'B' Schedule properties are ancestral properties or joint family properties. Even if the contention of the learned counsel for the appellant is accepted that in respect of item No.1 of 'B' Schedule properties Ex.A11 joint patta stands in the name of the first defendant and his brother, however, the appellant failed to implead the brother of first defendant in the suit. In such circumstances, the claim of appellant for partition in respect of item No.1 of 'B' Schedule properties is bad for non joinder of necessary parties. In this regard, it is relevant to rely on the judgment of this Court in ***Shanmugham and others Vs. Saraswathi and others***, reported in ***AIR 1997 Mad 226***, wherein it was held that non joinder of sharer in a suit for partition goes to the root of the matter and hence, the partition suit is liable to be dismissed for non-joinder of sharers. The relevant observation of this Court in this regard reads as follows:

“8. There is no merit in the contentions. The question of non-joinder of necessary parties in a suit for partition can be raised at any time as it goes to the root of the matter. It is well settled that a suit for partition is not



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maintainable in the absence of some of the co-sharers. See A. Ramchandra Pillai Vs. Valliammal (1987) 100 Mad L.W.486."

14. The learned counsel for the appellant by relying the judgment of *Balamani and another Vs. S.Balasundaram*, reported in **2009 (3) CTC 760** submitted that the claim of the appellant for partition in respect of item No.1 of 'B' Schedule properties need not be negatived on technical point of non-joinder and to enable the appellant to implead the brother of first defendant the suit may be remanded back to the Courts below. In case, the entire suit is bad for non-joinder for necessary parties, the Court may exercise its discretion and remand the matter to enable the parties to remove the formal defect. However, as pointed out earlier, out of 9 items in 'B' Schedule there is no evidence available on record to show that item Nos.2 to 9 are ancestral properties of the family. Likewise, 10 items available in 'C' Schedule properties were purchased in the name of the first defendant. There is no evidence available on record to show that the family possessed sufficient joint family nucleus to enable the first defendant to purchase 'C' Schedule properties out of joint family funds earned from said jointly family nucleus.



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15. Merely because, revenue documents in respect of item No.1

stand in the name of first defendant and his brother, he cannot claim that the item No.1 shall be treated as ancestral property. The same shall be adjudicated in the presence of his brother. Hence plaintiff's claim for partition in item No.1 of 'B' Schedule is rejected on the ground of non joinder of 1st defendant's brother.

16. As far as other items in 'B' Schedule are concerned absolutely

there is no evidence available on record to show those properties are ancestral properties. Hence, the trial Court on proper appreciation of evidence on record rejected the claim of plaintiff in respect of those items. Hence, other items in 'B' Schedule properties are not available for partition. Though the learned counsel for the appellant submitted that 'C' Schedule properties which were purchased in the name of first defendant was purchased out of joint family funds, there is no evidence available on record to show that family possessed sufficient joint family nucleus to enable the first defendant to purchase the properties in his name out of income from joint family properties. This Court already came to the conclusion that 'B' Schedule properties are not joint family properties.



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17. In such circumstances, absolutely there is no evidence available on record to show that 'C' Schedule properties were purchased out of joint family funds. Therefore, the findings of the fact reached by the Courts below that the appellant/plaintiff failed to prove that 'B' and 'C' Schedule properties were joint family properties is justified and the same requires no interference by this Court. Accordingly, the substantial question of law is answered against the appellant and in favour of the respondent. Hence, the Second Appeal is dismissed. It is open to the appellant to file a suit for partition in respect of item No.1 of 'B' Schedule property alone by impleading brother of the first defendant, if so advised.

18. a) In the result, the Second Appeal stands dismissed by confirming the judgment and decree passed by the Courts below.

b) In the facts and circumstances of the case, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

01.12.2023

Index : Yes/No
Internet : Yes/No
Neutral Citation Case : Yes/No
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To

- 1.The Sub-Court, Arakkonam.
- 2.The District Munsif Court, Arakkonam.



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S.SOUNTHAR, J.

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