



A.S(MD)No.16 of 2007

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	16.02.2023
Pronounced on	24.03.2023

CORAM

**THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN
AND
THE HONOURABLE MR. JUSTICE K.K.RAMAKRISHNAN**

**A.S(MD)No.16 of 2007
and
C.M.P(MD)No.8306 of 2022 and M.P.(MD)No.2 of 2012**

1.R.Raju (Died)

2.R.Periasamy

(second appellant is transposed to 14th respondent vide Court order dated 20.10.2016 made in MP(MD)No.3 of 2012 in AS. (MD)No.16 of 2007 by MSNJ & JNBJ)

3.Ashok Kumar

4.Kishok

5.Seenivasan

... Appellants

(Appellants 3 to 5 are brought on record as LR's of the deceased 1st appellant vide Court order dated 07.10.2021 made in CMP(MD)Nos.4028 & 4029 of 2021 in AS(MD)No.16 of 2007 by VBDJ and JNBJ)



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Vs.

- 1.R.Ganesan
- 2.Murugayiammal
- 3.Saraswathiammal
- 4.Shanthi
- 5.Selvi
- 6.Ramesh
- 7.Dhanapackiam
- 8.Ravi@ Buvanendran
- 9.Krishnamoorthy
- 10.Mohana
- 11.Renuga Devi
- 12.Gunasundari
- 13.Sangeetha

.. Respondent/Plaintiff

(R2 to R13 are impleaded vide order dated 08.01.2015 made in MP(MD)No.2 of 2013 in AS. (MD)No.16 of 2007 by ASJ & TMJ)

- 14.R.Periyasamy (died)
- 15.Maragatham
- 16.Sundarapandiammal
- 17.Saraswathi
- 18.Vijayakumar
- 19.Sankar
- 20.Vinoth Kumar



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(R15 to R20 are brought on record as LR's of deceased 14th respondent, vide Court order dated 18.10.2019 made in CMP(MD)Nos.7860, 8010 & 8011 of 2019 in AS.(MD)No.16 of 2007 by TSSJ & RTJ)

21.Parimaladevi

22.Sangareswari

.. Respondents

(Respondents 21 and 22 are brought on record as LR's of the deceased 1st appellant vide Court order dated 07.10.2021 made in CMP(MD)Nos. 4028 & 4029 of 2021 in AS(MD)No. 16 of 2007 by VBDJ & JNBJ)

PRAYER: Appeal filed under Section 96 of the Code of Civil Procedure, against the decree and the judgment dated 23.11.2006 rendered in O.S.No.531 of 2004 on the file of the Additional District Judge cum Fast Track Court No.3, Madurai.

For Appellant	: Mr.S.Subbiah, Senior Counsel for Mrs.P.Jessi Jeeva Priya
For R1	: Mr.A.Arumugam
For R15 to R20	: Mr.I.Velpradeep
For R21 to R22	: Mr.P.Paranthaman
For R2 to R13	: No Appearance



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JUDGMENT

K.K.RAMAKRISHNAN, J.

The present appellant and the transposed 14th respondent herein, who are defendants in O.S.No.531 of 2004, originally jointly filed this Appeal Suit before this Court challenging the preliminary decree for partition granted in favour of the first respondent/plaintiff in O.S.No.531 of 2004 on the file of the Additional District Judge cum Fast Track Court No.3, Madurai, dated 23.11.2006.

2. The first respondent namely, Ganesan, filed a suit in O.S.No.531 of 2004 on the file of the Additional District Judge cum Fast Track Court No.3, Madurai, seeking relief of partition of his 1/3 share in the suit schedule items 1 to 9 by metes and bounds by arraying the appellant as first defendant and the transposed deceased 14th respondent as a second defendant. The same was decreed as prayed for. Aggrieved over the same, both first defendant and the second defendant jointly preferred the above Appeal Suit. During the pendency of the above appeal, first respondent/plaintiff taken an affidavit to implead his sisters as party to this Appeal Suit. So, among three sisters, two sisters who were alive on the date, namely, Saraswathiammal and



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Murugaiyiammal and the legal heirs of the deceased sister Lakshiammal were impleaded. During the pendency of this Appeal Suit, the second appellant-Periyasamy, for some other reasons, supported the case of the plaintiff and hence, the first appellant Raju filed the transpose application in M.P(MD)No.3 of 2012 and the same was allowed by this Court by order dated 20.10.2016. So, Periyasamy was transposed as 14th respondent in this Appeal Suit. Subsequently, he died and his legal heirs are impleaded as R15 to R20 vide order of this Court dated 18.10.2019 made in C.M.P(MD)Nos.7860, 8010 & 8011 of 2019. During the pendency of this Appeal Suit, the sole appellant died and appellants 2 to 4 and respondents 21 & 22 are brought on record as his legal heirs, vide order of this Court dated 07.10.2021 made in C.M.P(MD)No. 4028 & 4029 of 2021.

2.1. For better appreciation of the fact, genealogy of the parties to the present appeal is necessary and the same is as follows:-

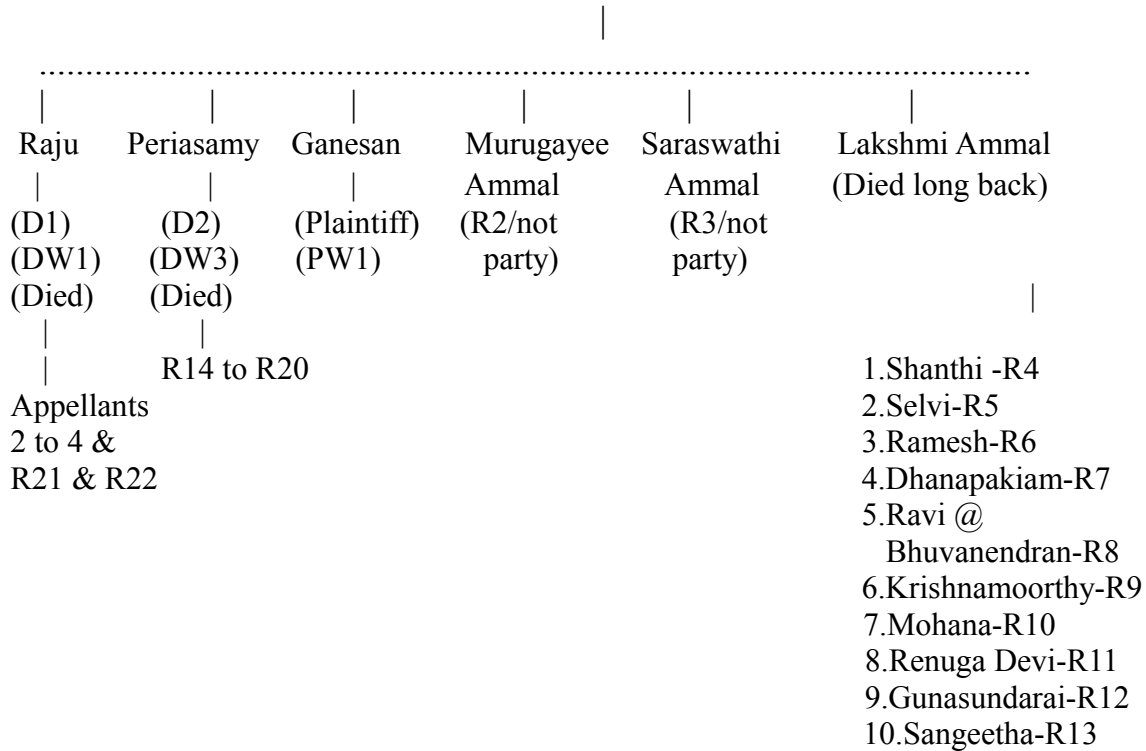


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GENEEOLOGY

Ramasamy Thevar – Meenakshi Ammal
(Died on 17.09.1991) – (Died on 05.10.1992)



3. For the sake of convenience, the parties are referred to as per their ranking before the Court below.

4. Brief facts of the plaintiff's case:-

The plaintiff and the defendants 1 & 2 are the sons of one Ramasamythevar and Meenakshi Ammal. They also have 3 sisters namely, Murugayee, Lakshmi Ammal and Saraswathi. After marriage, they were living



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separately. The said Ramasamythevar, the plaintiff and the defendants have had the joint family business in the name and style of 'Meenakshi Lathe and Welding Works'. From income of the said business, Ramasamythevar, being 'kartha' of the family purchased the suit schedule properties in his name and also in the name of his wife, the plaintiff, sons-first and second defendants and in the name of the first defendant's wife. During their life period, Ramasamy Thevar and Meenakshiammal executed separate Will dated 15.05.1975 under Ex.A1 & Ex.A2 bequeathing their entire property in favour of their sons viz., the plaintiff and two defendants. They died on 17.09.1991 & 05.10.1992 respectively. Thereafter, the plaintiff and the defendants jointly enjoying the properties without any division by metes and bounds. Later dispute arose between the family members and the same was not amicably resolved among themselves. Hence Ganesan, one of the sons of Ramasamy Thevar and Meenakshiammal couple filed the suit for partition against other two sons claiming 1/3 share in the suit schedule properties comprising items Nos.1 to 9.

5. The first appellant/first defendant filed written statement stating that the property in item Nos.1 & 3 which stands in his name and his wife's name are their self-acquired properties and the same was made through valid



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purchase vide sale deed dated 06.04.1984 and 09.06.1986 and the suit schedule properties in item Nos.2, 6 & 7 covered under the Will alone is liable for partition. The property in item Nos.4 & 5 stand in the name of the second defendant and the same are self-acquired properties of the second defendant. Even prior to 1975, the plaintiff and the defendants got separated from the Joint Hindu Family. The plaintiff and the defendants and their father along with one Chandrasekaran, the maternal uncle of the plaintiff and the defendants entered into a partnership deed dated 05.12.1975 to conduct partnership business by namely, “Meenakshi Lathe Works”. Hence, the plea of plaintiff that the said Meenakshi Lathe Works was joint family business is not correct. Each defendant separately purchased the property with their own income and hence, there was no cause of action to claim the partition in item Nos.1, 3, 4 & 5 and as per the Will, item Nos.2, 6 & 7 alone are liable for the partition.

6. Similarly, the second defendant filed separate written statement acceding the above facts and he specifically claimed that he is the owner of the property described in item Nos.4 & 5 of the suit schedule property and he purchased the property out of his own income and hence prayed for dismissal



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of the suit for partition.

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7.The learned Trial Judge, after framing necessary issues, examined P.W.1 to P.W.4 on the side of the plaintiff and marked Ex.A1 to Ex.A23. On the side of the defendants, D.W.1 to D.W.4 were examined and Ex.B.1 to Ex.B.36 were marked.

8.The learned Trial Judge, after considering the evidence, decreed the suit and granted decree of partition by holding the partnership deed Ex.B.1, even though it contained the name of D.W.2 (Chandrasekaran), he was not a partner in reality. Actually the said business was run only as a family business consisting of the family members of the plaintiff's namely, the father and his three sons. Ramasamythevar, the father of the plaintiff and defendants 1 and 2 jointly conducted the business as joint family business. The Ex.B1 is a sham and nominal deed. From the income of the business, suit properties were purchased in the name of the defendants 1 & 2, the plaintiff and his father & mother. The learned Trial Judge also gave the finding that there was adequate evidence to prove “Meenakshi Lathe Works” is a joint family business and the income from it was utilised for the purchase of other properties.



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9. Aggrieved over the same, Appeal Suit has been filed by the defendants, who are the present appellant and the transposed 14th respondent. The appeal grounds as stated in the memorandum of the appeal and the plea put forth by the learned Senior Counsel appearing for the appellant and the contra submissions made by the learned counsels appearing for the contesting respondents are as under:

10. Submission of the learned counsel for the appellant:-

The learned Senior counsel Mr.R.Subbiah, on behalf of the present appellant/1st defendant reiterated the written submission and specifically contended that there was no joint family business existed as held by the learned Trial Judge and the learned Trial Judge failed to consider the Ex.B.1 dated 05.12.1975 as a partnership deed made between plaintiff, defendants, and their father Ramasamy and D.W.2, who is not a member of the joint family. The said business was never treated as joint family business of the plaintiff's family and hence, the said finding of the learned Trial Judge is perverse.

11. The learned Senior counsel further submit that item no.1 of the



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schedule of the property purchased in the appellant's name and his wife's name under two different sale deeds dated 06.04.1984 and 09.06.1986. The same was purchased out of their own income. Similarly, item No.3 of the property purchased in the name of the appellant. The learned Trial Judge, without considering the oral as well as documentary evidence, erroneously rendered a finding that the properties were purchased from the joint family business by wrongly presuming the existence of the joint family business. Apart from that, even assuming the said business was a joint family business, neither there was evidence to show the said joint family business was generated surplus income and the same was utilised for the purchase for the properties mentioned in the schedule of properties item Nos.1,3,4 & 5. Adding to that, there was no alternative pleadings and evidence that the income of the said partnership was pooled together into the common hotchpot by the plaintiff, defendants and their father Ramasamy to purchase the said properties.

12. Further, the learned counsel for the appellant contended that there is neither plea of benami transaction nor proof for the same through the circumstances to presume benami transaction from the evidence or any other concrete oral evidence. The learned counsel further contended that even



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though second appellant changed his stand contrary to the pleadings and the evidence deposed before the trial Court, that would not change the legal position or ground to hold that there was a joint family business and the said business generated surplus income and the surplus income was utilised for purchasing the suit properties in the name of the first defendant and his wife. He further submitted that even though plea of partial partition taken on the ground that the property purchased in the name of the plaintiff's wife not included in the schedule of property, he does not claim any right over the said property and denounced the plea of the partial partition. In support of his submission, the learned counsel for the appellant cited the following judgments:-

1. 1969 (2) SCC 33 (State Bank of India v. Ghamandi Ram)
2. AIR 1968 SC 1276 (G. Narayana Raju v. G. Chamaraju)
3. AIR 1976 MAD 156 (R. Selvaraj v. R. Radhakrishna Pillai)
4. 87 LW 542 (Lakshmi Ammal v. Meenakshi Ammal and others)
5. 2009 (2) SCC 177 (U.R. Virupakshappa v. Sarvamangala)
6. 2009 (4) CTC 593 (Kanagammal v. Theatre Abirami Partnership Concern).
7. 2020 (6) SCC 387 (Bhagwat Sharan v. Purushottam and others)



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8. 2021 (5) CTC 575 (Kiran Devi v. Bihar State Sunni Wakf Board and Others)
9. 2022(1) CTC 674 (K.Karuppuraj v. M.Ganesan)

13. The submissions of the learned counsel representing the plaintiff/1st respondent that the learned trial judge after analysing the entire evidence and the demeanour of the witness has categorically held that the business “Meenakshi Lathe Works” was treated as joint family business by the members of the family and hence, there is no scope for interference with the finding of the First Appellate Court. He further submit that from the Ex.A5, 15, 20, 21, it is clear that the family all along treated the suit schedule properties as a joint family properties and the same were properly considered by the learned Trial Judge and granted decree for partition. So, the finding of the learned Trial Judge is not liable to be interfered. He further submit that even though D.W.2 was shown as a partner in Ex.B1, he was not a partner and only treated as manager of the said lathe business and the same was properly considered by the Trial Judge. Apart from that, from the document stated supra, the Trial Court legally drawn the presumption that the business was joint family business and the income generated from the said business was utilised for purchasing the suit schedule properties in the name of the family



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members. Also, the properties so purchased were treated as joint family properties and hence, the judgment and decree passed by the Court below does not warrant any interference. In support, he placed the following judgments:-

1. AIR 2002 Karnataka 83(DB)(Virupakshappa Malleshappa v. Akkamahadevi And Ors.)
2. 2017 (9) SCC 586 (Adivappa and others v. Bhimappa and others)
3. AIR 2003 SC 1880 (Madanlal (dead) by LRs v. Yoga Bai (Dead by LRs.)

14. From submission of the learned Senior counsel for the appellant and the learned counsel for the respondent, this Court framed the following points for determination :-

1. Whether the Meenakshi Lathe Work is partnership business or Hindu joint family business of family consist of plaintiff, first defendant and their father Ramasamythevar?

2. Whether the said Meenakshi Lathe Work was started with the income of either ancestral or co-parcency nucleus of Ramasamythevar?

3. Whether the item No.1,3,4,5,8 & 9 of the suit schedule properties are self acquired properties of the present appellant, 14th respondent, first respondent or purchased



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from joint exertion of the income arose from the above said Meenakshi Lathe Work?

4. Whether the turncoat stand of the second defendant/14th respondent in the Appeal Suit proceedings supporting the case of the plaintiff is legally acceptable?

5. Whether the judgment and decree of Court below in granting decree for partition in respect of the properties other than the item Nos.2, 6 & 7 is liable to be interfered?

15. The above points for determination intrinsically intertwined with the facts and law, this Court in order to arrive the proper conclusion, devolved the discussion in the following headings:

- i) “Meenakshi Lathe Works”- its character.
- ii) Source for purchase of the properties Item Nos.1, 3, 4, 5, 8 & 9.
- iii) Benami transaction-Plea and defence.
- iv) Plea of the blending.
- v) Is Ex.B.1, partnership deed a sham and nominal deed?.

16. “Meenakshi Lathe Works”- Its character

16.1. The Ramasamythevar was a worker in the Madura Coats Mill and he had no coparcenary property. It is a fact admitted by both the parties. After retirement from the said Mill, Ramasamythevar, plaintiff, first and second



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defendants and D.W.2, maternal uncle of the plaintiff, jointly started the business of lathe works in the name and style of 'Meenakshi Lathe Works' by entering into the partnership deed dated 05.12.1975 under Ex.B.1. As per Ex.B1, they agreed to contribute and receive the profit after deducting the expenditure in the following ratio:

Name of the partner	Investment	Ratio of the profit
Ramasamy	Rs.6,000/-	20%
Raju	Rs.3,500/-	20%
Periyasamy	Rs.3,500/-	20%
Ganesan	Rs.3,500/-	20%
P.Chandrasekar	Rs.3,500/-	20%

16.2. The details of the above partnership deed for better reason has not been whispered in the plaint and in the chief examination of the plaintiff. During cross-examination of P.W.1, Ex.B.1 was marked. So, the plaintiff not only suppressed the above document and also stated that D.W.2 was not inducted in the partnership deed and he feigned ignorance about the fact whether the said Chandrasekar (D.W.2) contributed any investment as a partner. Further, he admitted that Chandrasekar (D.W.2) was not a member of his joint family and also admitted that execution of the Ex.B.1. However, taken a peculiar stand that the contribution mentioned in the partnership deed



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is false and further he stated that since the document was executed as a sham and nominal, he did not produce the original. In addition to that, he did not obtain any document from D.W.2 that he only assisted in the business of Meenakshi Lathe Works. D.W.2 deposed that he made investment of Rs. 3,500/- and also they apportioned the profit up to the death of the Ramasamythevar and the same was corroborated by D.W.1 and D.W.3 and there was no answer in their cross-examination to favour the plaintiff. Also there was no valid reason to disbelieve the above version of contribution and the apportionment of share, which is in true with the documents in writing and signed by all partners. So, upon considering the above evidence, it is clear that the partnership business in the name and style of "Meenakshi Lathe Works" is not the joint family business as pleaded by the plaintiff. Hence, the substratum of plaintiff case that the Meenakshi Lathe Work is joint family business is not proved. Consequently, it is clear that the business was a partnership business conducted by the deceased Ramasamythevar, plaintiff, defendants 1 and 2; and D.W.2.

17. It is well settled principle that contents of the written documents cannot be contradict by oral evidence and the same is hit by Section 92 of the



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Evidence Act. In this case, in the partnership deed, there is reference of both investment and division of profit ratio. In the partnership deed, it is clearly stated that D.W.2, plaintiff, defendants and their father are partners. There is no evidence to claim that the above contribution was made from the income of the joint family property. It is the specific case of the plaintiff that Ramasamythevar has no ancestral property and he was working as labour in the Mill. Under the said circumstances, the business be construed as “Meenakshi Lathe Works” a partnership firm, which consist of partner outside the family and can be no stretch of imagination of joint family business. The P.W.1 party to the said document admitted the execution, but plead that the same was not intended to act. This cannot be legally countenanced on account of the evidence in contrary. Apart from that, the remaining partners namely, D.W.1 and 3 also have deposed in support of the contents found in the said partnership deed to prove that the “Meenakshi Lathe Works” run by partners as per the deed. Therefore, the case of the plaintiff that the business in the name and style of “Meenakshi Lathe works” is a family business is contrary to the contents of Ex.B.1 and the same not acceptable. In the result, it is held that “Meenakshi Lathe Works” is a partnership firm and not a joint family business. Hence, the plea that Ex.B1 is



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sham and nominal is also not accepted.

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18. Source for purchase of the properties Item Nos.1,3,4,5,8 &9.

In this case, admittedly, Ramasamythevar had not owned any property through his father or forefather. Hence, there was no existence of coparcenary. So, the finding of the learned Trial Judge that there was adequate coparcenary nucleus for the joint family is not factually correct and the same was against the record and hence, it is perverse. Apart from that, the plea that from the income of the said business, the properties in the name of the first defendant, his wife, and the second defendant i.e., item Nos.1, 3, 4, 5, 8 & 9 were purchased is also not proved through evidence. Except pleading, no other evidence available to presume the suit properties were purchased from the income of business. So this Court hold that the case of the plaintiff that the purchase of item Nos.1,3,4,5,8 & 9 made from the income of the joint family business is not proved.

19. Plea of blending :-

On the side of plaintiff, there was no proper pleadings regarding the blending of property. The first item of property purchased by the first



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defendant and his wife vide sale deed dated 06.04.1984 and 09.06.1986 under Ex.A3 & Ex.A4, respectively. Item No.3 was purchased by D.W.1 in his name under Ex.A3 dated 06.04.1984. Item Nos.4 & 5 in property stands in the name of second defendant and item Nos.8 & 9 stands in the name of the plaintiff. No evidence available to show that all the above mentioned items namely, item Nos.1,3,4,5,8 & 9 are purchased from common source and are commonly enjoyed by them. The D.W.1 evidence is that he was doing agricultural activities and having independent income, and he purchased the property from out of his own income. The same was corroborated by the evidence of D.W.2 and D.W.3. Upon the purchase, he and his wife have been enjoying the property as absolute owner. So, the blending of the said property in the common hotchpot is disproved through evidence. The plaintiff produced Ex.A.5, Ex.A.15, Ex.A.20 & Ex.A.21 to prove his case of joint enjoyment. The Ex.A.5 is a lease deed executed by one Viyasarajamadam. That the property was obtained for lease in the name of P.W.1. For that reason the plea to treat it as a joint family property is not tenable. The reason is that the said lessor has already executed a sale deed in favour of D.W.1 undoubtedly under Ex.A3 dated 06.04.1984 and Ex.A.4 dated 09.06.1986 in favour of D.W.1's wife. The lease deed from the vendor of D.W1 and his wife is not valid one



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after alienating it absolutely. Hence, claim of the plaintiff on the basis of Ex.A.5 that the property was commonly enjoyed is not legally sustained.

20. As per Ex.A.15, there was a suit filed against the plaintiff and the defendants for recovery of money on the basis of the mortgage deed executed by the plaintiff over the property covered under the Will. In the suit, the plaintiff and the defendants 1 & 2 jointly arrayed as a party to the suit. In the said suit, there was no mentioning about the suit schedule property and hence, Ex.A.5 does not render any assistance to the plaintiff's case. Ex.A.20 is the settlement deed dated 01.07.2004, which was executed jointly by the plaintiff, defendants 1 & 2 in favour of their sister's son. Since their brother-in-law was leading a immoral life. So, in the interest of the child, the property purchased in the name of the plaintiff and defendants was settled on the minor child to enjoy it absolutely on attaining his majority, the same was transferred in his name, ie., sister's son's name by way of execution of settlement deed and this document also does not render any assistance to the plaintiff's plea of joint enjoyment over the suit schedule properties, ie. item Nos.1,3,4 & 5.

21. Ex.A.21 is the marriage invitation Card. It is stated that the



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plaintiff's daughter's marriage was solemnized in the Mandapam of first schedule property. The reference in the Invitation Card will not confer any right over the property to seek partition when abundant materials are produced by the defendants to prove that it is their individual property. Permitting the plaintiff to conduct his daughter's marriage in the said first schedule property cannot be a piece of evidence to prove for blending. It is well settled that insofar as blending is concerned, clear evidence has to be produced by the plaintiff that the defendant deliberately and voluntarily thrown their separate property into the joint stock with clear intention of abandoning his claim on the said property with the object of assimilating the property as a joint family property. In this case, at the first instance, the Lathe business is not a joint family business, secondly, there was neither oral nor documentary evidence to substantiate the blending of properties purchased in the name of the individuals into the hotchpot of the joint family property. It is relevant to note that the Hon'ble Supreme Court laid down the law in respect of blending in **2019 (6) SCC 46 (S.Subramanian Vs. S.Ramasamy And Others)** as follows:

“9.... The law on the aspect of blending is well settled that property separate or self-acquired of a member of a joint Hindu Family may be impressed with the character of joint



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family property if it is voluntarily thrown by the owner into the common stock with the intention of abandoning his separate claim therein; but to establish such abandonment, a clear intention to waive separate rights must be established. Clear intention to abandon the separate rights in the property must be proved. Even abandonment cannot be inferred from mere allowing other family members also to use the property or utilisation of income of the separate property out of generosity to support the family members.”

22. The ingredients such as throwing the property into common stock, abandonment of separate claim and very existence of common stock which required to infer blending not present in this case. So the plea of blending held not proved.

23. Benami transaction Plea and defence:-

Question of benami transaction is a fact. That fact to be pleaded and proved in accordance with law. In the plaint, it is averred that his father Ramasamythevar as a 'kartha' of the family, utilised the profit of the joint family business income and purchased the properties in the names of the plaintiff and the defendants and also first defendant's wife. Since there was no



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joint family business as said. The plaintiff contends that the purchase in the name of the family members by kartha is a benami transaction. The plea of the plaintiff that the property was purchased as a benami is unacceptable, since to declare a transaction as benami, the following ingredients to be proved:-

- i) The payment of consideration from the joint family business.
- ii) Custody of the sale deed
- iii) Joint possession and enjoyment of the property
- iv) Motive for the transaction.

24. The none of the above ingredients proved by the plaintiff in the above case. Apart from that, plea of benami transaction without proper pleadings and evidence is not acceptable.

25. The ancillary question is whether the turncoat stand of the second defendant/transposed as 14th respondent in the Appeal Suit proceedings will change the factual or legal position.

25.1. The second defendant/transposed as 14th respondent in the suit has filed the written statement before the Court below, it is pleaded that item Nos.



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3 & 4 are his absolute property and he purchased the same out of his own income and he has been enjoying the property as absolute owner. He deposed before the Court below in the same line. So, he preferred the present Appeal Suit in A.S.(MD)No.16 of 2007 along with the present appellant. Now, he take a contra stand. As per the Order 41 r/w Section 96 of CPC, without proper amendment to his pleading as per Order 6 Rule 17 of the CPC, merely by getting transposed the earlier plea and testimony cannot get erased. Hence, though the present appellant filed the transpose application and the same was allowed by this Court, the contrary stand of the 14th respondent has no impediment in dismissing the suit filed by the plaintiff in respect of the properties in item Nos.1, 3, 4, 5, 8 & 9 on the basis of the above finding that the properties are not joint family properties.

26. As per the law laid down by the Hon'ble Supreme Court in 2009 (2) SCC 177 (U.R.Virupakshappa Vs.Sarvamangala And Another) and 2009 (4) CTC 593 (Kanagammal Vs. Theatre Abirami, Partnership concern, through its Managing partner S.Nagalingam and Others) and 2022 (1) CTC 674 (K.Karuppuraj Vs. M.Ganesan), the First Appellate Court has no jurisdiction to decide the dispute on the basis of the subsequent contra stand



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without amending the pleading and eschewing the deposition. Looking from another angle, a party cannot be permitted blow hot and cold, fast and loose, approbate and reprobate. The second respondent specifically took a stand that 'Meenakshi Lathe Works' is not a joint family business and the same was partnership business under Ex.B1. The property purchased in his name; in the name of the first defendant and his wife; and in the name of the plaintiff were purchased from their own income and never treated as joint family property. Now, he cannot turn around and say that the properties are joint family property, hence cannot be accepted. This is contrary to his pleadings and evidence. In this respect, the following reference from the judgments of the Hon'ble Supreme Court made by the learned counsel for the appellant is relied:

(i)2022 (1) CTC 674 (K.Karuppuraj Vs. M.Ganesan):

“8. The proper procedure would have been for the Plaintiff to move a proper application for amendment of the plaint in exercise of the power Under Order VI Rule 17 Code of Civil Procedure, if at all it would have been permissible in a first appeal Under Section 96 read with Order XLI Code of Civil Procedure. However, straightaway to rely upon the affidavit without



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amending the plaint and the pleadings is wholly impermissible under the law. Therefore, such a procedure adopted by the High Court is disapproved.”

(ii) 2020 6 SCC 387 (Bhagwat Sharan (Dead) thr. L.Rs. vs. Purushottam and Ors.):

“26. It is trite law that a party cannot be permitted to approbate and reprobate at the same time. This principle is based on the principle of doctrine of election. In respect of Wills, this doctrine has been held to mean that a person who takes benefit of a portion of the Will cannot challenge the remaining portion of the Will. In The Rajasthan State Industrial Development and Investment Corporation and Anr. v. Diamond and Gem Development Corporation Ltd. and Anr. (AIR 2013 SC 1241), this Court made an observation that a party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one party knowingly accepts the benefits of a contract or conveyance or an order, it is estopped to deny the validity or binding effect on him of such contract or conveyance or order.

25. The doctrine of election is a facet of law of estoppel. A party cannot blow hot and blow cold at the same time. Any party which takes advantage of any



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instrument must accept all that is mentioned in the said document. It would be apposite to refer to the treatise 'Equity-A course of lectures' by F.W. Maitland, Cambridge University, 1947, wherein the learned author succinctly described principle of election in the following terms:

The doctrine of Election may be thus stated: That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it....

This view has been accepted to be the correct view in Karam Kapahi and Ors. v. Lal Chand Public Charitable Trust and Ors. [(2010) 4 SCC 753]. The Plaintiff having elected to accept the Will of Hari Ram, by filing a suit for eviction of the tenant by claiming that the property had been bequeathed to him by Hari Ram, cannot now turn around and say that the averments made by Hari Ram that the property was his personal property, is incorrect.”

27. The submission of the learned counsel for respondent/plaintiff that the trial Court finding regarding the joint family business and from the income of the said business the property purchased need not be interfered by the



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appellate Court is not tenable when the Trial Court failed to consider the pleadings, evidence and law properly and had render a perverse finding that the family has ancestral nucleus, without any supportive evidence. The evidence placed before the Court clearly proves that the Ex.B.1 is a partnership business between the plaintiff and the defendants; their father Ramasamythevar and D.W.2. Apart from that, there was no evidence to prove that the income derived from the said business was jointly utilised by the plaintiff, defendants and Ramasamythevar to purchase the properties in the individuals' names. In addition to that there was no evidence that the defendant property pooled in to common hotchpot of the family of the Ramasamythevar and the plaintiff.

28. In the said circumstances, this Court as a final Court of fact upon appreciation of oral and documentary evidence hold that the properties in item No.1, 3, 4, 5, 8 & 9 are the separate property of the first defendant, his wife, second defendant and plaintiff respectively. The same was not liable for partition. Further, it is clear that the portion of the item No.1 property was purchased in the name of the first defendant's wife under Ex.A4. It is settled law that the property in the name of the female member of the family could not be deemed to be the joint family property. Further, in this case, she was not



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added as a party and also there was no relief in the plaint against her and her document. Even after they impleaded in the appeal, they are not in favour of the plaintiff's case.

29. In the judgement reported in **AIR 2002 Karnataka 83(DB)** there was evidence that the fund was contributed from the common joint family source. Contrarily, in this case, P.W.1 admitted that there was no ancestral property or coparcenary property available to the Ramasamythevar and hence, there was no contribution from the ancestral property. The business established from contribution of each partners from their own source.

30. The judgment cited by the respondent counsel in **AIR 2003 SCC 1880** is entirely different from the facts of the case on hand, ie., in the said case, the partnership deeds entered between the different members of the family in different combination and also there was no third party added as a partner. In this case, D.W.2 is one of the partner has deposed that he made a contribution and he received the profit as per the deed and he is not a member of Ramasamythevar family by blood.



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31.The judgments cited by the learned counsel **2017 (9) SCC 586** also not applicable to the present case. In the case cited, there was ancestral property existed and also evidence to that effect that the income from it was utilised to purchase the property in the name of the family members. In this case, there is no such evidence.

32. In this case, as per the direction of this Court, the sisters of the plaintiff are added as a party in the suit plaint in O.S.No.531 of 2004 and they also did not raise any claim over the property mentioned in the item Nos.1 ,3, 4, 5, 8 & 9 of the schedule properties which implies that the properties are the self-acquired properties of the first defendant and his wife, second defendant and plaintiff.

33. Insofar as the properties in item No.2, 6 & 7 are concerned, it is the case of the defendants and the plaintiff that the said properties stand in the name of their parents and they executed a Will in favour plaintiff and the defendants and the same was not disputed by the sisters of the plaintiff and legal heirs of the deceased sister, who are impleaded in this case as per the order made in M.P(MD)No.2 of 2013. So, this Court affirmed the decree for



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partition in respect of the item Nos.2,6 &7 of the suit schedule properties and dismiss the suit in respect of the suit schedule properties item Nos.1, 3, 4, 5, 8 & 9.

34. The C.M.P(MD)No.8306 of 2022 filed by the plaintiff/first respondent to receive the judgment and fair and final order in RCOP.No.238 of 2008 & RCOP.No.51 of 2017, requires no adjudication on account of the specific stand taken by the appellant that he did not claim any right of partition in the property which stands in the name of plaintiff's wife and secondly stated that they have renounced their plea of partial partition. Hence, the said CMP is closed.

35. In the result, decree in O.S.No.531 of 2004 on the file of the learned Additional District Judge cum Fast Track Court No.3, Madurai, dated 23.11.2006, granted for partition in respect of the property in item Nos.1, 3, 4, 5, 8 & 9 is set aside and the preliminary decree granted in respect of the remaining properties namely, item Nos.2, 6 & 7 is confirmed.

36. Accordingly, this Appeal Suit is partly allowed. No costs.



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Consequently, the connected miscellaneous petitions are closed.

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[G.J.J.] & [K.K.R.K.J.]
24.03.2023

NCC : Yes/No
Internet: Yes/No
Index: Yes/No
PJJ

To

1. The Additional District Judge cum Fast Track Court No.3,
Madurai.

2.The Section Officer, V.R.Records,
Madurai Bench of Madras High Court,
Madurai.



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DR.G.JAYACHANDRAN,J.
AND
K.K.RAMAKRISHNAN,J.

PJL

Pre-delivery Judgment made in
A.S(MD)No.16 of 2007

24.03.2023