



A.S.(MD).Nos.598 of 2011, 138 of 2016 & 191 of 2015

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 15.11.2023

Delivered on: 12.12.2023

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

AND

THE HONOURABLE MR.JUSTICE P.B.BALAJI

A.S.(MD).Nos.598 of 2011, 138 of 2016 & 191 of 2015

and

C.M.P.(MD)Nos.9393 of 2016 and 7340 of 2019

A.S.(MD).No.598 of 2011

1.G.Pitchaiah

2.G.Gopal

... Appellants / Defendants 1 & 3

V.

1.G.Radhakrishnan

... 1st Respondent / Plaintiff

2.G.Chellappa

3.Jothirajammal

... Respondents 2&3/ Defendants 2&4

Prayer:- Appeal Suits filed under Section 96 of the Code of Civil Procedure, against the judgment and decree, dated 05.04.2011, in O.S. No. 55 of 2005, on the file of the Additional District Judge, Fast Track Court No.2, Tirunelveli.



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For Appellants : Mr.V.R.Venkatesan
For Respondents : Mr.T.Antony Arulraj for R1
: Mr.A.R.M.Ramesh for R2
: Mr.J.Ashok for Jeyapal Associates for R3

A.S.(MD).No.138 of 2016

G.Chellappa ... Appellants / Defendants 1 & 3

V.

1.G.Radhakrishnan ... 1st Respondent / Plaintiff

2.G.Pitchaiah

3.G.Gopal

4.Jothirajammal ... Respondents 2to 4/ Defendants

Prayer:- Appeal Suits filed under Section 96 of the Code of Civil Procedure, against the judgment and decree, dated 05.04.2011, in O.S. No. 55 of 2005, on the file of the Additional District Judge, Fast Track Court No.2, Tirunelveli.

For Appellant : Mr.A.R.M.Ramesh
For Respondents : Mr.T.Antony Arulraj for R1
: Mr.V.R.Venkatesan for R2 & R3
: Mr.J.Ashok for Jeyapal Associates for R4

A.S.(MD).No.191 of 2015

G.Radhakrishnan ... Appellant / Plaintiff



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V.

1.G.Chellappa

2.G.Pitchaiah

3.G.Gopal

4.Jothirajammal ... Respondents / Defendants

Prayer:- Appeal Suits filed under Section 96 of the Code of Civil Procedure, against the judgment and decree, dated 05.04.2011, in O.S. No. 55 of 2005, on the file of the Additional District Judge, Fast Track Court No.2, Tirunelveli.

For Appellant : Mr.T.Antony Arulraj

For Respondents : Mr.V.R.Venkatesh for R1 & R3

: Mr.A.R.M.Ramesh

COMMON JUDGMENT

P.B.BALAJI,J.

All these three First Appeals arise out of O.S.No.55 of 2005, on the file of the Additional District Judge, Fast Track Court, Tirunelveli. The said suit in O.S.No.55 of 2005, was filed by one G.Radhakrishnan, seeking partition of 11 items of suit property.



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2. For the sake of convenience, the parties are referred to as per their rank before the trial Court.

3. Complaint in brief is as follows:

The plaintiff and the defendants are siblings, they having been born to their father – Gurusamy Konar and mother – Kaliasammal. The plaintiff states that the plaintiff and the defendants constituted a Hindu Undivided Joint Family and all the items of the suit properties were available for partition. It is further contended that the fourth defendant, his sister was married of with lot of jewels and sreedhana and hence, she had orally given up her share in favour of the plaintiff and the defendants 1 to 3, namely, her brothers. The plaintiff, therefore, prays that a decree for partition, declaring his 1/4th share in the suit properties, be granted.

4. Written statement in brief, is as follows:

The defendants 1 to 3 filed a written statement stating that the suit was bad for non-joinder of necessary parties as some of the properties were purchased in the names of the women folk in the household. Further,



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the defendants also stated that the plaintiff has not disclosed many other properties which are also available for partition and therefore, the suit was liable to be dismissed on the ground of partial partition also. It is also contended that only in order to bring the property within the jurisdiction of Tirunelveli Courts, the plaintiff has included the first item of the property alone, which is standing in his name as if it is also a joint family property. The defendants have further stated that some of the properties were bequeathed by the father, through a registered Will, dated 25.01.1993 and therefore, those of the properties covered by the said Will are not available for the partition.

5. The first defendant filed an additional written statement stating that the plaintiff and the defendant had purchased several properties in and around Tirunelveli in the name of the plaintiff and his wife and reiterating that as their father – Gurusamy Konar had executed a registered Will and bequeathed 2nd and 3rd items of the property in the name of the defendants, the plaintiff cannot claim joint possession of those properties.

6. The trial Court after analysing the pleadings of the parties to the



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suit, framed the following issues:

- 1. வாதிக்கு தபசில் சொத்தில் □ பங்கு கிடைக்கக்கூடியதா?
2. குருசாமிக் கோனாரால் 25.01.1993-ல் எழுதியதாகக் கூறப்படும் உயில் உண்மையானதா?
3. தேவையான கட்சியைச் சேர்க்கத்தாத தோசத்திற்காக இவ்வழக்கு நிலைக்ககத்தக்கதா?
4. வாதிக்குக் கிடைக்கக் கூடிய இதர பரிகாரம் என்ன? □

7. Before the trial Court, the plaintiff examined himself as P.W.1 and one Dr.K.Selvaraj was examined as P.W.2 and 11 documents were marked as Ex.A1 to Ex.A11, on the side of the plaintiff. On the side of the defendants, first defendant examined himself as D.W.1 and Sankaranarayanan and Jeyaseelan were examined as D.W.2 and D.W.3 and 33 documents were marked as Ex.B1 to Ex.B33.

8. The trial Court found that the Will set up by the defendants was not proved in any of the available modes. Further, the trial Court also found that the plea of oral partition was not proved by the plaintiff and therefore, the plaintiff's share must be 1/5th share and not 1/4th share. Further, the trial Court also held that the plaintiff was not entitled for partition in items



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6, 8, 10 and 11, which were purchased in the name of the children of the first defendant and they were not also parties to the suit and further, the plaintiff had also not established by sufficient documentary evidence that the said properties were purchased only out of joint family funds and proceeded to grant a preliminary decree, declaring 1/5th share in the suit property in Item Nos. 1 to 5, 7 and 9 alone and insofar as the item Nos. 6, 8, 10 and 11 were concerned, dismissed the suit.

9. Aggrieved by the said judgment and decree, three appeals have been preferred before this Court. A.S.(MD)No.598 of 2011 has been preferred by the defendants 1 and 3. A.S.(MD)No.191 of 2015 has been preferred by the plaintiff, insofar as disallowing the suit items 6, 8, 10 and 11. A.S.No.138 of 2016 has been preferred by the second defendant.

10. The grounds of challenge in A.S.(MD)Nos.598 of 2011 and 138 of 2016 are as follows:

The trial Court failed to see that the plaintiff himself had admitted the existence of the joint family properties and he had picked and chosen only the first item of suit property in order to file the suit within the local limits



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of the Courts of Tirunelveli, conveniently leaving out many other properties which were acquired by the joint family in the plaintiff's name and also plaintiff's wife name; on the date of purchase of properties in Ex.B2 to Ex.B5 in favour of the plaintiff, the plaintiff was unemployed and also aged about 19 years and therefore, there was no possibility of the plaintiff purchasing the said properties out of his own funds; the plaintiff himself has admitted that there were several other items of property in his name retracing his earlier statement that there was no other item of property in his name; the trial Court failed to see that the Will was a registered Will and the evidence of D.W.2 and D.W.3 ought not to have been disbelieved; the trial Court failed to see that the suit was liable to be dismissed on the ground of partial partition; the trial Court having observed that non-joinder of necessary parties affects the suit, ought not to have granted a decree in favour of the plaintiff; the trial Court erred in not even framing an issue regarding partial partition; when the plaintiff admitted joint family nucleus, the trial Court ought to have presumed that the purchase of the properties in the plaintiff's name and the plaintiff was bound to discharge the presumption in favour of joint family acquisition.



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11. We have heard Mr.T.Antorny Arul Raj, learned counsel for the plaintiff, Mr.V.Venkatesan, learned counsel for the defendants 1 and 3 and, Mr.A.R.M.Ramesh, learned counsel for the second defendant and Mr.J.Ashok, learned counsel for the fourth defendant.

12. Points for determination:

(I) Whether the suit is bad for partial partition?

(II) Whether the properties standing in the name of the plaintiff and his wife as set out in the written statement were also joint family properties available for partition and consequently, rendering the suit liable to be dismissed on the ground of partial partition?

(III) Whether the Will, dated 21.01.1993 - Ex.P33 was proved to be true and valid?

(IV) Whether the plaintiff is entitled to a share in suit items 6, 8, 10 and 11?

Point No.I &II:

13. The learned counsel for the defendants, who are the appellants in



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A.S.No.598 of 2011 and 138 of 2016, would vehemently contend that the trial Court erroneously placed the burden on the defendants to prove that the properties were available for partition, when the plaintiff himself had admitted that he got employment in the year 1984 and the properties were acquired in his name in and around 1982/1983 when he had no independent source of income.

14. Further, the learned counsel for the defendants / appellants also contended that the plaintiff had included the first item of the property which was admittedly standing in his name, which is purchased in the name of joint family nucleus. However, this was only for his convenience to file a suit at Tirunelveli. According to the learned counsel for the defendants / appellants, when the plaintiff was examined as P.W.1, he admitted the existence of several other properties standing in his name and most of the properties were purchased before the year 1984 and therefore, the Court ought to have held that the strong presumption in favour of joint family nucleus was not discharged by the plaintiff. The learned counsel for the defendants / appellants would state that the suit was also bad for non-joinder of proper and necessary parties, when admittedly some of the



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suit items purchased in the name of the wives of the children of Gurusamy Konar and in their absence, the partition suit could not have been decreed.

15. Per contra, the learned counsel for the plaintiff, who is the appellant in A.S.(MD)No.191 of 2015 would state that the defendants set up a Will of the father and miserably failed to establish the same in the manner known to law. Further, they have not even examined any of the attesting witnesses to prove the due execution of the said Will. Further, the learned counsel for the plaintiff / appellant in A.S.(MD)No.191 of 2015 would submit that some of the properties were standing in the names of the plaintiff and his wife and therefore, the burden was only on the defendants to establish that they were purchased only out of joint family funds and it was not necessary for the plaintiff to prove the same. The plaintiff would further contend that the trial Court has erroneously granted a decree for 1/5th share instead of 1/4th share, when the fourth defendant – sister did not choose to contest the suit, after entering appearance. He would state that deletion of 4 items on the ground that the said items of properties were standing in the names of persons, who are not the parties to the suit was also erroneous, since omission is not fatal. According to the plaintiff, the



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properties were only joint family properties and the joint family was fully represented. Further, the defendants have also not been able to prove that the said deleted items were purchased out of separate or independent funds and therefore were not available for partition.

16. The learned counsel for the defendants/appellants in A.S. (MD)No. 598 of 2011 138 of 2016, would place reliance on the decision of the learned Single Judge of this Court in ***P.Arunachalam V. M.Kaliammal*** reported in ***2022-5-CTC-204*** and in ***Mariammal V. Subbuthai*** reported in ***2013-5-CTC-49***.

17. In ***P.Arunachalam***'s case, the learned Single Judge of this Court illustrated instances, where the issue of partial partition would arise and referring to the said ratio, the learned counsel would state that in the instant case, the defendant had specifically set up a plea of partition providing particulars of properties and despite the same, the plaintiff has not chosen to amend the plaint and consequently, the trial Court ought to have dismissed the suit on the ground of partial partition.



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18. Placing reliance on ***Mariammal's*** case, the learned counsel would state that a suit for partition of properties belonging to Hindu Joint Family, without including all properties belonging to the Joint Family, was not maintainable. He would contend that in cross examination, the plaintiff has admitted that several items of properties were standing in his name and his wife's name and therefore, the trial Court ought to have dismissed the suit for partition.

19. We have paid our anxious and careful consideration to the rival submissions advanced by the counsel for the parties as well as the ratio laid down by the learned Single Judges of this Court in the decisions referred to above. We have also gone through the oral and documentary evidence adduced before the trial Court.

20. (a). The plaintiff has come to the Court with a specific case that 11 items of properties are available for partition and insofar as the 1st item of property, he has conceded that though the suit property stood in his



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name, it was purchased out of the joint family funds alone and therefore, the said property was also available for partition. However, it is the specific case of the defendants that the properties covered by Exs. B2, B3, B4, B5 and B7, were admittedly not belonging to the plaintiff and he was merely a name lender, for the purchases made by the joint family.

20.(b). Admittedly, the defendants have marked the documents in Ex.B2, B3, B4, B5 and B7 which evidence the fact that the properties were standing in the plaintiff's name or his wife's name. It is more relevant to take cognizance of the fact that the defendants have set up a Will – Ex.B33, which is alleged to have been executed by their father-Gurusamy Konar bequeathed the 2nd item and 3rd item of the properties to the defendants 1 to 4.

20.(c). It is the case of the defendants themselves that their father had executed a Will and they cannot conversely set up a plea that all the properties were only joint family properties. When the defendants attempted to take shelter under the Will of the father in respect of the second item of the suit property, the plaintiff's case that the properties covered under Ex.B2, B3, B4, B5 and B7 were not the properties of the joint family, but the separate property of the plaintiff and his wife, cannot



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be brushed aside lightly.

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20.(d). It is true that the plaintiff has admitted in his evidence that he joined the police force in the year 1984. However, that does not in any way automatically lead to the presumption that the properties acquired by him in the year 1982-83 are not properties purchased by him or for his benefit. In fact, the documents Ex.B5 and Ex.B7 pertain to purchases made subsequent to the plaintiff gaining employment in police service.

20. (e). Further, in the written statement filed by all the defendants, it is mentioned that the plaintiff was living in Tirunelveli and the father – Gurusamy Konar had purchased 10 properties, including the schedule item No.1 property in the name of the plaintiff and his wife Vellammal and in and around Tirunelveli and Tuticorin. Only to establish the fact that we have assumed that Late Gurusamy Konar purchased the property in the name of the plaintiff and daughter-in-law, it is only for their benefit and cannot be presumed to be joint family property or acquired out of joint family funds. It is also seen that several items of the properties have been purchased in the names of different family members and coupled with the fact that the father Gurusamy Konar himself, according to the defendants, had executed a Will, bequeathing the 2nd and 3rd suit items to defendants 1



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to 4, it would all only lead to the irrefutable conclude that the presumption of the joint family cannot be held in favour of the defendants. Merely by producing documents to show that the properties were purchased in the name of the plaintiff and his wife would not in any way further the cause of the defendants that the properties were purchased only out of the joint family funds.

20. (f). The defendants have to independently adduce acceptable evidence to substantiate their contentions that the properties purchased in the name of the plaintiff and his wife were only out of joint family funds, which were available to the undivided joint family. Excepting the list of properties purchased in the name of the plaintiff and his wife, no further evidence has been adduced by the defendants to show the existence of the joint family funds and further, the same being utilised to purchase property in the name of the plaintiff and his wife.

21. (a). The trial Court, has appreciated the oral and documentary evidence adduced by the parties and rightly found that the defendants have not let in evidence whatsoever, to substantiate their contentions in the written statement that several items of the properties were purchased in the



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names of the plaintiff and his wife and that they were purchased only out of the joint family funds available to the undivided family.

21. (b). The trial Court, therefore, rightly concluded that the suit is not bad for partial partition. Even though a specific issue has not been framed in this regard, we find that the trial Court has discussed the oral and documentary evidence threadbare and found that the suit is not bad for partial partition.

21. (c). Though the learned counsel for the defendants would vehemently contend that burden was on the plaintiff to establish that the properties were his separate properties, we are unable to countenance the said submission.

21. (d). In a suit of this nature, it is settled law that there is no presumption that the property is a Hindu joint family property and the burden to prove that any particular property is joint family property or joint co-parcenary property, such person claiming so has to adduce evidence to establish that the family was in possession of nucleus or joint family funds and that from and out of the said funds or nucleus, the acquisition was made in the name of one of the members of the joint family.



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22. Insofar as the decisions relied on by the learned counsel for the defendants, we have no quarrel with regard to ratio laid down by the learned Judges of this Court that have been relied on by the counsel the said three decisions. However, in the instant case, the defendants have failed to establish that the properties listed by them in the written statement were actually joint family properties and thereby, available for partition and only if they had succeeded in such an attempt, then the case of partial partition can be canvassed successfully.

23.(a). In *P.Arunachalam's* case, this Court set out instances as to when the issue of partial partition arises. Here, as already discussed in great detail, merely providing particulars of properties would not render a plea of partition entertainable. The person who raises the plea of partial partition will have to establish that the properties that have been left out are joint family properties, having been acquired in the name of the plaintiff, out of the joint family funds or acquisition. Therefore, the said decision would not also support the plea of the defendants.

23. (b). The decision in *Mariammal's* case is also on first principles



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holding that a suit filed without including all properties belonging to the joint family, is not maintainable.

24. Here, as already discussed and rightly held by the trial Court, excepting for furnishing a list of properties standing in the name of the plaintiff and his wife, there is no further evidence let in by the defendants to show that such properties were purchased only out of available joint family nucleus / funds, in order to draw a presumption that the properties were joint family properties and consequently, available for partition. When the defendants have failed to establish the same, the onus does not shift to the plaintiff to rebut the presumption thereafter. We do not find any justifiable grounds to interfere with the well considered findings of the trial Court. We answer Points Nos.I & II accordingly.

Point No.III:

25. Insofar as the Will, we find from the evidence that the attesting witnesses to the Will have not been examined. Only the scribe and the Sub Registrar, who registered the Will, have been examined. This does not satisfy the requirement of Section 68 of the Indian Evidence Act read with Section 63 of the Indian Succession Act. The trial Court has rightly



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held that the Will has not been proved in the manner known to law and therefore, cannot be relied on by the defendants to non suit the plaintiff.

26. We have independently gone through the evidence of the scribe as well as the Sub Registrar and the same does not in any way help the defendants to establish the truth and genuineness of the said Will Ex.B33 said to have been executed by Gurusamy Konar. We, therefore, answer Point No.II in favour of the appellant / plaintiff.

Point No.IV:

27. The learned counsel for the plaintiff states that when the allegation in the plaint that the fourth defendant-sister of the plaintiff and the defendants 1 to 3, had orally relinquished her share, the trial Court ought to have granted relief in respect of 1/4th share to the plaintiff and the defendants 1 to 3 erred in denying the additional share said to have been acquired from the sister of the plaintiff. Unfortunately, the plaintiff's case has to be established by adducing sufficient and satisfactory oral documentary evidence and he cannot take advantage of the fact that the fourth defendant – sister did not choose to contest the suit. Moreover, the



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case pleaded by the plaintiff that there was an oral relinquishment of the property is unknown to law, unless it stood established by a very strong and irrefutable evidence that such oral relinquishment was acted upon and the fourth defendant – sister had also by express and implied conduct got her right in the suit property ousted. Unfortunately, we do not find any positive evidence let in by the plaintiff to establish the alleged oral relinquishment said to have been made by the fourth defendant – sister of the plaintiff and the defendants 1 to 3.

28. (a). The learned counsel for the plaintiff would also contend that the trial Court erred in deleting the four items on the ground that the properties stood in the names of persons, who were not parties to the suit and on the ground of non-joinder, the trial Court dismissed the suit in respect of 4 items of properties. It was the specific case of the plaintiff that these items of properties were only joint family properties and when the joint family was adequately represented, the suit could not have been dismissed on the ground of non-joinder of the persons in whose names, the said 4 items had been purchased.



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28. (b). In this regard, we have already held while answering Point Nos.1 and 2 that the father, Gurusamy Konar had purchased the properties in the name of several members of the family and in fact, the plaintiff himself has derived the benefit under some of such purchasers, when properties have been purchased in his name or in the name of his wife. Therefore, the plaintiff cannot blow hot and cold.

28. (c). When it comes his property and his wife's property, he has taken a stand that they are separate or independent properties and not joint family properties. However, insofar as the properties in the names of the other family members, he contends that they have to be treated as joint family properties. Further, we have also found that no evidence is adduced that these 4 items of the properties were purchased only out of joint family funds/nucleus in the names of the members of the joint family, thereby, entitling the plaintiff to a share in the same. We do not find any justifiable ground to interfere with the decision of the trial Court, dismissing the suit insofar as the said 4 items of the suit properties are concerned. We, therefore, answer point No.IV accordingly.



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29. In fine, all the Appeal Suits are dismissed. There shall be no order as to costs. Consequently, connected Miscellaneous Petitions are closed.

(T.K.R.J.) & (P.B.B.J)
12.12.2023

Internet : Yes
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Neutral Citation: Yes/No
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To

1.The Additional District Judge,

Fast Track Court,

Tirunelveli.

2.The Section Officer,

VR Section, Madurai Bench of Madras High Court,

Madurai.



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