



S.A.No.1467 of 2010

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 13.03.2024

CORAM

THE HON'BLE MR. JUSTICE **G.ARUL MURUGAN**

S.A.No.1467 of 2010
and MP.No.1 of 2010

- 1.M.Murugesan (Deceased)
- 2.Kuppamma
- 3.M.Agilan (Died)
- 4.M.Ambedkar (Died)
- 5.Amudha
- 6.M.Ashokan
- 7.Anandkumar
- 8.Mani Mangala
- 9.A.Archana
- 10.A.Aishwaraya
- 11.Minor A.Harish Kumar
Rep by its mother natural guardian
Manimangala
- 12.Amulu
- 13.Amruthapriya
- 14.Minor A.Vaishnvi,
Rep by her mother natural guardian
Mrs.Amulu
- 15.Minor A.Srinivas
Rep by his mother natural guardian
Mrs.Amulu

(Appellants 2 to 7 brought on record as
Lrs of the deceased sole appellant



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vide order of court dated 20.07.2015
made in MP.Nos.1 to 3 of 2015 in SA.1467/2010(PSNJ))

(Appellants 8 to 11 brought on records as LRS of the
deceased 3rd appellant viz. M.Agilan vide
order of Court dated 30.01.2020 made in
CMP.No.6302 and 6303 of 2018 in SA.1487/2010(VPNJ)

(Appellants 12 to 15 brought on record as Lrs of the deceased
4th appellant viz, Ambethkar vide order of court dated
12.12.2019 made in CMP.No.7965 and 7960 of 2019
in SA.1467 of 2010 (VPNJ) ... Appellants

Vs.

1.M.Velu

2.M.Lakshimi

... Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C. against the
judgment and decree dated 27.07.2010 made in AS.No.48 of 2008 on the
file of the learned Additional Subordinate Judge, Tiruvannamalai
confirming the judgment and decree dated 27.03.2008 made in
OS.No.358 of 2005 on the file of the learned Additional District Munsif
Court, Tiruvannamalai.

For Appellants : Mr.G.Jeremiah

For R1 : Mr.R.Rajarajan for Mr.G.Rajan

For R2 : No Appearance



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JUDGMENT

The first defendant in the suit is before this Court on appeal. Pending appeal, the sole appellant died and the appellants 2 to 7 had been brought on record as legal heirs. The 3rd appellant died and the appellants 8 to 11 are brought on record as legal heirs and the appellants 12 to 15 have been substituted as legal heirs for the deceased fourth appellant.

2. The Second Appeal is filed against the judgment and decree dated 27.07.2010 in AS.No.48 of 2008 on the file of Additional Subordinate Judge, Tiruvannamalai, confirming the judgment and decree dated 27.03.2008 in OS.No.358 of 2005 on the file of the Additional District Munsif Court, Tiruvannamalai.

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

4. According to the plaintiff, the first defendant is his elder brother and the son of late Munian. The plaintiff's father Munian married one Kannammal as his first wife and the first defendant was born to them. As



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Kannammal died, the plaintiff's father Munian married Muniyammal as his second wife and the plaintiff and one daughter Lakshimi were born to them. Both the plaintiff's father Munian and mother Muniyammal died intestate leaving the 'A' schedule ancestral property on 14.08.1996. As such, the plaintiff's father was not only worldly wise, but the first defendant acted as the Kartha of the joint family. The plaintiff and the first defendant settled at Bangalore and earned jointly, purchasing various properties out of joint income of the name of the first defendant. The plaintiff came over to the village to look after the ancestral property and it is in joint possession. The plaintiff, first defendant and their father Munian were entitled to each $\frac{1}{3}$ share, which was inherited by the plaintiff and the defendants 1 and 2 equally, the plaintiff and the first defendant became entitled to $\frac{4}{9}$ share each, and the second defendant became entitled to $\frac{1}{9}^{\text{th}}$ share. The properties were purchased through sale deeds dated 01.07.1974, 11.10.1976 and 23.03.1992, out of the ancestral joint family income in the name of the first defendant. Since the first defendant admitted to sell one of the property to one Govindan in April 2005, a lawyer's notice was issued on 20.04.2009 and the first defendant sent an evasive reply. As such, the plaintiff has come up with the suit for



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partition and separate possession.

4. The first defendant resisted the suit by filing the written statement admitting that his father Munian married Muniyammal as his second wife, after the death of his mother Kannammal. However, his father Munian did not own any property and was only doing coolie work and after he married the second wife Muniyammal, the first defendant was not taken care of, and therefore the first defendant left for Bangalore, and from his daily earnings, saved some money and later joined as the sanitary worker in the Bangalore Corporation and from out of the income, he purchased the property.

5. The plaintiff had never come to Bangalore along with the first defendant as claimed by him. Only after the first defendant purchased the suit properties, he came in touch with the plaintiff when he returned to the village. Since he was in Bangalore, at the request of the plaintiff, he gave the second item of the property purchased by him to the plaintiff on lease to enable him to carry on cultivation and therefore the plaintiff is estopped from making any claim over that item of the suit property. The defendant



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had purchased item nos.2 to 6 of the suit properties on 01.07.1974 from one Muniyammal and purchased the 7th item of the suit property on 11.10.1976 from one Munusamy Udaiyar and purchased the item nos. 8 and 9 from one Kaveri Ammal on 23.03.1992. As far as the 1st item of the suit property is concerned, it was purchased from one Sivaperumal through an oral document. Therefore except the first defendant neither the plaintiff nor anyone has any right or claim over the suit property. Further patta nos. in 711, 829, 761 have been issued in the name of the defendant. When he received the legal notice containing false allegations, the same was suitably replied and therefore sought for dismissal of the suit.

6. During trial, the plaintiff examined himself as PW.1 and Avadiyan as PW.2 and Ex.A.1 to A.13 were marked. On the side of the defendants, the first defendant examined himself as DW.1 and the other witnesses as DW.2, DW.3 and Exs.B1 to Ex.B.14 were marked.

7. After analysing the documents and evidence, the trial court, decreed the suit. The Trial Court found that since the first defendant admitted that the second item of the suit property is the ancestral property and patta has also been issued jointly, it has been proved that is the



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ancestral property and since the plaintiff had been carrying on cultivation on those lands, it has to be taken that the suit properties are joint family properties and the plaintiff will be entitled for the relief. Aggrieved the first defendant filed appeal in AS.No.48 of 2008 on the file of Additional Sub-ordinate Judge, Thiruvannamalai.

8. After reappraising the evidence, the Lower Appellate Court dismissed the appeal. The Lower Appellate Court relied on the evidence of DW.1, that he is the eldest in the family and Kathra and he is only supporting his father by giving money, and his father Munian had a house in the village and the plaintiff and the first defendant were cordial prior to the filing of the suit. Aggrieved by the concurrent finding of fact, the first defendant is before this Court on appeal.

9. This Court, by order dated 02.12.2010 admitted the second appeal and framed the following substantial questions of law.

“1. Whether the Courts below are correct in law in failing to note that the suit was barred by Section 4 of Benami Transaction (Prohibition) Act, 1988?



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2. Whether the Courts below are correct in law in having rendered a finding contrary to the specific case of the plaintiff that the suit properties had been purchased from out of the joint earnings of the plaintiff and first defendant?”

10. The learned counsel appearing for the appellant argued that the suit properties had been purchased by the first defendant through sale deeds in Ex.B.1 to B.3 which are also marked as Exs.A.1 to A.3. The first defendant has been working in the Bangalore Corporation, and from the income, he had purchased the suit properties.

11. The learned counsel further argued that admittedly, all the sale deeds except the item no.1, for all the remaining item nos.2 to 9 stands in the name of the first defendant, as he purchased for a valuable consideration. The learned counsel further contended that the patta in Ex.B.4 has been issued in the name of the first defendant and he, being in possession and enjoyment of the suit property, was paying the kist to the Government, documents from Exs.B.5 to B.12 which are the tax receipts, have been filed, thereby the first defendant has established his title and



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possession. Further since the first defendant was employed in Bangalore, the portion of the item no.2 was leased in favour of the plaintiff in Ex.B.13 and the plaintiff being the lessee is precluded from making any claim over that item of the suit property.

12. The learned counsel further argued that when all the documents stand in the name of the first defendant and the first defendant has purchased the suit properties from his independent income, when the plaintiff claims that the suit properties have been purchased from out of the income derived from the ancestral property in item no.1, the onus is on the plaintiff to establish the fact that the suit properties are joint family properties.

13. The learned counsel further argued that when item no.1 of the suit property is only a house, the claim of the plaintiff that from the income generated out of the item no.1 of the suit property, the other items of the suit properties purchased is not sustainable. Further, the learned counsel contended that the claim of the plaintiff that he also worked along with the first defendant in Bangalore and that for convenience, the sale



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deed was executed in favour of the first defendant in Ex.B.3 cannot be sustained as there cannot be a Benami Transaction, and that the Benami Transaction came to effect in 1988 and admittedly, the sale deed in Ex.B.3 is in 1992. The plaintiff is barred from making the claim that the property was purchased for convenience in the name of the first defendant as the same is barred by law.

14. The learned counsel further contended that since the plaintiff has not proved that the ancestral property was available and that the property generated sufficient income and from the surplus, they were able to purchase the other items of the suit properties, the claim of the plaintiff that the suit properties are joint family properties cannot be sustained.

15. The learned counsel further relied on the judgment in **D.S.Lakshmaiah and Another vs. L.Balasubramanyam and Another** reported in (2003) 10 SCC 310 and submitted that there cannot be a presumption of the joint family property and burden is on the party who asserts that the properties are joint family properties. The learned counsel further submitted that since the plaintiff was not able to prove that the suit properties are joint family property, his claim for partition cannot be



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sustained.

16. The learned counsel also relied on the decision in **Bai Hira Devi and others vs. Official Assignee** reported in **AIR 1958 SC 448** and submitted that as per Section 92 of the Indian Evidence Act, no oral evidence can be let in contrary to a registered document. The learned counsel further contended that both the courts below have arrived at a finding of fact, which is not based on the settled legal principles and therefore are perverse and sought for allowing the second appeal.

17. Per contra, the learned counsel appearing for the respondents argued that when the first defendant himself admitted that the plaintiff was carrying on cultivation in two items of the suit properties and also admitted that item no.2 of the suit properties is the ancestral property, the claim of the plaintiff that the suit properties are joint family properties has to be sustained.

18. Learned counsel further submitted that even though the sale deeds in Exs.A.1 to A3 stands in the name of the first defendant, only



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because the first defendant, take the eldest member was the kartha of the family, for the sake of convenience the deeds were registered in the name of the first defendant that by itself cannot give exclusive rights for the first defendant and the plaintiff and the second defendant, being the brother and sister are entitled to claim a share in the suit property.



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19. The learned counsel further submitted that as far as one of the suit properties is concerned, there are no documents available on record, and the first defendant only claims to have purchased through a oral deed 30 years ago but he has admitted in his evidence that his father had a house and vacant site in the village. The fact that the item no.1 of the suit property is the ancestral property stands proved.

20. The learned counsel further argued that when the properties in item no.2 of the suit property, purchased through Ex.A.2 which stands in the name of the first defendant, since the plaintiff was carrying on cultivation and the same being joint family property, he was in possession of the property, based on which the patta in Ex.A.6 has also been issued. The first defendant himself admitted that this item no.2 of the suit property is the ancestral property, the fact that the entire properties in item nos.2 to 6 had been purchased through Ex.A.2 would show that those are all joint family properties, and this admitted fact need not to be proved and the court below have rightly decided that these properties are joint family properties.



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21. The learned counsel further contended that when item nos.1 to 6 of the suit properties have been admitted and proved to be the joint family properties, naturally the other properties available in item nos.7 to 9 are also ought to be taken as the joint family properties and the plaintiff need not independently prove that these three items alone do not form part of the properties.

22. The learned counsel further argued that the revenue documents filed in Exs.A.6 to A.10, would show that the patta has been issued in favour of all the joint owners and also the document filed in Ex.A.12 which are the electricity receipts, shows that the plaintiff had been in joint possession and therefore the plaintiff and the first defendant, being the brothers are also entitled to claim a share in the suit properties. The learned counsel further contended that both the courts below have arrived at the finding based on the evidence and available material and do not require any interference and sought for dismissal of the appeal.

23. Heard the learned counsel on both sides and perused the material available on record.



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24. Admittedly, the first defendant was born to Munian and his first wife Muniyammal. After the death of Kannammal, Munian had married Muniyammal, as his second wife, the plaintiff and the second defendant were born through them. The plaintiff has filed a suit for partition in respect of 9 items of the suit properties. The plaintiff contends that the item no.1 of the suit property is the ancestral property and from out of the income, the properties in item nos.2 to 9 had been purchased and therefore those properties are joint family properties. The plaintiff also claims that he worked with the first defendant in Bangalore and through the joint assertion, few of the properties were purchased and since the plaintiff's father was not sound and healthy, the properties were purchased in the name of the first defendant being the kartha only for the sake of convenience. The plaintiff has also filed document in Ex.A.6 which is the patta jointly stands in the name of the plaintiff and the first defendant asserts that the joint family exists, and the plaintiff and the first defendant are in the joint possession of the property and the plaintiff is carrying on cultivation in the lands.



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25. However, the first defendant has denied the rights of the plaintiff and claim that he had left for Bangalore at an early age and out of saving from daily wage work and later joined as a sanitary worker in the Bangalore Corporation will able to derive income, and out of his income, the properties were purchased through Exs.B.1 to B3. Therefore, the suit properties are self acquired property in which the plaintiff cannot make any claim. The defendant has also filed the revenue documents, patta in Ex.B.4 and the tax receipts in Ex.B.5 to B.12 to show that he has been in possession and enjoyment of the property. Further, it is the case of the defendant that since he was away from the village, he had given a portion of the land in Ex.B.13 in favour of the plaintiff through a lease deed and the plaintiff having being cultivated the land as a lessee, cannot claim any right over the suit property.

26. It is the case of the plaintiff that even though the documents stand in the name of the first defendant, the properties were purchased only from the income derived from the ancestral property and the suit properties are joint family properties. It is for the plaintiff to establish and prove the existence of joint family nucleus and also surplus income



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sufficient enough to buy other properties. As it is a settled proposition of law and there cannot be a presumption over the joint family property and the party who asserts the properties to be the joint family properties, the onus is on him to prove that the joint family property was available, which generated surplus income and that the surplus income was sufficient enough to purchase the other items of the properties. Para 18 of the judgment in **D.S.Lakshmaiah and Another vs. L.Balasubramanyam and Another (cited supra)** is usefully extracted hereunder:

“18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available.”

27. As such, the onus is on the plaintiff to prove the fact that the suit property is joint family property. In the instant case, the plaintiff



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claims that the first item of the suit property is ancestral property and out of the income generated, the other property was purchased. The plaintiff was not able to establish that the first item of the property is the ancestral property which generated income and the surplus was sufficient enough to purchase the other items of the properties. Further the fact that the first item of the suit properties is only a house and it shows that no income has been derived from the house much less to have surplus income for the purchase of other properties. When the plaintiff also claims that he had worked along with the first defendant in Bangalore and by the joint assertion, the income derived was used to purchase the other item of the suit properties and only for the sake of the convenience, the properties were purchased in the name of the first defendant cannot be accepted as there cannot be Benami Transaction pursuant to the Benami Transaction (Prohibition) Act, 1988.

As per the judgment in **R.Rajagopal Reddy vs. Padmini Chandrasekaran** reported in **1995 (2) SCC 638**, it is held the provisions of the Act will apply to suits filed or such plea taken after 19.05.1988.



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The plaintiff was also not able to prove that he worked in Bangalore along with the first defendant and contributed to the purchase of the suit properties which stands in the name of the first defendant.

28. However, the defendant in his evidence admitted that item no.2 of the suit properties measuring an extent of 37 cents was cultivated by the plaintiff and it is ancestral property and patta also jointly stands in the name of the plaintiff and the first defendant. The perusal of the patta in Ex.A.6 reveals that the patta in respect of lands in survey no.156/6 and 156/7 in item nos.2 & 3 of the suit properties stands jointly in the name of the plaintiff and the first defendant. The properties in the item nos. 2 to 6 have been purchased through sale deed dated Ex.B.1. From the material available on record, as it is admitted by the first defendant that the second item of the suit properties is an ancestral property for which the joint patta has been issued in favour of both the plaintiff and the first defendant and the patta in Ex.A.6 stands jointly in the name of the plaintiff and further fact that the properties in item no.2 to 6 have been jointly purchased in one sale deed in Ex.B.1, it can only be concluded that the suit properties in item no.2 to 6 are the joint family properties and the plaintiff is entitled



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to make the claim for partition.

As far as the property in item no.1 is concerned, it is only claim of the first defendant that, it was purchased through an oral document and when he has admitted that this father (Munian) was owning a house and a vacant site in the village would show that the item no.1 of the suit property is the ancestral property belonging to Munian in which the plaintiff and the defendants are entitled have a share. But, however the fact that the first item of the suit property generated sufficient income which was sufficient enough to purchase the other items of the suit properties in 7 to 9 has not been established.

29. When the plaintiffs has not produced any material or documents to discharge his onus to prove his claim that item nos.7 to 9 of the suit properties are joint family properties and when these three items of the suit properties have been purchased by the first defendant through sale deed in Ex.B.2 and B.3 and there is also evidence available that the first defendant worked as a sanitary worker in Bangalore Corporation and out of the income, he purchased the item nos.7 to 9 of the suit properties,



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it is clear that these are the self acquired properties of the first defendant.

30. The Courts below have arrived at a finding of fact that all the items of the suit properties are joint family properties, only by relying on the admission of DW.1 that item no.2 of the suit property is the ancestral properties for which joint patta has been issued and that he was a kartha giving money to his father Munian, will not automatically prove that item nos.7 to 9 are also the joint family properties without the plaintiff proving the same. Therefore, the finding arrived at by the courts below in respect of item nos.7 to 9 of the suit properties are by misreading of evidence are not based on the settled proposition which is perverse and are liable to be interfered with.

31. In view of the above findings, the substantial questions of law are answered in favour of the appellant.

32. Therefore, the second appeal is partly allowed and the judgment and decree of the Courts below are set aside in respect of item nos. 7 to 9 of the suit properties are concerned and as far as item nos,1 to



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6 of the suit properties are concerned, the judgment and decree of the courts below are confirmed. However, there is no order as to costs. Consequently, connected Miscellaneous Petition is closed.

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drl

Index : Yes / No

Neutral Citation : Yes / No

To

- 1.The Additional Subordinate Judge, Tiruvannamalai.
- 2.The Additional District Munsif Court, Tiruvannamalai.



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