



S.A.No.755 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on	11.12.2023
Judgment Pronounced on	08.03.2024

CORAM

THE HON'BLE MRS. JUSTICE K.GOVINDARAJAN THILAKAVADI

S.A.No.755 of 2015

1.Manonmaniammal (Deceased)

2.P.Devaki

3.Muthumari

(Appellants 2 & 3 recorded as legal heirs of the deceased 1st appellant vide order of Court dated 21.07.2015 in M.P.No.1 of 2015 in SA SR.No. 106740 of 14

... Appellants

Versus

1.Harinathan

2.G.Saroja

3.G.Suseela

Nagarathinam [died]



S.A.No.755 of 2015

4.R.Rukku

5.A.Selvi

6.Manickam

7.Seetharaman

8.Nagaraj

9.Ramesh

10.Suresh

11.Manjula

--Respondents

Prayer : This second appeal is filed under section 100 of Code of Civil Procedure, against the judgment and decree dated 24.06.2014 made in A.S.No.160 of 2004 on the file of the Additional District, Chengalpattu, reversing the judgment and decree dated 14.11.2002 made in O.S.No.135/1992 on the file of the Principal Subordinate Judge, Chengalpattu.

For Appellants : Mr.M.S.Subramanian

For Respondents : No appearance



S.A.No.755 of 2015

WEB COPY

JUDGMENT

The second appeal is preferred against the judgement and decree dated 24.06.2014 made in A.S.No.160 of 2004 on the file of the learned Additional District Judge, Chengalpattu, reversing the judgement and decree dated 14.11.2002 made in O.S.No.135 of 1992 on the file of the Principal Sub Court, Chengalpattu.

2. The case of the plaintiffs in brief is that, one late Kannappa Naicker and late Dhanabaggiammal (D7) are the parents of late Jayavelu, Harinathan @ Harikrishnan (D1), G.Saroja (D2), G.Suseela (D3), M.Nagarathinam (D4) R.Rukku (D5) and A.Selvi (D6). The 1st plaintiff is the wife of late Jayavelu and plaintiffs 2 and 3 are their children. The said Kannappa Naicker died intestate on 31.01.1985, leaving behind the plaintiffs and the defendants as his legal heirs. The suit properties are the joint family properties of late Jayavel and the defendants and late Kannappa Naicker. The 1st defendant is cultivating the land in S.No.293/6 of Kalivanthapattu village, while the plaintiffs are cultivating the land in S.Nos.30/2A, 30/2B, 31/2, 31/1 &



S.A.No.755 of 2015

32/2, measuring four acres. The power tiller was also purchased out of the joint family nucleus. While so, the 1st defendant, in order to grab the entire joint family properties, claiming exclusive title over the suit item No.1 and also trying to evict the plaintiffs from the house. Therefore, the plaintiffs were constrained to file the present suit for partition and for separate possession of share the suit properties.

3.The 1st defendant in his written statement has stated that some of the suit items were purchased by Kannapa Naicker from and out of his own income and therefore, they are his self-acquired properties. It is submitted that there was no ancestral nucleus for purchasing the suit properties. Some of the suit items were purchased by the 1st defendant from and out of his own funds and therefore, the plaintiffs are not entitled to any share in respect of those properties. The power tiller was purchased by the 1st defendant by availing a loan. The plaintiffs are only entitled 1/8 share in the properties owned by late Kannapa Naicker.

4.The defendants 2 to 6 in their written statement has stated that there are no joint family properties and the defendants, as daughters of late Kannappa



S.A.No.755 of 2015

Naicker, are entitled to 1/8 share in the properties belonging to Kannappa Naicker. The plaintiffs can claim only 1/8 share in the properties left by late Kannappa Naicker.

5. Based on the above pleadings, the trial Court framed necessary issues.

Re casted Issues:

- 1. Whether the plaintiff is entitled for partition of 8/21 share in the suit properties?*
- 2. Whether the schedule mentioned properties are joint family properties?*
- 3. Whether the plaintiffs are entitled to claim 1/8 share in the property owned and possessed by the Kannappan Naicker?*
- 4. Whether the plaintiffs are not entitled to claim any of the properties purchased by the 2nd defendant and 7th defendant?*
- 5. Is it correct to say that the properties purchased by Dhanabaggiam Ammal D7 and the first defendant having treated as joint family properties?*
- 6. Whether the 1st defendant has perfected title by*



S.A.No.755 of 2015

adverse possession by per scription over the suit properties?

7. *Whether the plaintiffs claim is hit on the principle of ouster?*
8. *Whether the properties purchased in the name of first defendant are self acquired property?*
9. *To what other relief?*

6.The trial Court passed the preliminary decree in favour of the plaintiff. Assailing the judgement and decree passed by the trial Court in O.S.No.135 of 2013, the defendants have preferred the appeal in A.S.No.160 of 2004 before the first Appellate Court i.e., the Additional District Judge, Chengalpattu. The 1st appellate Court partly allowed the appeal in the above following terms:

"2.That the decree and judgment in O.S.No.135/92 dated 14.11.2002 of the learned principal Sub Judge, Chengalpattu be and are set aside.

3.That the suit in O.S.No.135/92 be and the



same is hereby decreed partly by passing the Preliminary decree as follows:

4.That the plaintiffs be and are hereby entitled to get

a.1/8th share in the properties belonging to late Kannappa Naicker

b. 1/56(1/7 X 1/8) share of late Danabakkiam Ammal which she got as one of the legal heirs of late Kannappa Naicker.

c.1/7th share in the properties left by late Danabakkaim Ammal

5.That the suit in O.S.No.135/92 be and the same is hereby dismissed in respect of remaining properties.

6.That the appellant/1st defendant be and is hereby directed to pay a sum of Rs.5207.50 to the respondent/plaintiff being the cost of suit.



S.A.No.755 of 2015

7.That there will be no order as to costs in

appeal"

7. Aggrieved by the judgement & decree of the first appellate court, the plaintiffs had filed the present second appeal.

Submissions:

For the sake of convenience, herein after the parties would be referred as described by the trial Court.

8. The learned counsel appearing for the appellants/plaintiffs submitted that the first appellate Court erred in applying the Benami Transaction (Prohibition) Act, 1988 to the facts of the case. Since it is a suit for partition, on the basis that the suit properties are joint family properties, the first appellate Court misdirected itself applying the Benami Transaction (Prohibition) Act, 1988. The learned counsel further submitted that the first appellate Court went wrong in placing the burden on the appellants/plaintiffs and had totally ignored the documents filed by the plaintiffs in the suit and also



S.A.No.755 of 2015

failed to consider the admission made by D.W.1 as to the availability of the ancestral properties, which would form the nucleus for generating necessary and sufficient income for purchasing the other items of properties. He further submitted that the first appellate Court went wrong in holding that the properties which stood in the name of Kannappa Naicker, which were his self acquired properties, ignoring the available materials and evidence on record. Though there were no pleadings or documents placed before the first appellate Court, to show that he had independent income and without any documentary evidence on record. Hence, the first appellate Court ought to have rejected the said contention made by the 1st defendant. He further submitted that the husband of the 1st plaintiff and father of the plaintiffs 2 and 3, namely, Jayavel died on 25.03.1968 and after his demise, the father Kannappa naicker and the 1st defendant were only the male members and therefore, the sale deeds marked as Exs.A5 and B2 were in the name of the 1st defendant. Hence, the first appellate Court has wrongly held that the properties since stood in the name of the 1st defendant are self-acquired properties. Apart from the properties,



S.A.No.755 of 2015

purchased in the names of the father Kannappa Naicker and the 1st defendant, there are further properties admittedly belonging to the joint family. The first appellate Court ought to have held that the ancestral properties are generating substantial income from which alone the other properties would have been purchased in the name of Kannappa Naicker and the 1st defendant. The 1st defendant failed to establish his independent source of income and therefore, the first appellate Court ought to have rejected the case of the 1st defendant in respect of acquisition of properties in his name. The first appellate Court ought to have held that all the suit properties are joint family properties, in which the appellants/ plaintiffs are entitled to a share as claimed.

9.The learned counsel appearing for the appellants/plaintiffs further submitted that there is no presumption that the family, possessed the joint properties and therefore, the person ascerting the property to be joint had to establish that the family possessed of some property with the income of which the property could have been acquired. But where it is established or admitted that the family possessed joint property, which from its nature, may form



S.A.No.755 of 2015

sufficient family nucleus from which the property in question may have been acquired and the presumption arises is that it was the joint property and the burden shifts on the parties alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family. To support his contentions the learned counsel for the appellants had relied upon the decision in *Vinod Kumar Dhall vs. Dharampal Dhall* reported in (2018) 16 SCC 645.

10.Further contention of the learned counsel for the appellants/plaintiffs is that the burden of proving that any particular property is joint family property, is, therefore, in the first instance, upon the person who claims it as co-parcenary property. But, if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. To support his contentions, he has relied upon the decision reported in *AIR(1969) SC 1076*.

11.The learned counsel further argued that any property purchased by the Manager of Joint Family in the name of any member of the family and in



S.A.No.755 of 2015

the absence of any material to establish that consideration money was paid out of the separate funds of members, the property in question was a joint property.

The learned counsel further argued that Sections 3, 4, 5 & 6 of Benami Transaction (Prohibition) Act, 1988 is not applicable to pre-Act transactions.

He further submitted that the property purchased in the name of a member of the joint family, the Benami Transaction (Prohibition) Act, 1988, is not applicable in such case, as it was covered by exception to prohibition engrafted under Section 4 of the Act. To support his contentions, he has relied upon the following decision case reported in :

1.(1996) 2 SCC 491

2.AIR 2003 ANDHRA PRADESH 107

3.(1996) 7 SCC 55

4.AIR 1964 SCC 882 (V 51 C 113)

5.(2023) 3 SCC 315

12. Therefore, considering the above facts, the judgment and decree passed by the first appellate Court is liable to be set aside.



S.A.No.755 of 2015

WEB COPY

13.Despite of service of notice, none appeared on behalf of the respondents 1 to 11.

14.At the time of admission on, the following substantial question of law is framed:

1.Whether the lower appellate court was right in holding that the properties covered under Exs.B.1 to B.7 are properties purchased benami in the name of the first defendant by his father Mr.Kannappa Naicker and therefore, as per the provisions of the Benami Transaction (Prohibition) Act, 1988, the first defendant is the absolute owner of the property and therefore the plaintiffs have got no right or any share?

15. Mr.M.S.Subramanian, learned counsel appearing for the appellants/ plaintiffs and records perused.

16.Admittedly, it is a suit for partition. The plaintiffs in the suit claims for partition of 8/21 shares in the suit properties. According to the



S.A.No.755 of 2015

plaintiffs, the suit properties are joint family properties and therefore, the properties stands in the name of the 1st defendant are not the separate properties of the 1st defendant. The further contention of the plaintiffs is that the properties covered under Exs.B.1 to B.7 were purchased in the name of the 1st defendant by his father namely Kannappa Naicker out of the joint family nucleus and therefore, the provisions of the Benami Transaction (Prohibition) Act, 1988, and therefore, the 1st defendant cannot claim to be the absolute owner of the above mentioned properties and deny the shares of the plaintiffs in the said properties. Admittedly, the family were living jointly. But it does not mean that the joint family possessed any joint property, unless the same is established. It is well settled that, there is no presumption that a family, because it is joint, possessed the joint property and therefore, the person asserting the property to be joint had to establish that the family was possessed of some property with the income of which the property could have been acquired. But where it is established or admitted that the family which possessed joint property which from its nature and relative value may have formed sufficient nucleus from which the property in question may have been acquired, the presumption arises that it was a joint property and the burden shift to the party



alleging self acquisition to establish affirmatively that the property was acquired without the aid of the joint family. Therefore, the plaintiffs must establish that there was existence of joint family nucleus. Though nothing is stated in the plaint about the existence of joint family nucleus, Ex.A.7 Adangal would reveal that the joint family had ancestral properties. Even in the written statement filed by the 1st defendant it is not stated that the family was not possessed with ancestral property. Apart from that, nothing is placed on record to show that the father Kannappa Naicker had independent income for purchasing the suit properties. Therefore, it has to be presumed that only from the joint family nucleus, the suit properties were purchased. Moreover, the evidence of D.W.1 would clearly establish that, the father Kannappa Naicker was managing the family till his death. While so, the burden shifts on the 1st defendant to establish that he had independent income to purchase the properties covered under Exs.B.1 to B.7 respectively. Though D.W.1 deposed that he had purchased the properties under Exs.B.1 to B.7 by doing various business including paddy business, Waram Cultivation, Real Estate Business and Embroidery Business, the same is not mentioned in the written statement filed by the 1st defendant. No document was produced by the 1st defendant to



S.A.No.755 of 2015

prove that he was doing business and cultivation and the properties mentioned in Ex.B.1 to B.7 were purchased by him from the said income. Moreover, D.W.1 himself admitted that his brother late Jayavel died in the year 1968 and at that time D.W.1 was only 3 years old. The sale deeds under Exs.B.1 to B.7 were executed from the year 1972 till 1982. According to the plaintiffs, the 1st defendant was a minor at the time of execution of the above sale deeds and for that reason only, the stamp papers were purchased in the name of their father Kannappa Naicker. This fact was not rebutted by the 1st defendant. Therefore, it is made clear that the 1st defendant would not have purchased the above properties from his own income. Though the 1st defendant would contend that the power tiller was purchased by him by availing loan from the Bank, for which there is no evidence on record. Therefore, the presumption is that the said power tiller was also purchased from the joint family income. Thus, all the facts and circumstances indicate that the properties covered under Exs.B.1 to B.7 are family properties and not the exclusive properties of the 1st defendant. Merely the fact the sale deeds are in the name of the 1st defendant would not support his case. In the absence of evidence on record that the above properties are self acquired properties of the father Kannappa Naicker or of the 1st



S.A.No.755 of 2015

defendant, it has to be presumed that the above properties are the joint family properties purchased by the father in the name of his son, the 1st defendant herein for enjoyment of members of the joint family. While so, the 1st defendant becomes a coparcenar, and therefore, the prohibition under the Benami Transactions (Prohibition) Act, (45 of 1988) is not applicable in this case as it is covered by exception to prohibition engrafted in Section 4 of the Act. Therefore, immovable property purchased by father in the name of son for enjoyment of members of joint Hindu Family, Section 4(3)(a) is attracted in ***Surendra Kumar*** case,(***1996***) ***2 SCC 491*** the Hon'ble Supreme Court opined that when the property was purchased by the manager of the joint family in the name of his son who was then minor in the absence of material to establish that consideration money was paid out of separate funds, the property cannot be held Benami and it was only a joint family property. Therefore, the Benami Transactions (Prohibition) Act, would apply only in case property was held Benami. The bar of the Act is not applicable to a transaction as contained in Sections 4(3)(a) and (b). Thus, the provision of the Act could not be said to be applicable in the instant case.



S.A.No.755 of 2015

17. Therefore, for the foregoing reasons, I have no hesitation to hold that the property covered under Exs.B.1 to B.7 was purchased in the name of the 1st defendant was only for the benefit of the joint family. Therefore, the plaintiffs and the defendants 1 to 6 are equally entitled for a share in the properties covered under Exs.B.1 to B.7. This appeal has been preferred only against the disallowed portion. The 1st appellate Court except the properties covered under Exs.B.1 to B.7 passed the preliminary decree in the following terms:

1.1/8th share in the properties belonging to late Kannappa Naicker

2.1/56(1/7 X 1/8) share of late Danabakkiam Ammal which she got as one of the legal heirs of late Kannappa Naicker.

3.1/7th share in the properties left by late Danabakkiam Ammal.

18. Since it is now determined that the properties covered under Exs.B.1 to B.7 are not the separate properties of the 1st defendant, the plaintiffs are entitled to 1/7th share in the said properties. Accordingly, this substantial question is answered.



S.A.No.755 of 2015

WEB COPY

19. In the result, the Second Appeal is allowed. The decree and judgment in A.S.No.160 of 2004 on the file of the Additional District Judge, Chengalpet, is set aside with regard to the disallowed portion alone. The preliminary decree passed by the learned Additional District Judge, Chengalpet, in A.S.No.160 of 2004, in respect of other properties in the suit is confirmed. No costs.

08.03.2024

vsn

Index: Yes/No

Speaking Order : Yes/No

To

1. The Additional District, Chengalpattu,
2. The Principal Subordinate Judge, Chengalpattu.



WEB COPY



S.A.No.755 of 2015

K.GOVINDARAJAN THILAKAVADI, J.

vsn

Pre delivery judgement made in

S.A.No.755 of 2015

08.03.2024