



A.S.No.202 of 2017

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 28.11.2023	Delivered on 05.01.2024
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CORAM:

THE HONOURABLE MR JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR JUSTICE N.SENTHILKUMAR

A.S.No.202 of 2017
and
C.M.P.No.8676 of 2017

1.Subramaniyan

2.Palaniyammal

3.S.Suresh

...Appellants

Vs.

1.Balamurugan

2.C.Suresh

...Respondents

Prayer: Appeal Suit filed under Section 96 of the Code of Civil Procedure to set aside the judgment and decree passed in O.S.No.1 of 2012 dated 08.02.2017 on the file of Principal District Judge, Perambalur.

For Appellants : Mr.S.Kamadevan

For Respondents : Mr.P.Valliappan, Senior Counsel
for Mr.S.M.S.Shriram Narayan for R1



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J U D G M E N T

WEB COPY (Judgment of the Court was delivered by **R.SUBRAMANIAN, J.**)

The defendants 1 to 3 in O.S.No.1 of 2012, who had suffered a decree for partition and separate possession of half share of the plaintiff in the suit properties are the appellants.

2. For the sake of convenience, the parties will be referred to as per their rank in the suit.

3. The plaintiff laid a suit for partition and separate possession of his half share contending that the items 1 to 10 of the suit properties belonged to the joint family of Rathinam Nainar and his three sons including the 1st defendant. At a partition that took place between the Rathinam Nainar and his sons on 21.07.1994, the suit properties were allotted to the 1st defendant, father of the plaintiff. The 1st defendant married the plaintiff's mother Amudha on 04.09.1989 and the plaintiff was born out of the said wedlock. It is also pleaded that the 1st defendant drove away the plaintiff's mother from the matrimonial home during the year 1992-1993 and has been living



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with the 2nd defendant since then and had married the 2nd defendant in the year 1994. The plaintiff would claim that the marriage between the 1st defendant and the 2nd defendant, having taken place during the subsistence of the marriage between the 1st defendant and the plaintiff's mother Amudha, is invalid. It was also pleaded that the 3rd defendant born out of the wedlock between the 1st defendant and the 2nd defendant cannot claim to be a coparcener, as he would succeed only to the properties of his father viz., the 1st defendant as per Section 16 of the Hindu Marriage Act.

4. It is the further contention of the plaintiff that the suit items 11 to 22 of the 'A' schedule and the 'B' schedule properties were purchased out of the income from the suit 'A' schedule properties and as such, they also belonged to the joint family of which the plaintiff had become the coparcener by birth. It was also contended that the settlement deeds executed by the 1st defendant on 29.11.2011 settling items 12 to 15 of 'A' schedule and 'B' schedule properties in favour of the 2nd defendant are invalid. In fact, it is the execution of the settlement deeds which triggered the suit.



5. The 1st defendant filed a written statement which was adopted by the defendants 2 and 3.

6. The 1st defendant would contend that the suit is speculative in nature. He would plead a customary divorce between him and the plaintiff's mother. According to him, the marriage between him and the 2nd defendant that had taken place after the customary divorce is valid. The 3rd defendant would be a legitimate son *de hors* Section 16 of the Hindu Marriage Act. It was the further contention of the 1st defendant that he was working abroad for more than 25 years and out of his hard earned money, he has purchased the properties in his name. It is also his plea that he was enjoying the properties purchased by him as his separate properties. The claim of the plaintiff that the suit items 11 to 22 of the 'A' schedule and the suit 'B' schedule properties were purchased from the surplus income that was available from the family properties that was allotted to the 1st defendant in the partition that took place in 1994 was specifically denied. It was also claimed that proceedings for divorce between the mother of the plaintiff and the 1st defendant are pending. The sum and substance of the contention of



the 1st defendant was that the suit properties at least items 11 to 22 in 'A' schedule and 'B' schedule properties are his separate properties and the plaintiff has no right to demand partition as a coparcener.

7. The 4th defendant remained exparte.

8. On the above pleadings the learned trial Judge framed the following issues:

1. Whether the plaintiff is entitled for ½ share in the suit “A” and “B” Schedule properties?

2. Whether the plaintiff has no right to seek partition of ½ share in “A” and “B” Schedule properties?

3. To what relief the plaintiff is entitled to?

and the issues were recast as follows:-

1. Whether the plaintiff is entitled to get any share in the suit properties?

2. Whether the suit properties are ancestral joint family properties of the plaintiff and the 1st defendant?

3. To what relief, the plaintiff is entitled?



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9. At trial the plaintiff was examined as PW1 and Exs.A1 to A17 were marked on his side. The 1st defendant was examined as DW1 and the 2nd defendant was examined as DW2. Exs.B1 to B13 were marked on the side of the defendants.

10. On a consideration of the evidence on record, the learned trial Judge dis-believed the contention of the defendants that the suit items 11 to 22 of 'A' schedule and 'B' schedule properties were purchased from the separate income of the 1st defendant. The learned trial Judge found that though it was shown that the 1st defendant had gone to several Gulf Countries, there was nothing to show that he was employed therein and he had earned sufficient income, in order to support the claim that the suit properties were purchased out of the said income. The learned trial Judge took note of the description of the 1st defendant as Agriculturist in all the documents of purchase and the absence of any evidence for transfer of money from outside the country to the account of the 1st defendant in India as the reasons to dis-believe the contention of the 1st defendant.



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11. The learned trial Judge also concluded that the marriage between the 1st and 2nd defendants being in violation of Section 5(i) of the Hindu Marriage Act is void in view of Section 11 of the said Act. On the above conclusions, the learned trial Judge found that the 2nd defendant being the son born out of an invalid marriage would not become a coparcener and hence the plaintiff would be entitled to half share in all the suit properties. The settlement deeds executed by the 1st defendant in favour of the 2nd defendant were held to be invalid in respect of the plaintiff's share.

12. The learned trial Judge also found that the 1st defendant being the Manager and Karta of the joint Hindu Family, purchases made in his name are presumed to be the properties of the family and the burden of proving the contrary is always on the person who alleges that the properties were purchased from and out of his own income, particularly when he is the Karta.



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13. Finding total absence of evidence as to the source of funds for purchase of these properties viz., items 11 to 22 of the 'A' schedule and the 'B' schedule, the learned trial Judge concluded that the income from the items 1 to 10 of 'A' schedule property must have contributed towards the purchase of the other properties. On the above findings, the learned trial Judge concluded that the plaintiff would be entitled to a half share in the suit properties and granted a preliminary decree declaring his half share in the suit properties. Hence, this appeal.

14. We have heard Mr.S.Kamadevan, learned counsel appearing for the appellant and Mr.P.Valliappan, learned Senior Counsel appearing for Mr.S.M.S.Shriram Narayan, learned counsel for the 1st respondent. The 2nd respondent, despite service, does not appear either in person or through counsel duly instructed.

15. Mr.S.Kamadevan, learned counsel appearing for the appellants / defendants would vehemently contend that the trial Court fell in error in coming to the conclusion that the items 11 to 22 of 'A' schedule and 'B'



schedule properties were purchased out of the income from the suit 'A' schedule properties. Drawing our attention to the extent of the suit items 1 to 10, the learned counsel would submit that the total extent of items 1 to 10 being only about 1 ½ acres, the income there from would not have been so much, so as to leave enough surplus, which would have been used for purchase of other properties.

16. The learned counsel would also draw our attention to Ex.B1(series) which would show that the 1st defendant was employed abroad for a considerably long time. The learned counsel would implore us to draw a presumption, from the fact that the 1st defendant was employed abroad, that he would have earned a lot and such earning would have contributed to the purchase of the items 11 to 22 of the suit 'A' schedule and 'B' schedule properties. The learned counsel would also vehemently contend that the plaintiff who was a juvenile and he would have no knowledge of the happenings to tender evidence on the source of purchase of the suit properties.



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17. The learned counsel would also draw our attention to the judgment of the Hon'ble Supreme Court in ***D.S.Lakshmaiah and another Vs. L.Balasubramanyam and another*** reported in ***(2003) 10 SCC 310*** in support of his contention that mere existence of the joint family will not lead to a presumption that the property owned by the Karta is a joint family property. The learned counsel would also submit that unless it is proved that the joint family property that existed had so much of income that it left a surplus after defraying the expenses and it was that surplus which was used for the purchase of the properties in the name of the Karta.

18. In support of the said submission, reliance is placed by the learned counsel on the judgment of the Division Bench of this Court in ***R.Deivanai Ammal (Died) and another Vs. G.Meenakshi Ammal and others*** reported in ***2004 (4) CTC 208***. Reliance is also placed on various judgments of this Court as well as the Hon'ble Supreme Court by the learned counsel in support of his submission that it is for the coparcener who alleges that the properties belonged to a joint family to establish the existence of the nucleus and availability of the surplus income. He would also point out that unless



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the coparcener who sues for partition alleging that the properties belong to the joint family establishes the foundational facts viz., the availability of nucleus, the availability of income and the availability of surplus income, the onus will not shift to the Karta or the coparcener, in whose name the properties stand, to prove that he had independent source of income and the property was purchased out of such independent income.

19. Drawing our attention to Ex.B6, the learned counsel would submit that once it is shown that the 1st defendant was working abroad and he was earning enough, the trial Court ought not to have held that because he is described as an agriculturist in some documents, he had no other income other than agricultural income.

20. Contending contra Mr.P.Valliappan, learned Senior Counsel appearing for the plaintiff/ 1st respondent would submit that no doubt there is some evidence to show that the 1st defendant was working abroad, but there is no evidence to show that he had sent monies or he had brought monies with him, from and out of which the suit items 11 to 22 of 'A'



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schedule and 'B' schedule properties were purchased.

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21. The learned senior counsel would submit that there is a difference between the purchase made in the name of the Karta and purchase made in the name of the junior member of a joint Hindu family. The learned senior counsel would submit that as far as the purchases made in the name of the Karta are concerned, any property purchased in the name of the Karta with the aid and assistance of the joint family estate is impressed with the character of the joint family property. If the Karta claims that the properties standing in his name claims are his own, it is for him to show that it was acquired without detriment to the ancestral estate or the surplus income from the ancestral estate was not utilized for such purchase.

22. In support of his submission Mr.P.Valliappan, learned Senior Counsel would rely heavily upon the judgment of the Hon'ble Supreme Court in *V.D.Dhanwatey Vs. Commissioner of Income Tax* reported in *AIR 1968 SC 683*. Our attention is also drawn to the judgment of this Court in *The Additional Commissioner of Income-tax Vs. P.L.Karuppan Chettiar*



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reported in *AIR 1979 Madras 1*.

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23. The learned counsel would also rely upon the judgment of the Division Bench of this Court in *Thenmozhi and another Vs. Kousalya and others* reported in **2023 (2) CTC 328**, wherein, the Division Bench had dealt with the question of proof of the character of properties and concluded that once it is shown that there was a joint family nucleus and such nucleus yielded sufficient income, the onus was on the person in whose name the property stands to show that he had independent source of income. If he fails to establish such income, the property would be presumed to be belong to the joint family.

24. Reliance is also placed on the judgment of a Division Bench of this Court in *Rajendran and another Vs. Radhakrishnan and others* made in *A.S.No.452 to 455 of 2011* dated **21.09.2023**, to which one of us (Hon'ble Mr.Justice R.Subramanian) was a party to contend that there is a presumption in respect of the properties that stand in the name of the Manager of the joint Hindu family and such presumption is not available in



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respect of other junior members and female members.

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25. Our attention is also drawn to the judgment of the Court in ***K.Kuppusamy and others Vs. S.Vadivukkarasi and others*** reported in ***MANU/TN/5935/2023***, wherein, after referring to the judgment of the Hon'ble Supreme Court in ***Mallesappa Bandeppa Desai and others Vs. Desai Mallappa and others*** reported in ***AIR 1961 SC 1268***, it was held that it is for the person in whose name the property stands to prove with clear and satisfactory evidence that the purchase money proceeded from his separate funds.

26. We have considered the rival submissions.

27. From the contentions of the learned counsel on either side, the following points emerges for consideration in this appeal:-

1) Whether the plaintiff has proved the foundational fact viz., joint family was possessed of sufficient nucleus and



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there was income from the said joint family property which would have aided the purchase of the other properties.

2) Whether the defendants have established that the 1st defendant had separate income and it was that income which contributed for purchase of that properties.

POINT No.1:

28. It is an admitted case of the parties that the items 1 to 10 viz., the properties which were allotted to the 1st defendant at the partition that took place on 21.07.1994 are ancestral properties/ joint family properties. It is also not in dispute that the marriage between the mother of the plaintiff Amudha and the 1st defendant is subsisting as of today. Proceedings for divorce are pending before the Hon'ble Supreme Court. Therefore, the marriage between the 1st defendant and the 2nd defendant is void being in violation of Section 5(i) of the Hindu Marriage Act. It is therefore clear that the 3rd defendant having been born of such invalid marriage will not become a coparcener along with the 1st defendant. He would only inherit as class-I heir of the 1st defendant under Section 8 of the Hindu Succession Act.



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29. Therefore, the essential question that is to be determined is as to whether items 11 to 22 of the suit 'A' schedule and the 'B' schedule properties were purchased from and out of the income from items 1 to 10 of the suit 'A' schedule properties, so that they can also be classified as joint family properties in which the plaintiff would be entitled to half share.

30. As already pointed out the nature and character of items 1 to 10 of the suit 'A' schedule properties is not in dispute. The plaintiff has also produced the revenue records, including the adangal extracts to show that the properties were cultivated and there was sufficient income there from. Ex.B13 is the series of adangal extracts, which show that items 1 to 10 were cultivable lands and they were cultivated and they were yielding a good income. It is the claim of the 1st defendant that he was employed abroad and he has purchased the suit properties from and out of the income from his employment as a driver in the Gulf Countries. Ex.B1 series are his passports. From the passports it is found that the 1st defendant has been travelling abroad. Items 11 to 22 have been purchased during the years



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2003 and 2005 under Exs.A2 to A4. Ex.A2 is dated 29.10.2003, Ex.A3 is dated 18.02.2004 and Ex.A4 is dated 28.04.2005. To buttress his contention that the defendant had earned sufficient income from his employment abroad, copies of his bank pass books have been produced. All these bank pass books viz., Exs.B2 to B5 relate to the period between 2009 and 2012 and they do not relate to the period during which the properties were purchased by the 1st defendant under Exs.A2 to A4. A cursory look at the entries in these pass books do not show that the 1st defendant had transferred monies from abroad and such monies were utilized for purchase of the properties.

31. No doubt, the burden of proving existence of nucleus and a possibility of a surplus there from is on the plaintiff. Once the plaintiff is able to prove the existence of the nucleus and possibility of surplus income, it is for the defendant who claims that the properties were purchased out of his own income to prove that he had independent source of income and the purchase money proceeded from such independent source.

32. It will be useful to refer to the judgment of the Hon'ble Supreme



Court in ***V.D.Dhanwatey Vs. Commissioner of Income Tax*** reported in ***AIR***

1968 SC 683, where the Hon'ble Supreme Court had observed as follows:-

4. The general doctrine of Hindu law is that property acquired by a karta or a coparcener with the aid or assistance of joint family assets is impressed with the character of joint family property. To put it differently, it is an essential feature of self-acquired property that it should have been acquired without assistance or aid of the joint family property. The test of self-acquisition by the karta or coparcener is that it should be without detriment to the ancestral estate. It is therefore clear that before an acquisition can be claimed to be a separate property, it must be shown that it was made without any aid or assistance from the ancestral or joint family property.

33. In *Mallesappa Bandeppa Desai and others Vs. Desai Mallappa and others* reported in ***AIR 1961 SC 1268***, the Hon'ble Supreme Court observed that where the Manager claims that any immovable property has been acquired by him with his own separate funds and not with the help of the joint family funds of which he was in possession and charge, it is for him to prove by clear and satisfactory evidence his plea that the purchase money



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proceeded from his separate funds. **The onus of proof in such a case must be placed on the Manager and not on the coparceners.**

34. A Division Bench of this Court in *Thenmozhi and another Vs. Kousalya and others* reported in **2023 (2) CTC 328** had while acknowledging the fact that the initial burden is on the plaintiff concluded that once the plaintiff places evidence to show that the joint family was possessed of properties and that properties were sufficient to yield income, the onus would shift to the Manager or Karta to prove separate income. If he fails to do so, necessarily the property will be held to be ancestral in nature. What is the nature of extent of proof that is required would differ or vary from case to case and there cannot be a straight jacket formula.

35. If we are to examine the evidence available on hand in the light of the pronouncements referred to *supra*, we find that there is some evidence to show that the family was possessed of certain properties which were capable of yielding income. Ex.B13 series viz., adangal extracts would show that items 1 to 10 of 'A' schedule properties were cultivated regularly and were



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yielding sufficient income. The family was not very large, therefore it is quite possible that there was a surplus available from the income from the family properties. In the light of the evidence above, if we are to test whether the 1st defendant has discharged the onus that has shifted to him on the establishment of the foundational facts stated above, we have to necessarily answer in the negative.

36. No doubt, a bunch of four passports have been produced to show that the 1st defendant had been travelling to Gulf Countries very often. From the entries therein we find that the duration of stay were for very short periods, sometimes extending up to a few months. Apart from the above and the oral evidence of 1st defendant as DW1, we have no other evidence to show that the 1st defendant had enough income from his employment in Gulf countries, he has transferred that income to India and it was that income which was used for purchase of the properties between the year 2003 and 2005. Though the 1st defendant would in his oral evidence claim that he had sent monies to India and it was with the aid of that money the properties were purchased, there was not even a shred of paper to support such



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evidence.

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37. We have considerable reservations in accepting the oral testimony of the 1st defendant since he has gone to the extent of disputing the paternity of the plaintiff. Though he had disputed the paternity of the plaintiff, in his evidence, he had admitted that the plaintiff was his son. From the averments made by him in the matrimonial proceedings, which were filed as Exs.A7 and A8, the trial Court has come to the conclusion that the 1st defendant had admitted that the plaintiff is his son in those proceedings and when it came to the suit for partition, he has chosen to deny paternity only with a view to deny a share to the plaintiff. Rightly the learned counsel for the appellant has not attempted to raise that question before us. We have already referred to the evidence that is available in the form of adangal extracts viz., Ex.B13 series which would show that the suit items 1 to 10 have been cultivated regularly with paddy, sugarcane and other cash crops. As we had already pointed out the family was also not that large and there is a possibility of there being a surplus. Once that much was established by the plaintiff, we have to conclude that a presumption would arise to the effect that the other



properties were purchased from and out of the income from the ancestral properties.

POINT No.2:

38. As we had already pointed out while discussing the first point the onus is on the 1st defendant to establish that he had sufficient income abroad and that he had transferred that income to India. Though the 1st defendant admits that he had transferred the monies from abroad, he has not chosen to produce any document evidencing such transfer. He has only chosen to produce his bank statements between the year 2009 and 2013, which are much later than the period during which the actual acquisitions were made. The properties were purchased under Exs.A2 to A4 between 29.10.2003 and 28.04.2005. The acquisitions are also not for a very high value. The total consideration for all the three documents put together is only around Rs.2,10,000/-. We therefore have to necessarily conclude that the 1st defendant, who was in a position to place best evidence before the Court has refrained from doing so and has chosen to burke facts.

39. We therefore conclude that the 1st defendant has not discharged



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the onus of establishing that he had separate income and it was with the aid of such separate income the properties viz., suit items 11 to 22 of 'A' schedule and 'B' schedule properties were purchased from his own separate income. As a sequel we will have to conclude that all the properties are joint family properties and the plaintiff has got half share as coparcener in all the properties.

40. The Hon'ble Supreme Court has also recently concluded that a son who is born of a invalid marriage will not become a coparcener and he would only inherit as a class-I heir under Section 8 of the estate of his father. Therefore the 3rd defendant would not become the coparcener. We therefore do not see any reason to interfere with the findings of the trial Court.

41. The appeal therefore fails and it is accordingly **dismissed**. However bearing in mind the relationship between the parties we do not impose any costs, despite the fact that the 1st defendant has chosen to raise a vexatious plea of denial of paternity. Consequently, the connected miscellaneous petition is closed.



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(R.SUBRAMANIAN, J.)

(N.SENTHILKUMAR, J.)

05.01.2024

dsa

Index : Yes

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Neutral Citation : Yes

Speaking order



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To

The Principal District Judge,
Perambalur.



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R.SUBRAMANIAN, J.
and
N.SENTHILKUMAR, J.

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