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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **04.04.2024**

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A.NO.1918 OF 2001
and
C.M.P.No.20226 of 2001

P.Sakthivel

:Plaintiff/Appellant/Appellant

.VS.

1.S.Chellapandi

2.Thoppammal(died)

3.Thottayam

4.P.Muniyandi

5.Kumarammal

6.Bommuthai

7.Panchavarnam

(Respondents 5 to 7 are brought on record as legal representatives of the deceased second respondent as per order of this Court made in C.M.P.Nos.1950 and 1951 of 2019 in S.A.No.1918 of 2001, dated 25.09.2019)

:Defendants/Respondents/

Respondents

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree made in A.S.No.8 of 2001, dated 14.09.2001, on the file of Additional Subordinate Judge, Dindigul,confirming the judgment and decree made in O.S.No.540



of 1998 dated 29.6.2000, on the file of II Additional District Munsif, Dindigul.

For Appellant	:Mr.R.Nandakumar
For Respondents 1,3 and 4	:Mr.M.P.Senthil
For Respondent-2	:Died
For Respondents 5 to 7	:No appearance

JUDGMENT

The Second Appeal is directed against the judgment and decree made in A.S.No.8 of 2001, dated 14.09.2001, confirming the judgment and decree made in O.S.No.540 of 1998, dated 29.6.2000, on the file of II Additional District Munsif, Dindigul.

2.The plaintiff in the suit is the appellant. The suit is filed for declaration of title and permanent injunction. The suit was dismissed by the trial Court and the findings of the trial Court were confirmed by the Ist Appellate Court. Aggrieved by the concurrent findings, the appellant/plaintiff has come by way of this Second Appeal.

3.According to the appellant/Plaintiff, the suit property was originally purchased by the plaintiff under Ex.A4, dated 6.3.1998



from one Aundivel and Kumarasamy. The said Aundivel and Kumarasamy got the suit property in an earlier partition. It was further stated by the appellant/plaintiff that the suit property was originally purchased by the plaintiff's vendor's brother Subbiah Naicker and his paternal uncle Krishnasamy Naicker under a registered sale deed, dated 10.5.1952, marked as Ex.A1. Later on, the suit property was mortgaged by the above said Subbaiah Naicker and Krishnasamy Naicker along with Plaintiff's vendor in favour of Palanisamy Gounder under Ex.A2, dated 21.2.1962. It was further pleaded in the year 1972, there was an oral partition between Krishnasamy Naicker and his branch on one side and the plaintiff's vendor's branch on the other side. Thereafter, there was an oral partition in the year 1977 among the children of Kami Naicker and the property purchased by the appellant was allotted to the share of Aundivel and Kumarasamy. The said property which was allotted to the share of Aundivel and Kumarasamy was enjoyed by them till 6.3.1998 and then sold to the plaintiff under Ex.A4. Thus the plaintiff claimed title and possession over the suit property and lodged the suit.

4.The respondents herein filed a written statement and resisted the suit on the ground that their father Subbiah Naicker got separated from the family of Kami Naicker branch 50 years



back and out of the self acquired income by rearing the cattles, he purchased the suit property along with Krishnasamy Naicker in the year 1952. It was further pleaded that the revenue documents like patta stood in the name of their father Subbiah Naicker. It was also claimed by the respondents that in the year 1968, when the property was mortgaged by their father, as per the request made by the mortgagee, the plaintiff's vendors have also joined in the mortgage document. However, the mortgage debt was cleared by the plaintiff's father and the original document is in the custody of the defendants. The respondents/defendants specifically denied the oral partition in the year 1973 and 1977 pleaded by the appellant/plaintiff. It was also claimed that in UDR Scheme, plaintiff got patta for the suit property behind the back of the respondents and hence, the same could not advance their case. On these pleadings, the respondents prayed for dismissal of the appeal.

5. Before the trial Court, the father of the appellant-plaintiff was examined as P.W.1. One of the vendor of appellant was examined as P.W.2. The appellant's cousin was examined as P.W.3. The sons of Mortgagee under Ex.A2 was examined as P.W.4. Two other persons, who allegedly mediated partition as pleaded by the appellant, were examined as P.W.5 and P.W.6. On behalf of the



appellant, 19 documents were marked as Ex.A1 to Ex.A19. On behalf of the respondents, the first respondent was examined as D.W.1. Seven documents were marked as Ex.B1 to Ex.B7.

6.The trial Court, on appreciation of evidence available on record, came to the conclusion that the appellant/plaintiff failed to prove that the suit property was joint family property. The trial Court has also entered a finding that the oral partition pleaded by the appellant was not true and consequently, dismissed the suit. Aggrieved by the same, the appellant preferred an appeal in A.S.No.8 of 2001, on the file of Additional Sub-Court, Dindigul. The First Appellate Court affirmed the findings of the trial Court. Aggrieved by the concurrent findings, the appellant is before this Court.

7.At the time of admission, this Court formulated the following substantial questions of law by order, dated 07.12.2002:

1.Whether the property acquired by a member of joint family in undivided name can be construed as his separate property when the joint family nucleus is proved?

2.Whether Ex.A2-Mortgage Deed executed jointly by the Plaintiff's vendors does not prove that the property is a joint family property?



8.Elaborating the substantial questions of law formulated at the time of admission, the learned counsel for the appellant submitted that the respondents/defendants admitted the existence of joint family nucleus even in the pleadings and hence the acquisition made by the senior most members of two branches of family namely, Krishnasamy Naicker and Subbiah Naicker shall be treated as a property acquired out of the joint family funds. The learned counsel further submitted that the property acquired by respondents' father Subbiah Naicker was mortgaged in favour of one Palanisamy under Ex.A2 by joining the appellant's vendor Aundivel and Kumarasamy. It is the specific contention of the learned counsel that if the property was not treated as a joint family nucleus, there was no necessity for Subbiah Naicker and Krishnasamy Naicker to join the plaintiff's vendor as a co-executant in the mortgage deed.

9.The learned counsel for the respondents by taking this Court to the admission made by the plaintiff's side witness, submitted that P.Ws clearly admitted that the joint family property available in the village of Pommanallur would not yield any income. When the plaintiff's witness admitted that the joint family nucleus would not yield any income, any presumption in respect of acquisition made by the senior-most member of the family got



rebutted. Therefore, it was submitted that in the absence of any evidence on the side of the appellant/plaintiff that the property purchased by Subbiah Naicker was purchased out of the joint family funds, the same shall be treated as his self acquisition. As far as the recitals found in Mortgage deed Ex.A2 is concerned, the learned counsel submitted that even in the pleadings, it was explained by the respondents, the vendors of the plaintiff were added as parties in view of the request made by the mortgagee. The learned counsel further submitted that the recitals found in the mortgage deed describing the property as ancestral property or self acquired property is not conclusive proof to determine the character of the same. In this regard, the learned counsel relied on the following judgment:

(1)Ekambaram .vs. Jayalakshmi and others reported in 2019 CDJ MHC 3722.

(2)Ramasamy Gounder @ Senban(died and others .vs. Chinnapillai @ Nallammal and others reported in 2022(3)CTC 703.

**10. Answer to Substantial Question Nos.1 and 2**

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It is the specific case of the appellant/Plaintiff that the appellant's father's brother Subbiah Naicker purchased the suit property along with his paternal uncle Krishnasamy Naicker for the benefit of joint family and hence, the said property shall be treated as a joint family property. On the other hand, the respondents pleaded that Subbiah Naicker got separated from the family even 50 years back and he purchased the suit property out of the income derived from rearing the cattles. The respondents, even in the pleadings, admitted that joint family possessed of immovable properties in Pommanallur Village. The plaintiff's side witness P.W.5 during cross-examination clearly admitted that joint family property in Pommanallur Village is a rain-fed land and it would not yield any surplus income. When plaintiff's side witness clearly admitted that there was no surplus income from joint family property, the general presumption that property purchased by senior most member of family is deemed to be purchased out of joint family funds got rebutted. In such circumstances, the Courts below had correctly come to the conclusion that the suit properties which were purchased under Ex.A1 are self acquired properties of Subbiah Naicker. Further, the appellant pleaded that there was an oral partition in the year 1973 between the branch of Kami



Naicker and Krishnasamy Naicker. It was also pleaded that among the children of Kami Naicker, there was an oral partition in the year 1977 and the suit properties were allotted to the share of the appellant's vendors Aundivel and Kumarasamy. However, the appellants failed to lead any convincing evidence in support of the oral partition. Therefore, the Courts below concurrently came to the conclusion that the oral partition pleaded by the appellant, was not proved. Even assuming that the property acquired by the Subbiah Naicker shall be treated as a joint family property, in the absence of any acceptable evidence to prove the oral partition among the sons of Kami Naicker allotting the suit property to the vendors of the appellant, the prayer for declaration made by the appellant cannot be granted.

11.The learned counsel for the appellant placed much emphasis on the recitals found in Ex.A2 Mortgage deed executed by Subbiah Naicker and the vendors of the appellant along with members of Krishnasamy Naicker branch in favour of one Palanichamy. While considering the recitals with regard to the character of the property dealt with under Mortgage deed, this Court in ***Ekambaram .vs. Jayalakshmi and others reported in 2019 CDJ MHC 3722*** observed as follows:



“10.The argument has also been putforth that in respect of the properties standing in the name of Mannathan and which had been sold, all the brothers had joined in the execution of the sale deed. As held by the Courts below, merely because, the four brothers had joined in the sale of the abovesaid items that would not lead to inference that the properties standing in the name of Mannathan are only the joint family properties. Mere joining of the party in the execution of the sale deed or mortgage does not creat any right for such a person and such inclusion might be at the instance of the purchasers or the mortgagee. Therefore, it is found that the abovesaid position of law has been rightly appreciated and followed by the Courts below and in such view of the matter, the Courts below are found to be totally justified in holding that the items 9,20 and 21 of the plaint schedule properties are not the joint family properties and they are the separate and independent properties of Mannathan and hence, they are not liable for partition as claimed by the plaintiff.”

12.In *Ramasamy Gounder @ Senban(died and others .vs. Chinnapillai @ Nallammal and others reported in 2022(3)CTC 703*, this Court observed as follows:

“28. It is clear from the above judgments that merely because a property is described as an ancestral property in the recitals of the document, that by itself is not a conclusive proof as to what is stated therein, more particularly when there are other materials to show that properties concerned are not Ancestral



properties”.

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13.In view of the law laid down by this Court in the above mentioned case laws, mere recital in a mortgage deed describing the subject-matter of the deed as ancestral property of one of the executant, is not the conclusive proof to come to a conclusion that the character of the property as ancestral.

14.In the case on hand, the suit property was purchased by Subbiah Naicker along with Krishnasamy Naicker. The appellant/Plaintiff's side witness P.W.5 clearly admits that the family property in Pommanallur Village is rain-fed land and the same would not yield any surplus income. In such circumstances, the consideration for purchasing the properties under Ex.A1 should have moved from Subbiah Naicker's self acquisition by rearing the cattles. The said fact was also admitted by P.W.s in their evidence. In such circumstances, the contention raised by the learned counsel for the appellant based on the recitals found in Ex.A2 mortgage deed, is also not acceptable to this Court.

15.In view of the discussions made earlier, both the substantial questions of law framed at the time of admission are answered against the appellant and as a consequence, the Second



Appeal stands dismissed. There is no order as to costs.

Consequently, connected Civil Miscellaneous Petition is closed.

04.04.2024

Index:Yes/No
Internet:Yes/No
NCC:Yes/No
vsn

To

- 1.The Additional Subordinate Judge,
Dindigul.
- 2.The II Additional District Munsif,
Dindigul.
- 3.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

vsn

JUDGMENT MADE IN
S.A.NO.1918 OF 2001
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