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S.A(MD)No.245 of 20



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 16.10.2024

CORAM

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

**S.A(MD)No.245 of 2004
and
C.M.P(MD)No.1481 of 2004**

1.Muppidathi Konar
2.Bhoothattha Konar

... Appellants/Appellants/
Defendants 2 & 3

Vs.

1.Subbammal
2.Kala
3.Indirani
4.Soundari Ammal
5.Chendammal
6.Thangaththammal

... Respondents/Respondents 1, 2 & 4 to 7/
Plaintiffs 1, 2 & 4 & Defendants 4 to 6

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree, dated 18.06.2002 passed in A.S.No.46 of 1998 on the file of the Sub Court, Ambasamudram, confirming the judgment and decree dated 29.10.1997 passed in O.S.No.330 of 1991 on the file of the Principal District Munsif, Ambasamudram.

For Appellants : Mr.H.Arumugam

For RR 1 & 3 : Mr.K.Pragadesh Ganapathy
for Mr.M.Saravanan



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JUDGMENT

The Judgments and decrees passed in O.S.No.330 of 1991 on the file of the Principal District Munsif, Ambasamudram and in A.S.No.46 of 1998 on the file of the Sub Court, Ambasamudram, are being challenged in the present Second Appeal.

2.The respondents 1, 2 & 4 along with one Pappathi herein as plaintiffs instituted a suit in O.S.No.230 of 1991 on the file of the trial Court against the defendants for the relief of partition for 1/4th share in the suit properties.

3.For the sake of convenience, the parties are referred to as, as described before the trial Court.

4.According to the plaintiffs, the suit schedule properties belonged to the Hindu Undivided Family consisting of one late. Pattukonar and the defendants 1 to 3. The first plaintiff is the wife of the late. Pattukonar and the plaintiffs 2 to 4 are the children of the said



Pattukonar. The first defendant is the father of the said Pattukonar and defendants 2 and 3 are the sons and the defendants 4 to 6 are the daughters of the first defendant. The said Pattukonar died 16 years before, leaving behind the plaintiffs as his legal heirs. After his demise, the suit properties are in joint possession and enjoyment of the plaintiffs and the defendants. With regard to the 1st item of the suit property, the plaintiffs came to know that the defendants effected a partition deed dated 16.10.1986, wherein the 1st item was allotted to the second defendant, which was highly illegal and fraudulent. The execution of the partition deed without including the plaintiffs is a sham and nominal one and is not binding on the plaintiffs. It is false to state that Pattukonar purchased a house property with the help of the first defendant and separated from the joint family. In fact, the first defendant never assisted the Pattukonar monetarily and that house was purchased out of his own income and also by selling the first plaintiff's jewels. The 2nd item of the schedule property was purchased in the name of Karta of the family namely the first defendant herein, out of common efforts and contributions. With an intent to defraud the plaintiffs, the first defendant attempted to sell the same to one Ramakrishan, however, he denied the same. The 3rd item is the ancestral property and the same was allotted to the first defendant



branch at the time of effecting partition with his brothers. The defendants also cut down 10 Palm trees standing in that property and earned Rs.3000/-. When the plaintiffs requested the defendants for partition, they evaded them. Hence the plaintiffs sent a legal notice dated 17.07.1991 for which the defendants also sent a reply dated 23.07.1991 with a false statement. Hence, the plaintiffs have filed the said suit for the abovestated relief.

5.The defendants 1 to 3 had filed a written statement and admitted the relationship. Pattukonar had no avocation and sufficient source of income to purchase a house property. Since Pattukonar is the eldest son and has a wife & kids, a house property was purchased in his name by the first defendant. As such, that property is a joint family property. The suit filed by the plaintiffs excluding that house property worth about nearly Rs.20,000/-, as if it was purchased by Pattukonar clearly shows the greedy nature of the plaintiffs. As already a house property was given to Pattukonar, the plaintiffs have no right to claim the suit properties. Hence the defendants 1 to 3 made an arrangement allotting 1st item to the first defendant. Further, the second & fourth items of properties are self-acquired properties of the first defendant. The second defendant renovated the house in the 1st item and resided



there and denied the cause of action and raised objections regarding court fees and prayed for dismissal of the suit.

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6.Before the trial Court, on the side of the plaintiffs, the first plaintiff was examined as P.W.1 and Exs.A1 to A3 were marked. On the side of the defendants, the second defendant was examined as D.W.1 and Ex.B.1 was marked.

7.On the basis of the rival pleadings made on either side, the trial Court, after framing necessary issues and after evaluating both the oral and documentary evidence, has decreed the suit.

8.Aggrieved by the Judgment and decree passed by the trial Court, the defendants 2 and 3 as appellants, had filed an Appeal Suit in A.S.No.46 of 1998 on the file of the first Appellate Court.

9.The first Appellate Court, after hearing both sides and upon reappraising the evidence available on record, has dismissed the



appeal and confirmed the Judgment and decree passed by the trial Court.

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10.Challenging the said Judgments and decrees passed by the Courts below, the present Second Appeal has been preferred at the instance of the defendants 2 and 3 as appellants.

11.At the time of admitting the present second appeal, this Court had framed the following substantial questions of law for consideration:

'i) Whether the Courts below are correct in holding that the suit items 1, 2 & 4 are joint family properties and granting the decree for partition?

ii) Whether there was independent consideration by the lower Appellate Court on the Judgment of the trial Court in dismissing the appeal preferred by the appellants herein?'



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12.The learned counsel appearing for the appellants/defendants 2 & 3 would submit that the Courts below have failed to advert to and consider from a proper perspective the rival pleadings of the parties and the questions emerging for decision therefrom and this has vitiated the findings and judgments of the Courts below; the Courts below have failed to bear in mind the well settled principle of law that though there may be a presumption that the Hindu Family is a joint family, there is no presumption that the properties standing in the name of any of the members of the family are joint family properties and that it is for the plaintiff to plead and establish that there was sufficient nucleus or surplus income from the joint family property to admit the acquisitions; the Courts below failed to see that there is neither sufficient pleading nor any evidence to show that there was either joint family nucleus or surplus income from the ancestral property viz., item No.3 which would admit the acquisitions of item Nos.1, 2 and 4 after defraying all the family expenses; the Courts below ought to have seen that there is no evidence to suggest to item Nos.1, 2 & 4 were acquired either out of joint family nucleus or out of surplus joint family funds or out of joint exertions of the co-parcenors and that in the circumstances, the ready



assumption of the Courts below that item Nos.1, 2 & 4 are also joint family properties available for division is clearly erroneous and contrary to settled law; the Courts below ought to have seen that if it could be construed that item Nos.1, 2 & 4 are joint family properties, then on the same footing, the house purchased in the name of Pattu Konar is also joint family property on the very admission of P.W.1 herself, the reasoning to the contra when item Nos.1, 2 and 4 are held to be joint family property is clearly erroneous and the Courts below ought to have seen the mere fact that D.W.1 has purchased a portion of the vacant site from the first respondent describing the northern property as the property of the first respondent, would not convert the house property purchased in the name of Pattu Konar as the private property of Pattu Konar and the first plaintiff. The Courts below ought to have seen that Pattu Konar and his branch cannot retain the house property purchased in the name of Pattu Konar and also claim a share in the suit 1st item and Courts below have erred in decreeing the suit and the Courts below have erred in placing the burden on the defendants to show that item Nos.1, 2 and 4 are not joint family properties, overlooking that it is for the plaintiffs to show by sufficient pleading and proof that they are purchased out of surplus joint family funds or joint family nucleus



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13.The learned counsel appearing for the appellants/defendants 2 and 3 would further submit that there were no pleadings with respect to the 4th item of the suit property and the same is not properly described with survey number and extent as per Order VII Rule 3 of CPC. Hence, a decree cannot be granted in respect of the 4th schedule property. The court below has failed to consider that the separate house was purchased in the name of Pattukonar by the first defendant and he left the joint family. If the plaintiffs claim for partition of the suit properties, they shall also include the house property in which they are residing. The Plaintiffs cannot approbate and reprobate. The plaintiffs did not produce any evidence to show that her husband Pattukonar purchased the house property from his own income. As such the Courts below ought to have presumed that the property in the name of Pattukonar is also a joint family property and would be subjected to the present partition suit. The courts below ought to have decided the plaintiff's case independently instead of looking into the weakness of the defendant's case and prayed for allowing the Second Appeal.



14.The learned counsel appearing for the respondents 1 & 3/plaintiffs reiterated the averments made in the plaint and the appeal and submitted that the Courts below had rightly dismissed the suit.

15.Heard the learned counsel appearing for the appellants and the learned counsel appearing for the respondents 1 & 3 and also perused the records carefully.

16.According to the plaintiff, the suit schedule properties belonged to the Hindu Undivided Family consisting of one late. Pattukonar and the defendants 1 to 3. The first plaintiff is the wife of the late. Pattukonar and the plaintiffs 2 to 4 are the children of the said Pattukonar. The first defendant is the father of the said Pattukonar and defendants 2 and 3 are the sons and the defendants 4 to 6 are the daughters of the first defendant. The said Pattukonar died 16 years before, leaving behind the plaintiffs as his legal heirs. After his demise, the suit properties are in joint possession and enjoyment of the plaintiffs and the defendants. With regard to the 1st item of the suit property, the plaintiffs came to know that the defendants effected a partition deed dated 16.10.1986, wherein the 1st item was allotted to



the second defendant, which was highly illegal and fraudulent. The execution of the partition deed without including the plaintiffs is a sham and nominal one and not binding on the plaintiffs. It is false to state that Pattukonar purchased a house property with the help of the first defendant and separated from the joint family. In fact, the first defendant never assisted the Pattukonar monetarily and that house was purchased out of his own income and also by selling the first plaintiff's jewels. The 2nd item of the schedule property was purchased in the name of Karta of the family namely the first defendant herein, out of common efforts and contributions. With an intent to defraud the plaintiffs, the first defendant attempted to sell the same to one Ramakrishnan, however, he denied the same. The 3rd item is the ancestral property and the same was allotted to the first defendant branch at the time of effecting partition with his brothers. The defendants also cut down 10 Palm trees standing in that property and earned Rs.3000/-. When the plaintiffs requested the defendants for partition, they evaded them. Hence the plaintiffs sent a legal notice dated 17.07.1991 for which the defendants also sent a reply dated 23.07.1991 with a false statement.



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17. According to the defendants, they had admitted the relationship. Pattukonar had no avocation and sufficient source of income to purchase a house property. Since Pattukonar is the eldest son and has a wife & kids, a house property was purchased in his name by the first defendant. As such, that property is a joint family property. The suit filed by the plaintiffs excluding that house property worth about nearly Rs.20,000/-, as if it was purchased by Pattukonar clearly shows the greedy nature of the plaintiffs. As already a house property was given to Pattukonar, the plaintiffs have no right to claim the suit properties. Hence the defendants 1 to 3 made an arrangement allotting 1st item to the first defendant. Further, the second & fourth items of properties are self-acquired properties of the first defendant. The second defendant renovated the house in the 1st item and resided there, denied the cause of action, raised objections regarding court fees and prayed for dismissal of the suit.

18. On a perusal of the materials available on record, it is seen that no evidences were produced by the defendants to prove that the house property was purchased in the name of Pattukonar from the



Joint family income. During cross-examination, D.W.1 also deposed that he was not aware of the date of purchase and the details of the attestors. Dw1 also deposed that the said Pattukonar resided in the Joint family even after his marriage and birth of children. However, valid reasons were not given as to why the first defendant purchased the property in the name of Pattukonar. D.W.1 deposed that only after filing of the suit, the plaintiffs shifted to the house purchased in the name of Pattukonar. On the Contrary, the recitals of Ex.B1-Partition deed reads as 'Pattukonar severed from the joint family by purchasing a house in his name with the help of the first defendant. Hence the recitals of Ex.B1 lack credence. If it is true, then the first defendant would not have purchased a vacant site from the plaintiffs which is adjacent to their house. Hence it is proved that the house property was self-acquired by Pattukonar. The first defendant has not proved that the items 2 & 4 were purchased with his own funds and proceeds. D.W.1 deposed that the 2nd item was sold to one Ramakrishnan by his father namely the first defendant and he is in possession. However, this fact was not pleaded either in the reply notice or in the written statement. Hence it cannot be accepted. No title documents were produced with respect to the 4th item. Despite the order of injunction, the 3rd defendant built a house in the 4th item and resided there. Hence, he



should leave the same to restore the peace of the family. DW1 admitted in his evidence that 3rd item is the ancestral property, hence it need not be proved. Plaintiffs are not the parties to Ex.B1-partition deed and as such the same will not bind them. Since the first defendant died intestate during the pendency of the suit, his $\frac{1}{4}$ share shall be devolved to all the legal heirs namely the plaintiffs and the defendants. D.W.1 admitted the cutting of palm trees in the 3rd schedule property, hence there is no need for any further proof.

19.The plaintiffs are entitled for partition of shares in the property as the defendants have not established whether it is a self-acquired property or a joint family property. The plaintiff's husband and father of the plaintiffs 2 to 4 died viz., Paattu Konar, as he had already purchased the house in his name and he was in possession and enjoyment of the property, which is a separate property and is not available for partition. Regarding other schedule of properties, which are all the suit properties, the plaintiffs are entitled for a share in those properties equally and during the pendency of the suit, the first defendant died, it is to be decided whether it is a self-acquired property or not and his share also to be allotted for division between the plaintiffs and defendants. When the first defendant died intestate, his



share 1/4 is to be devolved equally between the parties. It is only for entitlement of share between the parties. Hence in the remaining properties of the first defendants, the plaintiffs are also entitled to their respective share.

20. When D.W.1 admitted that the suit schedule properties are common joint family properties and no other evidence to show that it is a self-acquired properties. The Appellate Court has rightly held that it is a family property, when a family continues to be a joint family, the acquisition of the properties in the first defendant name should be presumed that it is a joint family properties.

21. After independent hearing of the parties and based on the evidences, the Appellate Court has concurred with the trial Court findings and held that no cogent evidences were adduced to prove that the house property was purchased by the first defendant in the name of Pattukonar and no valid reason given; D.W.1 admitted that the vacant site in the house property was purchased from the plaintiffs by the defendants. Hence, it shows that the house property in the name of Pattukonar is the separate property; no release deed was produced



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by the defendants to prove that Pattukonar was actually left from the joint family and the defendants failed to prove that the item Nos.1, 2 and 4 were self-acquired properties of the first defendant.

22.From the above, this Court is of the view that the Judgments and Decrees of the Courts below are accompanied with sufficient reasons, in which, this Court does not want to make any interference. Accordingly, the substantial questions of law framed are ordered as against the defendants and in favour of the plaintiffs.

23.In the result, the Second Appeal stands dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

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V.BHAVANI SUBBAROYAN, J.

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To

1.The Sub Court,
Ambasamudram.

2.The Principal District Munsif,
Ambasamudram.

3.The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

Judgment made in

S.A(MD)No.245 of 2004

16.10.2024

17/17