



WEB COPY



1

A.S.(MD)NO.176 OF 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 17.04.2025

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

AND

THE HON'BLE MR.JUSTICE M.JOTHIRAMAN

A.S.(MD)No.176 of 2022 AND
C.M.P.(MD)Nos.7596 & 7597 of 2022

P.Ragavan

... Appellant/ 2nd Defendant

Vs.

1. Kamatchi

... 1st Respondent / Plaintiff

Pothiraj (died)

2. P.Venkatesh

3. P.Sankar

4. K.P.Selvaraj

... Respondents 2 to 4 /
Defendants 3 to 5

5. Thayarammal(exonerated)

6. Vijayakumar @ Govindaraj(exonerated)

7. V.Gokulam(Exonerated)

8. Nallusamy Naidu(Exonerated)

9. Subbammal(Exonerated)

... Respondents 5 to 9 /
Defendants 6 to 10

Rajammal (died)

Prayer: Appeal suit filed under Section 96 CPC., to set aside the Judgment and Decree dated 19.04.2022 passed in O.S.No.35 of 2016 on the file of the Additional District Court, Theni at Periyakulam by allowing this appeal suit.



For Appellant : Mr.V.Meenakshisundaram

For R-1 : Mr.S.Ayyanar Prem Kumar

For R-3 & R-4 : Mr.P.Rajendra Babu

For R-2 : No appearance.

* * *

J U D G M E N T

(Order of the Court was delivered by G.R.SWAMINATHAN, J.)

This appeal arises out of a partition suit. The suit properties stand in the name of one Pothiraj and his sons. The plaintiff Kamatchi is one of the sons of Pothiraj. He filed O.S.No.35 of 2016 on the file of the Additional District Court, Theni at Periyakulam seeking partition and separate possession of 7/36th share in the suit property. Pothiraj was shown as the first defendant. Defendants 2 to 5 are the siblings of the plaintiff / sons of Pothiraj. Defendants 6 to 10 were exonerated during the pendency of the suit itself. 11th defendant is the wife of Pothiraj and mother of the plaintiff and defendants 2 to 5. The appellant herein was shown as the second defendant. He opposed the suit prayer as regards the suit items 2 and 3 in “A” schedule and suit items 1,2,3,4,5,8,12,15,16,21 and 22 in “B” schedule and suit items 6 and 7 in “C” schedule.



WEB COPY

2. According to him, the aforesaid items are his absolute properties. He claimed title by virtue of Ex.B.3 to Ex.B12. He further contended that he purchased them out of his own funds. Based on the rival pleadings, the Court below framed necessary issues. The plaintiff examined himself as P.W.1 and marked Ex.A.1 to Ex.A.13. The appellant examined himself as D.W.1 and the fourth defendant was shown as D.W.2. Ex.B1 to Ex.B.12 were marked. After considering the evidence on record, the trial Court passed preliminary decree on 19.04.2022 granting 1/5th share in favour of the plaintiff in all the suit items. Challenging the same, this appeal came to be filed by the second defendant.

3. The second defendant also filed CMP(MD)No.7597 of 2022 to receive and mark the Will dated 05.10.2015 said to have been executed by Pothiraj in favour of other sons by exonerating the appellant herein as Ex.B.13 on the defendant side in the suit.

4. The learned counsel for the appellant reiterated all the contentions set out in the memorandum of grounds of appeal and



called upon this Court to set aside the impugned judgment and dismiss the suit.

5. Per contra, the learned counsel appearing for the plaintiff submitted that the impugned judgment is well reasoned and that it does not call for any interference.

6. We carefully considered the rival contentions and went through the evidence on record.

7. The point for determination is whether the Court below had erroneously cast burden of proof on the appellant.

8. It is not in dispute that the items mentioned above do stand in the name of the appellant / second defendant (ie.) Ex.B.3 to Ex.B12 pertains to the said items.

9. The Court below had held that the second defendant / D.W.1 had failed to discharge the burden of proving the fact that he purchased the properties vide Ex.B.3 to Ex.B12 out of his own funds.



WEB COPY 10. The Hon'ble Supreme Court in the decision reported in **2012 (1) CTC 128 (Malla Naicker @ Singari V. Jeeva (minor))** had held as follows:-

“12. The presumption regarding the coparcenary property *vis-à-vis* separate property and the person on whom the burden lies has been succinctly stated in *Mulla's Hindu Law*, 17th Edition, Volume 1, Page 344 in paragraph No. 233 as follows:

“(1) Presumption that a joint family continues joint —

(2) There is no presumption that a joint family possesses joint property—

“To render the property joint, the Plaintiff must prove that the family was possessed of some property with the income of which the property could have been acquired or from which the presumption could be drawn that all the property possessed by the family is joint family property or that it was purchased with joint family funds, such as the proceeds of sale of ancestral property or by joint labour. None of these alternatives is a matter of legal presumption. It can be brought to



WEB COPY



the cognizance of a Court in the same way, as any other fact, namely, by evidence.

Where it is established or admitted that the family possessed some joint property which, from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the presumption arises that it was joint property and the burden shifts to the party alleging self acquisition to establish affirmative that the property was acquired without the aid of the joint family. However, no such presumption would arise if the nucleus is such that with its held the property claimed to be joint could not have been acquired. In order to give rise to the presumption the nucleus must be such that with its held the property claimed to be joint could have been acquired.”

The wide proposition that once the ancestral nucleus is proved or admitted the onus on the member to prove that the property acquired was his self-acquisition cannot be accepted as correct. The existence of some nucleus is not the sole criterion to impress the subsequent acquisitions with family character. What is to be shown is that the family had as a result of the nucleus sufficient surplus income from which the subsequent



WEB COPY



acquisitions could be made? Alternatively, this may be shown from the nature and relative value of the nucleus itself. This is the second phase in the onus of proof, which lies on the person, who sets up the family character of the property.

Where, however, the existence of the nucleus is shown and no other source of income is disclosed the presumption may be made that the nucleus was sufficient to enable the property to be acquired. Such being the presumption, if any member of the family claims any portion of the property, as his separate property, the burden lies upon him in any such case to that it was acquired by him in circumstances which would constitute it is separate property.

He may do so by showing that the income of the existing ancestral property was employed in other ways, or was kept intact. If he adduces no evidence, the presumption that the property was joint family property, must prevail. The mere fact that it was purchased in his name and that there are receipts in his name respecting it does not render the property his separate property for all that is perfectly consistent with the notion of its being joint property. However, if, in addition to the fact that certain property stands in the name



WEB COPY



of one of the members, A, B, there be these further facts, namely that some other member of the family had acquired separate property with their own moneys and dealt with it as their own without reference to the rest of the family, and that, AB was allowed by the family to appear to the word to be the sole owner, the presumption that the property is joint is weakened, and the burden of proving that it is joint will lie on those who allege that it is joint. There is no presumption in case of property standing in the name of female members.

In the case of a Kartha or a Manager, who managed the family affairs, or was in possession of sufficient joint family assets, the onus would be on such Kartha to prove that the acquisition made by him was without the aid of such joint family assets.”

13. Therefore, bearing in mind the aforesaid principles, we shall see the evidence available in this case. As stated supra, the First Appellant is the Kartha of the joint family and Ex. B1, also proves that the joint family possessed of nucleus. As per Ex. B1, the property is an agricultural property, having irrigation facilities. Therefore, having regard to the fact that the First



WEB COPY



Appellant is the Kartha of the family and the properties were purchased in his name and in the name of his wife, the burden is on the Kartha to prove that the properties stands in his name are his self acquired properties and they were not purchased out of the income from the joint family properties.”

11. The approach adopted by the Court below runs counter to the proposition of law laid down above. Since the burden of proof was wrongly cast on the appellant, the impugned judgment has to be necessarily set aside. It is accordingly set aside.

12. The appellant further contended that if the additional evidence is taken on record, it would be seen that Pothiraj (father) had executed a registered Will in which he had bequeathed the “B” schedule properties in favour of the plaintiff and defendants 3 to 5. Since witnesses have to be examined before the Court below, we cannot straightaway take the additional evidence on file.

13. In this view of the matter, the impugned judgment is set



aside and the matter is remitted to the file of the Court below. The appellant is permitted to prove that the Will said to have been executed by his father in the manner known to law. The Court below is directed to dispose of the suit on merits and in accordance with law within a period of four months from the date of receipt of a copy of this order. The plaintiff is at liberty to adduce further evidence to disclose the burden cast on him. This appeal suit is allowed accordingly. No costs. Consequently, connected miscellaneous petitions are closed.

(G.R.SWAMINATHAN, J.) & (M.JOTHIRAMAN, J.)
17th April 2025

NCC : Yes / No
Index : Yes / No
Internet : Yes/ No
PMU

Note : Registry is directed to return the original documents to the counsel on record.

To:

1. The Additional District and Sessions Judge,
Theni at Periyakulam.
2. The Record Keeper, V.R.Section,
Madurai Bench of Madras High Court, Madurai.

10/7



WEB COPY



11

A.S.(MD)NO.176 OF 2022



WEB COPY



12

A.S.(MD)NO.176 OF 2022

G.R.SWAMINATHAN,J.

AND

M.JOTHIRAMAN, J.

PMU

A.S.(MD)No.176 of 2022

17.04.2025