



A.S.(MD) No.41 of 2017

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 06.01.2025

CORAM:

**THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN
and
THE HONOURABLE MR.JUSTICE N.SENTHILKUMAR**

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1.M.Kandhasamy

2.J.Kalaiyarasi

3.Chellakili

4.Minor.N.Sathya

5.Minor.N.Aravinth

[Appellants 4 and 5 are
represented by their mother
and next friend third appellant]

... Appellants

-VS-

1.M.Ganeshamoorthy

2.S.Santhaiya

... Respondents



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Appeal suit filed under Section 96 of the Civil Procedure Code, 1908, as against the judgment and decree in O.S.No.49 of 2011, on the file of the IV Additional District Judge, Tirunelveli, dated 11.11.2016.

For Appellants : Mr.V.Meenakshisundaram

For Respondents : No appearance

J U D G M E N T

[Judgment of the Court was made by RMT.TEEKAA RAMAN, J.]

The plaintiffs having not satisfied with the judgment and decree dismissing the suit in respect of the third schedule properties have preferred this appeal.

2. For the sake of convenience, the parties are referred to as per the ranking in the suit.

3. The plaintiffs 1 and 2, first defendant and one Nalla Perumal are the legal heirs of Muthaiyah Nadar and Masanammal. The plaintiffs 3 to 5 are the legal heirs of the one of the deceased brother of the plaintiffs 1 and 2 and first defendant, namely, Nalla Perumal.



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4. According to the plaintiffs, the suit schedule properties are joint family properties and hence, they are available for partition.

5. According to the defendants, except third schedule properties, the first and second schedule properties alone are joint family properties and available for partition. Further, according to the defendants, the first item of the third schedule properties is a house constructed in the Natham land by the first defendant with the separate fund available with him and the second item of the third schedule properties is a landed property purchased by the first defendant by pledging 40 sovereigns of gold jewels of his wife and hence, third schedule properties are the self-acquired properties of the first defendant and are not available for partition.

6. During trial, the first plaintiff himself was examined as P.W.2 and the second plaintiff herself was examined as P.W.1 and marked Exs.A1 to A11. On behalf of defendants, the defendants 1 and 2 themselves were examined as D.W.1 and D.W.2 respectively and marked Exs.B1 to B16.



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7. Based upon the both oral and documentary evidence, the learned Trial Judge has come to the conclusion that in view of the admitted position, the plaintiffs are entitled to 3/4 share and the first defendant is entitled to 1/4 share in the first and second schedule properties. In respect of the third schedule properties are concerned, the learned Trial Judge has categorically held that there is no acceptable evidence either independent oral evidence or documentary evidence to show that there were income from the joint family properties and there were surplus income and that surplus income was sufficient to purchase the third schedule properties. According to the plaintiffs, the first plaintiff sent money to the first defendant. However, for the payment of money by the first plaintiff, there is no documentary proof. In this case, there is no acceptable evidence that there were surplus income from the joint family properties and that surplus income was sufficient to purchase the third schedule properties. Hence, the plaintiffs failed to prove that the third schedule properties were purchased from and out of the income derived from the joint family properties and therefore, the plaintiffs are not entitled for any share in the third schedule properties. Aggrieved over the findings rendered by the learned Trial Judge in respect of the third schedule properties, the plaintiffs have filed this appeal.



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8. It remains to be stated that the second defendant is none other than the purchaser of the first item of third schedule properties from the first defendant. According to the second defendant, he is the *bona fide* purchaser of the first item of third schedule properties for a valid sale consideration and hence, the plaintiffs are not entitled for any share in respect of the third schedule properties.

9. Heard the learned counsel for the plaintiffs / appellants and perused the materials available on record.

10. Though the defendants / respondents were served and their names have been printed in the cause list, none appeared on before the defendants.

11. The short point arises for consideration is whether the plaintiffs have proved that the third schedule properties were purchased by the first defendant from and out of the income derived from the joint family properties.



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12. In the case of ***Malla Naicker @ Singari vs. Jeeva (minor)***, reported in **2012 (1) CTC 128**, this Court has categorically held as to on whom the burden of proof lies in respect of the self-acquired property *vis-a-vis* ancestral property. The relevant portion of the said decision is extracted hereunder:

“17. Therefore, having regard to the presumption as per the law laid down by the Hon'ble Supreme Court as well as our High Court as referred to above, and as stated in Mulla Hindu Law that when a Kartha claims certain properties as a separate properties and the joint family admittedly possessed of some nucleus, the burden is on the Kartha to prove that the properties are his separate properties and not purchased out of the joint family properties' income. On the other hand, if the co-parcener claims certain properties as his separate properties, then the burden is cast on the other co-parcener, who claims that the property is a joint family property to prove that property purchased in the name of one of the co-parceners was purchased out of the joint family properties' income and it was not a separate property.”



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13. In the instant case, the first defendant was examined as D.W.

1. Exs.B3 to B5 are the mortgage deeds and Exs.B6 and 7 are the receipts for payment of the mortgage amount and Ex.B8 is the certified copy of the sale deed executed by the first defendant in favour of the second defendant in respect of the first item of the third schedule properties. Ex.B11 is the sale deed executed in favour of the first defendant in respect of the second item of the third schedule properties. Hence, we are of the view that the learned Trial Judge has rightly come to the conclusion that the plaintiffs have failed to prove that the third schedule properties were purchased from the income of the joint family properties and there were surplus income from the joint family properties and on that basis alone, the third schedule properties were purchased by the first first defendant.

14. It remains to be stated that the first defendant has proved the source of income for purchase of the third schedule properties by pledging the 40 severeigns of gold jewels of his wife. Hence, we are of the view that the findings rendered by the learned Trial Judge do not warrant interference of this Court. Accordingly, the above point is answered as against the plaintiffs.



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15. In the result, this appeal is dismissed and the Judgment and Decree, dated 11.11.2016, passed in O.S.No.49 of 2011, by the learned IV Additional District Judge, Tirunelveli, are hereby confirmed. No costs.

[T.K.R., J.] [N.S., J.]

06.01.2025

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

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To:

- 1.The IV Additional District Judge,
Tirunelveli.
- 2.The Section Officer,
VR Section,
Madurai Bench of
Madras High Court,
Madurai.



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