

(1993) 06 MAD CK 0039
In the Madras High Court

M. Sethuramalingam

APPELLANT

Vs

K. Ramalakshmi and Others

RESPONDENT

Date of Decision : 30-06-1993

Acts Referred:

Citation : (1994) 1 MLJ 169

Hon'ble Judges : Srinivasan, J

Bench : Division Bench

Judgement

Srinivasan, J.—These two appeals arise out of a suit for partition. The earlier appeal is filed by the first defendant in the suit and the later appeal is filed by the plaintiff. The plaintiff and defendants 2 to 5 are the sisters of the first defendant. Their father Mahalingam Chettiar died on 7.11.1968. His wife died in 1980. It is the case of the plaintiff that Mahalingam Chettiar had some ancestral properties in the shape of lands described as item 4 in the plaint schedule, but the income therefrom was not sufficient for maintaining the family. According to her, she carried on business with the help of her husband and with the aid of the income from the business acquired items 1 to 3 which are house properties. In the plaint as originally filed, there were only four items. But, subsequently, by an amendment, two more items were introduced, one being cash of Rs. 43,600 and the other being jewels worth Rs. 53,000. The amendment was only with respect to the schedule by introducing two more items, but no part of the body of the plaint was amended. No recital was included in the plaint as regards the said cash and jewels. The plaintiff also said that defendants 2 to 5, her sisters had already relinquished their interests in the property on 30.3.1981 under Ex. B-1 and thereafter, the properties were owned in common by the plaintiff and the first defendant only. The plaintiff claimed one half share in items 1 to 3 and 1/4th share in the remaining properties.

2. The suit was contested by the first defendant. According to him, the release by defendants 2 to 5 enured only in his favour and the plaintiff cannot claim the benefit thereof. He contended that items 1 to 3 were also acquired with the aid of

joint family nucleus and all the items 1 to 4 were only joint family properties. He also contested the claim of the plaintiff for items 5 and 6, denying the existence thereof. He raised a plea that some of the lands shown in the plaint had already been sold and they were not available for partition.

3. The trial court held that items 3,7 and 11 to 14 in item No. 4 of plaint Schedule had already been sold and they were not available for partition. It was held that the suit was not barred by limitation and that items 1 to 3 were all acquired with the joint family nucleus. It was found that item 1 was a family dwelling house in which the first defendant resides and the plaintiff cannot claim any share till the first defendant continues to reside there. The claim with reference to items 5 and 6 was negatived. The court granted a decree for accounting with regard to the income. On that basis, a preliminary decree was passed.

4. The plaintiff is aggrieved by the refusal of the court below to grant one half share in items 1 to 3 of the suit properties and is challenging the finding that the properties are all joint family properties. The plaintiff is also challenging the dismissal of the suit with reference to items 5 and 6 and the decree with reference to item No. 1. According to the plaintiff, Section 23 of the Hindu Succession Act will not apply as item No. 1 is not a joint family house and the first defendant is dwelling elsewhere. The first defendant is aggrieved by the decree inasmuch as the court below has negatived his claim that the release by 4 defendants 2 to 5 enures only in his favour.

5. In so far as the release is concerned, Ex. B-6 is the document under which defendants 2 to 5 relinquished their interest in the property. No doubt the preamble to the document reads that it is executed in favour of the first defendant and at the end also it is recited that the releasors have no objection whatever to the releasee enjoying the property with absolute right. But, the body of the document does not contain any clause whatever conveying the interest of the releasors to the releasee as such. What all the releasors have done is to abandon their interest in the property. The relevant portion of the document reads thus:

6. A perusal of the above recitals shows that the releasors relinquished and abandoned their interest, but did not convey it to the releasee. It is also admitted by the first defendant as D.W. I that the sum of Rs. 40,000 paid by him to the four sisters as consideration for obtaining the release was taken from out of the family funds. Hence, there is no substance in the contention of the first defendant that the release would enure only in his favour. It is argued by learned Counsel that if a release is executed by a coparcener in favour of another coparcener, then it may enure in favour of the entire joint family, but the said principle would not be applicable when there is a sole surviving coparcener and in this case the first defendant is the only surviving coparcener and the sisters are not coparceners. We do not agree. It is admitted that the releasee and the releasors are having joint interest in the property and it is not in dispute that

there is one other person who is also entitled to and having interest in the property besides them. Unless the releasors conveyed their interest in the property in favour of the releasee, a mere release will enure in favour of the estate as such. The releasors are only abandoning their interest in the property. In this case, Mahalingam Chettiar died in 1968 and his wife died in 1980. There is no dispute that the parties continued to be joint and there was no division at any time. Hence, the release deed enures in favour of the remaining co-owners, namely, the first defendant and the plaintiff. We reject the contention of the first defendant as regards the effect of the release deed.

7. Before considering the main question argued by the plaintiff as regards the character of properties in items 1 to 3, we will dispose of the other minor contentions. Items 5 and 6 are, as stated earlier, cash of Rs. 43,600 and jewels worth Rs. 53,000. There is no averment whatever in the plaint that the said items are in existence and available for division. The evidence adduced on the side of the plaintiff is absolutely worthless. There is nothing on record to prove that cash of Rs. 43,600 was available at the time of the suit. According to the plaintiff, the cash was invested by the first defendant in the business run by him under the name "Madurai Sakthi Calendar Company". But, the books of account relating to the said company do not show cash balance of Rs. 43,000 and odd. In any event, it should be noted that the first defendant has paid a sum of Rs. 40,000 to the other sisters from the joint funds. In those circumstances, we cannot accept the case of the plaintiff that a sum of Rs. 43,600 was available for partition among the parties.

8. As regards jewels, the position is equally worse. There is no evidence to show that the jewels were ever in existence. P.W. 1, the husband of the plaintiff, has given evidence that his mother-in-law told him about the weight and the nature of the jewels. It is purely hearsay. The plaintiff has not chosen to go into the witness box to speak about the jewels which were available in the family. If really the jewels were in existence, it is for the plaintiff to prove the same. In this case, the plaintiff has miserably failed to prove the existence of the jewels for division. Hence, that case is rejected.

9. As regards item No. 1, the court below has taken the view that Section 23 of the Hindu Succession Act would apply as it is a family house in which the first defendant is dwelling. The evidence on record shows that the first defendant is not living in item No. 1. There is no evidence to hold that the said item is treated as family dwelling house and that the first defendant is living therein. Hence, we are of the view that the court below is wrong in holding that Section 23 of the Hindu Succession Act would apply. The court below has taken the view that this item was obtained by Mahalingam Chettiar in the partition between him and his brother in 1930. The said property was purchased only in 1963 under Ex. B-2. It was not one of the properties which Mahalingam Chettiar got in the family partition in 1930. Hence, the decree of the court below with regard to item No. 1 is unsustainable and we hold that item No. 1 is also divisible and the plaintiff will

be entitled to a share therein.

10. The only question that remains to be considered is Whether items 1 to 3 are joint family properties or self-acquired properties of Mahalingam Chettiar. It is the case of the plaintiff that Mahalingam Chettiar was doing business along with her husband as the family properties did not yield sufficient income, even to maintain the family. There is no evidence to prove the business which is said to have been carried on by Mahalingam Chettiar and P.W. 1. There is not even a whisper as to when the said business was commenced. The only witness who has spoken about the business is P.W. 1 who deposed that he was carrying on business with Mahalingam Chettiar. According to him, they used to purchase old jewels and sell the same for higher price. But, no scrap of paper has been produced to show that any business was conducted by Mahalingam Chettiar and P.W. 1. No account has been maintained. Admittedly, P.W. 1 was employed in other shops under strangers. In the absence of any acceptable evidence, we are not prepared to believe the evidence of P.W. 1 that he was carrying on business with Mahalingam Chettiar.

11. As regards the income from the lands, which were admittedly ancestral properties and obtained by Mahalingam Chettiar in the family partition, P.W. 1 has stated in the chief-examination that the yield from the lands was 100 to 120 bags per year. He adds that it was not sufficient for family maintenance. In the cross-examination he has stated that the yield was 125 bags per year. Thus, the only evidence adduced on the side of the plaintiff itself shows that the lands were yielding not less than 125 bags per year. The version of P.W. 1 that it was not sufficient for the maintenance of the family is hardly acceptable. It is not in dispute that the family initially comprised of only eight members including Mahalingam Chettiar and his wife when all the daughters were round. For eight members in a family, it is impossible to visualise that 120 bags of paddy was not sufficient for maintaining the family. There would have been sufficient surplus even if the members of the family were used to consume more than the normal quantity.

12. Apart from that, the evidence shows that the first two daughters, viz., defendants 2 and 3 were married long before 1945. The third daughter, viz., the plaintiff was married in 1950. The fourth daughter was married in 1960-61. The first defendant was married in 1971 and the fifth daughter was married in 1976 i.e., after the death of Mahalingam Chettiar. It is proved in evidence that some lands of the family were sold for meeting the expenses of the marriage of defendants 4 and 5. Thus, even by 1950, three members of the family had gone out and the yield of 125 bags per year would have been much more than sufficient for their sustenance and there would have been considerable surplus.

13. We have positive evidence in Ex. B-4 which is a compromise decree in O.S. No. 460 of 1927 on the file of the court of District Munsif, Madurai. The decree is dated 13.2.1930. Under that decree, Mahalingam Chettiar was allotted items 12 to 22 and 42 to 50 of part I of "A" Schedule and items 9 to 17 of Part III of "A"

Schedule. The decree gives the value of those properties as Rs. 57,000, One can easily appreciate if the value of the properties in 1927, which was the year in which the suit was filed was Rs. 57,000 such value would have certainly multiplied and increased several folds even by 1950 or so. The three items which are now in dispute were purchased only in 1957 and 1963. Item No. 2 was purchased under Ex. B-3 on 11.9.1957 for a sum of Rs. 7,250. Item No. 3 was purchased for a sum of Rs. 4,750. The document of purchase is not marked in court. However, the agreement for the sale is marked as Ex. A-1. That is dated 27.12.1956. The agreement stands in the name of P.W. 1. According to the agreement, the sale should be completed within a month theWrom and it can be inferred that the sale was completed somewhere in 1957. That is clear from the address of P.W. 1 found in Ex. A-2 dated 23.8.1957. It is stated that P.W. 1 is residing in item No. 3. Hence, it can be inferred that item No. 3 was purchased before 23.8.1957. Item No. 1 was the last of the items purchased under Ex. B-2 dated 12.12.1962. The total consideration is Rs. 10,000 out of which Rs. 8,500 went in discharge of an "Othi" dated 13.6.1962. It should be noted that the vendors under Ex. B-2 were P.W. 1, his father and other members of his family. The othi was executed on 13.6.1962 and the principal amount of Rs. 8,500 was shown as part of sale consideraton. A sum of Rs. 1,0000 was paid by way of adjustment as against rent payable by the vendors on a leaseback arrangement. Only a sum of Rs. 500 was paid in cash at the time of sale. Thus, in 1962 Mahalingam Chettiar had spent Rs. 8,500 for the purchase of item No. 1. Therefore, it is clear that money for all the three items had been paid out between 1957 and 1963 and the evidence on record is sufficient to infer that at that time the income from the family properties was more than sufficient for being utilised for such purchases.

14. Learned Counsel for the plaintiff has invited our attention to the following passage in Mulla's Hindu Law, 16th Edition, Paragraph 233 at pages 259-260:

(2) No presumption that a joint family possesses joint property. - There is no presumption that a family, because it is joint, possesses joint property or any property. When in a suit for partition, a party claims that any particular item of the property is joint family property, or when in a suit or a mortgage, a party contends that the property mortgaged is joint family property the burden of proving that it is so rests on the party asserting it.

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 only be brought to the cognizance of a court in the same way as any other fact, namely, by evidence. There is at times indiscriminated use of the expression "presumption" in this context. It is to be understood to indicate those

presumptions of fact which may be said to arise in considering whether the burden of proof has or has not been discharged by a party. It is not as there is any general solvent for all cases.

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. But no such presumption would arise if the nucleus is such that with its help 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 help the property claimed to be joint could have been acquired.

15. He has also relied on the judgment of the Supreme Court in Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, and referred to the following passage:

(10) Whether the evidence adduced by the plaintiff was sufficient to shift the burden which initially rested on him of establishing that there was adequate nucleus out of which the acquisitions could have been made is one of fact depending on the nature and the extent of the nucleus. The important thing to consider is the income which the nucleus yields. A building in the occupation of the members of a family and yielding no income could not be a nucleus out of which acquisitions could be made, even though it might be of considerable value. On the other hand, a running business in which the capital invested is comparatively small might conceivably produce substantial income, which may well form the foundation of the subsequent acquisitions. There are not abstract questions of law, but questions of fact to be determined on the evidence in the case.

In Appalaswami v. Suryanarayanamurthi (1947) 2 M.L.J. 138 : ILR 1948 Mad. 440 : 1948 M.W.N. 211 : (1947) 50 Bom. L.R. 628 : 52 C.W.N. 505 : AIR 1947 P.C. 189, the nucleus of Rs. 7,220 included 6/16th share in a rice mill and outstandings of the value of Rs. 3,500, and as the acquisitions in question were made during a period of 16 years it was possible that the joint family income might have contributed therefor. But in the present case, the finding of the court is that the income from the lands was not sufficient even for the maintenance of the members, and on that, they were right in holding that the plaintiff had not discharged the initial burden which lay on him. But even if we are to accept the contention of the appellant that on proof of the existence of the watan lands the burden had shifted on to the defendants to prove that the acquisitions were made without the aid of joint family funds, we must hold on the facts that that burden had been discharged.

16. Again he relied on the judgment of the Supreme Court in Mudi Gowda Gowdappa Sankh Vs. Ram Chandra Ravagowda Sankh, and the following

observation at page 1080:

The law on this aspect of the case is well settled. Of course there is no presumption that a Hindu family merely because it is joint, possesses any joint property. The burden of proving that any particular property is joint family property, is, therefore, in the first instance upon the person who claims it as coparcenary property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. This is however subject to the limitation that the joint family property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate.

17. There is no doubt that the proposition of law is well settled. But the only question is whether it is applicable to the present case. We are not applying any rule of presumption in this case. The evidence available on record has been referred to by us. The evidence shows that the only source of income which Mahalingam Chettiar had was the ancestral lands which were allotted to him in the family partition. There is no evidence to show that he had any other source of income. The case of business set up by the plaintiff had been negatived. There is also evidence available to prove the income from the properties. We have held that the said income is more than sufficient for the maintenance of the family and there would have been sufficient surplus. Apart from that, the evidence also shows that most of the lands which were allotted in the family partition to Mahalingam Chettiar were available at the time of suit and only a few items had been sold by Mahalingam Chettiar during his life time and some items were sold by the first defendant at the instance of his mother after the death of Mahalingam Chettiar for the purpose of meeting the expenses of the marriage of his sister. It is seen from the evidence that Mahalingam Chettiar had sold some properties which were allotted to him in the family partition and purchased house properties with the aid thereof. P.W. 1 has himself admitted that his marriage was performed in a property situated in North Avani Moola Street which was later sold by Mahalingam Chettiar. Hence, the version of P.W. 1 that when Mahalingam Chettiar came to Madurai in 1940 he had no property in the town of Madurai is not acceptable. Thus, the evidence on record is more than sufficient to draw the only inference possible that the family had sufficient nucleus with the aid of which items 1 to 3 could have been purchased. We also hold that items 1 to 3 could not have been purchased with the aid of any other fund. Hence, we affirm the finding of the trial court that items 1 to 3 joint family properties and the plaintiff will be entitled only to 1/4th share therein.

18. In the result, Appeal No. 745 of 1983 is dismissed. Appeal No. 370 of 1984 is partly allowed with reference to item No. 1 of the suit properties. Consequently, Clause (1) of the preliminary decree passed by the trial court shall be substituted

by the following clause:

It is declared that the plaintiff will have 1/4th share in items 1,2 and 3 of the plaint schedule and items 1, 2, 4 to 6 and 8 to 10 in item 4 of the plaint Schedule.

Clause (2) shall be modified by including plaint item No. I therein in addition to the items mentioned therein. The other clauses shall remain as they are and the decree passed by the trial court stands confirmed. The parties will bear respective costs.