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**(2014) 02 MAD CK 0178**  
**In the Madras High Court**  
**Case No : S.A. No. 98 of 2001**

Nagarathinam, Adhiyaman, Senthamil Selvi and N. Pari

APPELLANT

Vs

Rajagopal

RESPONDENT

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**Date of Decision :** 06-02-2014

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31

**Citation :** (2014) 2 MLJ 406

**Hon'ble Judges :** R. Karupiah, J

**Bench :** Single Bench

**Advocate :** S. Parthasarathy for Mr. S. Sounther, for the Appellant; A.K. Sriram for G.M. Syednurullah Sheriff, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

R. Karupiah, J.—The appellants who are the defendants in the suit filed this second appeal against the decree and judgment dated 29.07.1999 made in A.S. No. 16 of 1998 on the file of Additional District Court, Nagapattinam confirming the judgment and decree dated 19.12.1996 made in O.S. No. 98 of 1994 on the file of Subordinate Court, Mayiladuthurai. For the sake of convenience, the plaintiff in the suit is referred to as respondent herein and defendants in the suit are referred to as appellants herein.

2. The respondent/plaintiff filed the suit (a) for possession in respect of 5 items of "A" Schedule properties (b) for the amount of Rs. 4,000/- as past profit (c) for alternative relief of preliminary decree for partition and separate possession of the plaintiff's 1/3rd share in 5 items in "A" schedule and 6 items in "B" Schedule properties (d) To direct the defendants 1 and 2 or all the defendants to render accounts for the income of the suit properties for the past three years prior to the suit (e) for final decree (f) for cost (g) other reliefs.

3. The respondent and the appellants 1 and 2 are brothers. The third appellant is the wife of second appellant and the fourth appellant is son of first appellant. The

father of the respondent Rengasamy Padayachi was employed as Gangman and died in the year 1976. While he was alive, he was depending only on his meagre income and lived various places in thatched houses. The respondent's father or the family members have not owned any property much less income yielding property. The family do not possess any ancestral or joint family property. The respondent joined in the Air Force at the age of 18 = years in the year 1955 and began to earn. Since he was in the Military service, he was eligible to enjoy Government Poromboke land and he occupied item 1 of the suit "A" Schedule property which was used as "Kalam" by some persons in the year 1958-1959. At that time, the first appellant was minor and the 2nd appellant was an young boy aged about 4 or 5 years. Only out of the respondent's money, the said first item was made fit for cultivation. Initially, "B" memos were issued to the respondent and later assigned to the respondent on the basis of his application and on account of his Military service. The above said first item given by the State Government to the appellant as a grant and the respondent out of his own income erected a borewell and brought electricity connection. The respondent out of his own income purchased item Nos. 2 and 3 including 3A of "A" Schedule properties for his benefit. Further, the respondent has also purchased house site in his mother's name and subsequently got it transferred in his name and put up the building in item 4 of the "A" Schedule with his own fund and also by raising loan from the building society. Since the respondent was in service elsewhere he allowed his father, mother and others to live in the newly constructed house in item 4 of the "A" Schedule and kept all the documents in an alamirah in that house. Thus the entire "A" schedule properties are self-acquired properties of the respondent. Neither the appellants 1 and 2 nor the family contributed any amount for the purchase of properties. The respondent used to come to the village during cultivation time and cultivating "A" schedule properties out of his own earnings. The appellants 1 and 2 used to help the respondent only in cultivation of the lands. The respondent settled the village permanently after his retirement in June 1992. Since the respondent was living in the newly constructed house, the appellants were allowed to live in item No. 5 of "B" Schedule house. The appellants began to disturb the respondent's possession and hence the respondent filed a suit in OS. No. 1034 of 1993 in respect of items 1 to 3 of the suit "A" Schedule properties. The appellants 1 and 2 for the first time in November 1993, claimed as both "A" & "B" Schedule properties are the joint family properties. The interim injunction granted in the suit was vacated, by holding that whether the properties are self-acquired properties can be determined only after full fledged trial. The appellants are in illegal possession in the plaint "A" schedule properties and hence the respondent entitled to recover possession and future profits. To avoid multiplicity of proceedings, the respondent filed comprehensive suit for partition of 1/3rd share in A and B schedule properties. Since some of the properties in "B" schedule stands in the name of appellants 3 and 4 they are impleaded as necessary parties. Hence, this suit.

4. The appellants 1, 2 and 4 who are the defendants 1, 2 and 4 filed a written statement in which, it is stated that the first item in A-schedule was encroached in the year 1966 by the respondent's father and then patta was granted in the name of respondent and therefore, the above said item one in A schedule is joint family property and not a separate property of the respondent. A schedule 2nd item was purchased out of loan obtained by the 1st appellant and the above said loan was discharged out of joint family income. A schedule 3rd item including item 3A were purchased by the 2nd appellant in the name of the respondent by obtaining loan and the above said loan was discharged out of income from the joint family properties. The father of the respondent and appellants 1 and 2 was working as gangman in Railways and also took the lease of Railway lands in his name and also in his wife's name and cultivated the same. Further, the jewels of the appellants mother also given to the family. The 1st appellant joined duty as loco mechanic in the year 1962 and 2nd appellant joined duty in the year 1983. At the time of marriage of the 2nd appellant in the year 1985, the parents of the 3rd appellant given 50 sovereigns of jewels as sridhana and further, she received Rs. 6000/- from LIC. Therefore, A schedule properties are not self-acquired properties of the respondent and he has no sufficient income. The fourth appellant and the respondent's mother are lessees in item Nos. 3 and 4. Therefore, the respondent is not entitled to separate right over A schedule properties. Item-6 in B schedule belonged to the 3rd appellant and it is not a joint family property. Therefore, the above said item wrongly included in the suit. The 5th item in B-schedule, the measurement was wrongly given as 17 = cents instead of 0.15 cents and their mother living in the respondent's house with permission is false. The joint family had obtained loan of Rs. 4 lakhs and so as to escape from paying the said amount, the suit has been filed. Further, the suit is not maintainable since the mother of the respondent is necessary party to the suit but not impleaded. The respondent is not entitled to seek relief of accounts from the appellants and therefore, prayed for dismissal of the suit.

5. The third appellant filed separate written statement in which it is stated that "B" Schedule 6th item was purchased by 3rd defendant out of his salary and constructed the house by obtaining a loan for Rs. 1,32,000/- and also obtained Rs. 10,000/- from GPF amount, therefore, the respondent and other appellants have no right in the above said 6th item of "B" Schedule property.

6. The fourth appellant has also filed additional written statement in which it is stated that "A" Schedule 3-A item was not self acquired property of the respondent, even though which was purchased in the name of the respondent, but it was purchased out of joint family income since the respondent being the elder member of the family purchased in his name. Therefore, the respondent has no right in the above said property.

7. The trial court has framed eight issues. On the side of the respondent/plaintiff examined one witness as PW1 and marked 11 documents as Exs. P1 to P11. On the side of the appellants/defendants examined two witnesses as DW1 and DW2

and marked 76 documents as Exs. B1 to B76.

8. The trial court has discussed about the oral and documentary evidence adduced on either side and finally held that all the items of A-schedule properties are separate properties of the respondent/plaintiff and not ancestral properties. Therefore, the respondent/plaintiff is entitled to the relief of declaration, recovery of possession and also the relief of mesne profits. The trial court also directed to take separate proceedings regarding mesne profits. In view of the above said findings, the trial court has dismissed the relief of partition in respect of all items in A-schedule properties. With regard to items 1 to 5 in B-schedule properties, the trial court has held that the plaintiff has not impleaded the necessary parties particularly the mother of the plaintiff and therefore, the suit for partition regarding items 1 to 5 is not maintainable and hence rejected the claim of the respondent. The trial court has discussed about the 6th item of B-schedule and finally held that it is self-acquired property of third appellant/third defendant and it is not joint family property and therefore, rejected the relief of partition in respect of 6th item. Finally the trial court has decreed the suit and granted declaration, recovery of possession and mesne profits only in respect of A-schedule properties. The respondent/plaintiff has not preferred any appeal as against the findings regarding B-schedule properties. The appellants who are the defendants in the suit alone preferred the first appeal against the decree and judgment passed by the trial court. The first appellate court has confirmed the decree and judgment passed by the trial court and dismissed the first appeal.

9. Aggrieved over the above said concurrent findings of the courts below, the appellants/defendants in the suit preferred this second appeal.

10. The Second Appeal is admitted on the following substantial questions of law:

1. Whether the judgments of the courts below are vitiated in not advertng to the exhibits filed on appellants side, especially the letters written by the respondent by his own hand writing wherein, he submitted that the suit "A" schedule properties are purchased and improved out of joint family funds ?

2. Whether the judgment of the lower Appellate Court is vitiated in not advertng to the oral evidence and material admissions of respondent as PW1, as mandated by order 41 Rule 31 of the CPC ?

3. Whether the judgments of the Courts below are vitiated by perversity and non-consideration of material evidences on record in holding that the suit "A" schedule properties are self acquired properties of the respondent ?

4. Whether the Courts below erred in holding that the appellants have not discharged the onus of proof without advertng to the admissions of respondent, which established existence of joint family nucleus ?

11. Heard the learned counsel appearing on either side and perused the entire material records.

12. The learned counsel appearing for the appellants submitted that all the five items of A-schedule properties are not self-acquired properties of the respondent and the properties are joint family properties, but, the trial court has wrongly held that the properties are self-acquired properties. The learned counsel further pointed out that the trial court has not at all considered the letter addressed by the respondent and also not considered the vital admission of the respondent, at the time of oral evidence. The learned counsel also submitted that both the courts below had wrongly held that as if the burden of proof lies only on the appellants but the burden of proof only lies on the respondent and hence the findings of both the courts below are perverse and illegal and therefore, prayed for set aside the above said concurrent findings of the courts below.

13. Per contra the learned counsel appearing for the respondent would submit that the first item of A-schedule was assigned by the Government in favour of the respondent only on the ground that he was in Military service and therefore, the first item is self-acquired property of the respondent, as rightly held by both the courts below. The items 2, 3 and 3A of A-schedule properties were purchased by the respondent out of his own income and not purchased from joint family income, since there is no joint family property to give income to purchase the properties and therefore, the above said items are also self-acquired properties of the appellant, as rightly held by both the courts below. The fourth item of A-schedule property was originally belonged to the respondent's mother and the mother of the respondent executed a settlement deed in favour of the respondent and therefore, the above said item is not a joint family property as contended by the learned counsel for the appellants and it is also self-acquired property of the respondent as rightly held by both the courts below. The learned counsel appearing for the respondent submitted that both the courts below have correctly discussed the entire oral and documentary evidence adduced on either side and given correct findings and the above said findings are not perverse findings and further no questions of law have been arises and hence the second appeal is not maintainable.

14. The respondent/plaintiff filed a suit in respect of five items in A-schedule and six items in B-schedule properties and seeking relief of declaration, recovery of possession and mesne profits in respect of A-schedule properties. The respondent also seeking alternative relief of preliminary decree for partition in respect of A and B schedule properties. The trial court has granted a relief of declaration, recovery of possession and mesne profits in respect of all the five items of A-schedule properties, but dismissed the relief of partition in both A and B schedule properties. The first appellate court also confirmed the findings of the trial court. No appeal has been preferred in respect of six items of B-schedule properties. Therefore, in this appeal, only to be decided whether five items of A-schedule properties are self-acquired properties, as contended by the learned counsel for the respondent or joint family properties as contended by the learned counsel for the appellants.

15. Admittedly, the first item of A-schedule was originally a Government poramboke land and the above said property was assigned by the Government to the respondent, since he was in Military service. The Government has also granted patta in the name of respondent as per Ex. A9 order of Tahsildar dated 24.01.1976 and the patta number is 666. The appellants have not denied the fact that the patta was granted in the name of respondent, while he was in Air-Force. It is not the specific case of the appellants that the patta was granted only on the basis of possession. Admittedly, at the time of issuing patta in the name of respondent, the father of the respondent, who was kartha of the family alive. Therefore, the appellants have not stated any reason why the above said property was assigned in the name of respondent, if the patta was granted only on the basis of possession of the appellants family. At the time of oral evidence, 1st appellant deposed as DW1 as admitted that the patta has been granted in the name of respondent only on the ground that he was in Air-Force service. But, he expressed ignorance about the patta was granted only on the ground that he was in Air-Force. Further, appellants have not claimed right on the basis of possessory title over the 1st item of A-schedule property. Therefore, both the courts below have given clear findings after discussing both sides oral and documentary evidence and finally held that the 1st item of A-schedule is a self-acquired property of the respondent and not joint family property as pleaded by the appellants. Therefore, the above said finding is not perverse finding and hence no need to interfere with the above said findings.

16. According to the respondent, the 2nd item of the suit property namely S. No. 137/3 was purchased by the respondent under Ex. A1/Ex. B16 sale deed dated 25.06.1975 from one Srinivasa Naidu. It is also contended that the respondent had purchased items 3 and 3 A under Ex. A2/Ex. B17 on 27.03.1991 from one Dhanabalu, Thangarasu and Mariammal and therefore, the respondent claimed title over the said properties as self-acquired properties. It is not in dispute that the above said properties purchased in the name of respondent but the contention of the appellants is that the 2nd item was purchased out of loan obtained from 1st appellant and 3rd item was purchased by the 2nd appellant by obtaining loan and the above said loan discharged out of joint family income and hence, the above said properties are only joint family properties and not self-acquired properties of the respondent. Both the courts below have discussed in detail about the oral and documentary evidence adduced on either side and finally held that the appellants have not produced any reliable documents to prove the source of income from joint family properties to purchase the above said properties and also not filed any reliable documents to prove that the 1st and 2nd appellant obtained loan only for the purpose of purchase the above said properties. Both the courts below further held that the respondent was working in Air-Force and earned income, but the appellants have not produced any reliable oral and documentary evidence to prove that the family of the appellants having sufficient income to purchase the properties and therefore, the above said properties purchased in the name of respondent is self-acquired property of the

respondent and not joint family property, as contended by the learned counsel for the appellants.

17. On careful reading of entire oral and documentary evidence adduced on either side revealed that the appellants have miserably failed to prove the income from ancestral property and also not proved the loan obtained by the appellants for purchase of the properties and discharged only out of income from joint family property. As rightly pointed out by the learned counsel for the respondent except the averments made in the written statement and oral testimony of interested witness, no other documentary or oral evidence to prove the income from joint family properties or obtaining loan and discharged by the appellants only to purchase the properties. Therefore, the finding of both the courts below that the items 2 and 3 including 3A are self-acquired properties of the respondent is correct. A perusal of oral evidence of DW1 revealed that even prior to purchase of 2nd and 3rd items of "A" schedule suit properties, the above said properties were in possession of the appellants family as a lessee and out of the income, the above said properties were purchased. But, the above said facts also not proved by reliable oral and documentary evidence. Further, on the side of the appellant, they have not produced any document to prove that at the time of retirement of the deceased Rangasamy, father of the respondent, he had received Rs. 50,000/- and out of the above said amount purchased the items 2 and 3 of A-schedule properties. It is not in dispute that the deceased Rangasamy Padayachi was only a gangman and he retired from service in the year 1967. As rightly discussed by the courts below, the appellants never placed any reliable documentary evidence to prove the above said Rangasamy Padayachi was a permanent employee and received a sum of Rs. 50,000/-, at the time of retirement. Therefore, except certain receipts for discharge of loan, no reliable evidence to prove that the appellants family having joint family properties and sufficient income from the properties to purchase the above said properties and the loan obtained for purchase of the properties and discharged only out of the excess income from joint family properties and therefore, the above said findings of both the courts below regarding suit items 2 and 3 including 3A also not perverse finding as contended by the learned counsel for the appellants.

18. It is not in dispute that the 4th item of A-schedule property was purchased in the name of mother of the respondent and she executed Ex. A3 settlement deed, dated 24.01.1969, in favour of the respondent. The contention of the respondent is that the above said property was purchased in the name of his mother, out of his income in the year 1964 and therefore, she executed settlement deed Ex. A3 in favour of the respondent on 24.01.1969 and therefore, it is separate property of the respondent and not a joint family property.

19. Per contra, the learned counsel for the appellants submitted that the above said property namely 4th item purchased out of joint family income in the name of mother of the respondent, therefore, it is joint family property. In the written statement or at the time of evidence, the appellants have not stated any reason

why the above said property was not purchased any one of the joint family members and purchased in the name of female member. As already discussed, the appellants have not produced any reliable documents to prove that the joint family having surplus income to purchase the suit properties. As rightly discussed by the courts below, the mother of the respondent has not objected the above said Ex. A3 settlement deed executed in favour of the respondent. Further, the respondent has borrowed the loan from Mayuram Co-operative Building Society Limited, for construction of house sites in item 4 of A-schedule property under Ex. A7 letter dated 14.04.1974. It is also revealed that the municipality house tax receipts Ex. B31 (series) stands in the name of the respondent and it is further revealed from Ex. B29 that the respondent alone paid the amount to the above said society. Electricity card and electricity bill also admittedly in the name of the respondent. Therefore, on the side of the respondent has produced reliable oral and documentary evidence to prove that the 4th item of "A" schedule property also self-acquired property of the respondent and not a joint family property as pleaded by the learned counsel for the appellants.

20. In the instant case, on the side of the respondent has proved by reliable documentary evidence namely Exs. A1 and A2-sale deed, Ex. A3-settlement deed and Ex. A9-assignment order regarding A-schedule properties. Further, the respondent has produced Ex. A6 to prove that he was retired from Air-Force service. The respondent has also produced Ex. A7 to prove that he obtained loan from building society to construct the building in A-schedule 1st item. The respondent has also produced Ex. A8-Electricity Card to prove that the service connection is in his name. Therefore, the respondent has produced reliable oral and documentary evidence and also adduced oral evidence to prove his case.

21. Per contra on the side of the appellants have not produced any reliable documents to prove that the appellants family having sufficient nucleus from joint family properties to purchase A-schedule properties in items 2 to 4. Further, the appellants have miserably failed to prove that before assignment by the Government to the appellant in respect of item 1 of A-schedule property, the entire joint family members enjoying the property as joint family property and only on the basis of possession of joint family members, the property was assigned in the name of the respondent.

22. Per contra, as already discussed, the Government has given the property to the respondent only on the ground that he was in Military service. The appellants have produced Exs. B4, B5, B7 to B10, B12, B14, B15, B18 to B21 letters and contended that the appellants family members obtained loan and the respondent also sent money to the appellants and therefore, the above said documents revealed that the items 2 to 4 in the suit properties purchased by the appellants by obtaining loan. A careful reading of entire letters revealed that nowhere it is stated about the said loan and amount mentioned in the letters relating to the purchase of items 2 to 5 in A schedule properties. Both the courts below also



discussed about the documents and not accepting the contention of the appellants. The respondent has produced several documents to prove the possession in A-schedule house property. Admittedly, the respondent is brother of the 1st and 2nd appellant. In the above said circumstances, only on the basis of permissive possession they are living in the house property and it cannot be taken as the property is joint family property as pleaded by the learned counsel for the appellants. The 1st appellant deposed as DW1 and deposed that he was having accounts to prove the expenses for the construction in A-schedule 4th item. But, the above said material documents not produced on the side of the appellants. Further, the appellants have not examined the mother of the appellants 1 and 2 to prove that the family having sufficient fund to purchase the properties and also to prove that the mother having jewels and obtained loan and from the above said fund, the properties were purchased in the name of respondent or in the name of mother. No reason has been assigned by the appellants for non-examination of material witness as discussed by the courts below. Absolutely no pleadings and evidence to prove that the appellants family having sufficient means and the mother of the appellants 1 and 2 doing milk vending business and earned money and out of the above said fund, the properties were purchased. On the side of the appellants not produced any documents to prove that the father of the appellants 1 and 2 or the family members taken lease and out of income from the lands, the properties were purchased. Therefore, absolutely no reliable oral and documentary evidence to prove the contention of the learned counsel for the appellants as rightly discussed by both the courts below. Therefore, the findings of both the courts below are not perverse finding or illegal as pleaded by the learned counsel for the appellants. Both the courts below correctly discussed about the oral and documentary evidence particularly the alleged letters written by the respondents and finally held that the appellants have failed to prove that the A-schedule properties are joint family properties and therefore, all the substantial questions of law answered as against the appellants.

23. In view of the above said discussions, the findings of both the courts below are to be confirmed and the second appeal is liable to be dismissed. In the result, the second appeal is dismissed. No order as to costs.