
(1999) 03 MAD CK 0094
In the Madras High Court
Case No : A.S. No. 700 of 1985

Packiyam Ammal and Others

APPELLANT

Vs

Pattu Ammal and Others

RESPONDENT

Date of Decision : 22-03-1999

Acts Referred:

Evidence Act, 1872 — Section 114(1)

Citation : AIR 1999 Mad 383 : (1999) 2 MLJ 404

Hon'ble Judges : S.S. Subramani, J

Bench : Single Bench

Advocate : R.N. Kothandraman, for the Appellant;

Final Decision : Partly Allowed

Judgement

S.S. Subramani, J.—Plaintiffs in O.S. No. 308 of 1981, on the file of Sub Court, Vridnachalam, are the appellants herein.

2. One Muthappa Udayar had two sons and a daughter, by name Chinnadurai, Subramania Udayar and Pattu Ammal. Muthappa Udayar died in 1965 leaving behind his widow Pakkiyam Ammal two sons daughter named above. Chinnadurai died in 1968 issueless and unmarried. The suit for partition was filed by the widow of Muthappa Udayar as first plaintiff and the wife of Subbmaniam Udayar and his children born in that marriage, as plaintiffs 2 to 4. Subramania Udayar is the first defendant and Pattu Ammal, daughter, is the second defendant. First plaintiff claimed half share and second plaintiff claimed 5/24 share in the property, and they wanted all the plaint schedule items to be divided by metes and bounds. In the B Schedule, there are 11 items of immovable properties. It is alleged in the plaint that all the items belong to the joint family of Muthappa Udayar, and after the death of Muthappa Udayar first defendant came into management of the same. "C" Schedule items are movables. A claims as also made by third plaintiffs that he is entitled to get future maintenance from first defendant, i.e., her father. A further claim made that first defendant was bound to contribute for the marriage of third plaintiff. Plaintiffs claimed past mesne

profits, and also future mesne profits to be decided under Order 20, Rule 12, C.P.C

3. First defendant remained ex parte, and the contest was mainly by alienees. It may not be out of place to state that there is also allegation in the plaint that the first defendant has borrowed huge amounts from third parties and the debts are not binding on the share of plaintiffs, and the creditors should be presented from realising the amount from the share of plaintiffs. The main reason for making such an allegation was that the debts were incurred for illegal and immoral purposes. It is alleged that the first defendant was keeping a concubine and he was a drunkard and the family was never benefited under his management as he was a spendthrift.

4. The lower Court, after a long trial, passed a preliminary decree in regard to all items except items 9 and 10 and also the immovable property. It also directed the first defendant to pay a sum of Rs. 5,000/- for the marriage expenses of third plaintiff. No amount was awarded towards maintenance claimed by third plaintiff. Aggrieved by the preliminary decree, plaintiffs have come to this Court with regard to that portion of the decree which went against them.

5. In the various grounds taken in the Memorandum of Appeal, it is said that even in regard to B Schedule Items 9 and 10, the suit ought to have been decreed, but further contended that the declaration ought to have been given that the debts incurred by first defendant are not binding on none of the plaintiffs, though such a declaration was given only in respect of first plaintiff, in regard to "C" Schedule item also, a claim is made in the Appeal.

6. Even though notices have been served on all the respondents, I did not have the opportunity of hearing the case of respondents. I heard learned counsel for appellant/plaintiffs alone in this Appeal.

7. Learned counsel for the appellants put forward the following submissions :-- In regard to Item No. 9, the lower Court went wrong in dismissing the suit and upholding the claim of the 16th defendant, which cannot be supported. It is contended that the first defendant was the manager of the family and when he purchased the property, he continued as Manager. He had no separate source of income, and the B Schedule items were in his possession and management during the relevant time. Being the manager, his possession towards the family is that of a trustee, and law presumes that his acts are consistent with his position as manager, i.e., his acts were to the benefit of the family. It was also argued that the defence was taken only by the alienee, and First defendant has not put forward before Court any case as to how the property was acquired. How he acquired the property is within his special knowledge. It was also contended that the immovable properties that are scheduled to the plaint are deriving very good income. More than ten acres of land are in the possession of the family. Excluding Item No. 9, the income therefrom would be sufficient to meet the expenses of the family. It is also contended that first defendant himself has been incurring heavy debts and the creditors have also filed suits against him. That

also shows that he was not having independent source of income. Learned counsel further submitted that merely because Ex. B-6 sale deed stands in the name of first defendant, it cannot be presumed that the family is not entitled to the property. Another circumstance which was relied on by learned counsel was that the sale deed was executed in favour of 16th defendant by first defendant under Ex. B-5, wherein he has made his son, fourth plaintiff also as a party, and this has not been considered by the lower Court. In regard to Item No. 10, the finding of the lower Court is that since the plaintiffs have no title to the property, the same is not liable to partition. According to learned counsel, in a suit for partition, title to property is not material. The only consideration is, whether that Item is a family property. Ex. A-2 shows that Item No. 10 was in the exclusive possession of the family. That possessory right is partible.

8. I will consider these submissions in seriatim.

9. Regarding Item No. 9, it is seen that the property was acquired in the name of first defendant as per the original sale deed dated 6-1-1972. Registration copy of the same has been produced by 16th defendant and marked as Ex. B-6. It could be seen from the copy of sale deed that the property was acquired for a total consideration of Rs. 700/- out of which Rs. 400/- was received by the vendor before execution of the sale deed, and Rs. 300/- was received in discharge of certain debts, and in consideration of the same. Item No. 9 was conveyed in the name of first defendant. Admittedly, Muthappa Udayar died in 1955, and first defendant became the manager. At the time when Ex. B-6 was taken, he was the manager of the family. There is absolutely no evidence in this case to show that the first defendant was having any income of his own or whether he was having any other avocation. Even according to the case of 16th defendant, items 1 to 8, 10 and 11 were in the possession of the family long before Ex. B-6 sale deed was taken. More than 10 acres of land was in the possession of the first defendant at a time when Ex. B-6 was taken.

10. In Mulla's "Principles of Hindu Law" --Volume 1 -- 17th Edition (1998), Article 233 deals with difference between coparcenary and coparcenary property. At page 435, under the sub-heading "No presumption that a joint family family possesses joint property", the learned Author has said thus:--

"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."

At page 347, learned Author has said thus :--

"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 (he notion of its being joint property.

11. In a recent decision of the Honourable Supreme Court reported in Surendra Kumar Vs. Phoolchand (dead) through and another, , in paragraph 6 of the judgment, this question has been considered. In that case, at the time of acquisition of the property by joint family manager, the acquirer was a minor. The question was, whether it is a separate property or property of the family. In that case, the minor attempted to prove that the consideration for the acquisition was paid by his uncle. The contention was found against. Thereafter, Their Lordships considered as to what is the law regarding acquisition by a member Relevant portion of the judgment reads thus :--

"..... It is no doubt true that there is no presumption mat a family because it is joint possessed joint property and therefore the person alleging the property to be joint has to establish that the family was possessed of some property with the income of which the property could have been a acquired. But such a presumption is a presumption of fact which can be rebutted. But where it is established or admitted that the family which possessed joint property which from its nature and relative value may have formed sufficient nucleus from which the property in question may have been acquired, the presumption arises that it was the joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family, Both the Courts below have scrutinised the evidence bearing in mind the aforesaid legal position and have rightly come to the conclusion that the property in question is the joint family property

12. In Achuthan Nair Vs. Chinnamu Amma and Others, . Their Lordships considered this question and compared the same with the case of Marumakkathayam Law. Relevant portion in paragraph 7 reads thus :--

"..... .Courts have recognised the difference between a joint Hindu family under the Hindu law and a tarwad under the Marumakkathayam law in the context of acquisition of properties for ascertaining whether a property acquired in the name of a member of a family is a joint family property or the self-acquired property of the said member. Under Hindu Law, when a property stands in the name of a member of a joint family, it is incumbent upon those asserting that it is a joint family property to establish it. When it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is a joint family

property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus. This is a well-settled proposition of law. But the said principle has not been accepted or applied to acquisition of properties in the name of a junior member of a tarwad (anandravan). It was held that there was no presumption either way; and that the question had to be decided on the facts of each case.....

Further down, in paragraph 10, Their Lordships have held that the Manager of a family governed by Marumakkathayam law, stood in a fiduciary relationship with the other members of the family, and there is a strong presumption that the property was acquired from out of the funds of the family. The said principle also could be applied to the facts of this case. In that regard, there is no difference between the Hindu Law and the Marumakkathayam Law. If a person is in management of the family properties, and if he acquires any property, and if it is shown that the person in management has no other source of income, a presumption has to be drawn that the acquisition enures to the benefit of the family. The lower Court rejected the claims of the plaintiffs on the ground that witnesses examined on their side admitted that the property was acquired by first defendant. In this case, we must understand that the plaintiffs' witnesses are not persons in management and they cannot be expected to speak how the property was acquired. It must be understood that the first defendant has borrowed amounts from third parties and documents have been obtained by them. If the first defendant had any source of income, the necessity for borrowing the amount might not have arisen. When the presumption is against first defendant it is for him to rebut the same by adducing best evidence that no portion of the family income was utilised to acquire B Schedule, Item 9. First defendant remained ex parte,

13. Added to the above circumstances, when the 16th defendant purchased the property, fourth plaintiff was also made a party to the sale deed by first defendant. The document was executed by first defendant on his own behalf and also on behalf of his son, fourth plaintiff. Why the fourth plaintiff was also added as a party, is not explained by 16th defendant in his written statement. If the fourth plaintiff was not having any right over the property, his presence in the deed was not necessary. From the above circumstances, it should not be understood to mean that merely because a person's name is inserted in a document, he is getting a title. But in this case, that has to be taken as an additional circumstance against the first defendant. In regard to Item No. 9, the finding of the lower Court will have to be set aside and I do so.

14. In regard to Item No. 10, the only reason for dismissing the suit was that the family is not having title to the property. Under Ext.. A-2, it is found that the family is in possession. It could be a Government land. The possessory right continues in the family. Any arrangement between the members of the family may not bind the Government. But, as between them, it has to be treated as a family asset and available for partition. A preliminary decree also will have to be

passed with regard to Item 10.

15. Though learned counsel for plaintiffs argued in regard to "C" Schedule Item, I do not find even an issue suggested before lower Court, nor was any evidence let in. Even though an attempt was made by learned counsel to show that that was also available for partition, I do not find any evidence regarding the same.

16. The further question that arises for consideration is, whether the decree obtained against the first defendant could be executed even as against plaintiffs 2 to 4. As against the 1 st plaintiff, it has been declared by lower Court that it is not binding on her. Plaintiffs 2 to 4 are claiming only under the 1st defendant. They are respectively his wife and children and, therefore, they will have to take their right only from the share of 1 st defendant. If that be so, it cannot be said that their share of the property is not liable for the debt of 1st defendant. Apart from the same, no evidence has been let in in this case to show that 1 st defendant was a drunkard or that he has incurred debts for illegal or immoral purposes. Except for the interested testimony of plaintiffs, there is no other evidence to come to a different conclusion from the one arrived by the Court below. Therefore, the finding of the lower Court is to be confirmed. 16th defendant has taken Ex. B-5 sale deed from 1st defendant. She has no case that it was executed for family necessity or consideration. She is supporting the document only on the ground that first defendant alone is competent to execute the sale deed. The property being his self-acquisition. Therefore, the sale deed is not binding on the family. Plaintiffs are entitled to ignore the same and get partition over that item also.

17. In the result, the Appeal is allowed in part. Preliminary decree passed by lower Court is modified. It is declared that the plaintiffs are also entitled to a preliminary decree as prayed for in regard to Items 9 and 10 also, according to the shares declared by the lower Court. The question whether the 16th defendant is entitled to any equity will be considered at the time of passing of final decree. No costs.