

(1987) 06 MAD CK 0028
In the Madras High Court

Ponnuswamy

APPELLANT

Vs

Meenakshi Ammal and Others

RESPONDENT

Date of Decision : 17-06-1987

Acts Referred:

Citation : (1989) 2 LW 227 : (1989) 2 MLJ 506

Hon'ble Judges : Sivasubramaniam, J;Siva Subramaniam, J

Bench : Division Bench

Judgement

Siva Subramaniam, J.—The plaintiff, who was partly successful in O.S. No. 76 of 1978 on the file of the Sub-Court, Udamalpet, is the appellant in this appeal. The respondents herein are the defendants in the suit.

2. The material allegations in the plaint are as follows: The plaintiff, who is the appellant herein, is the only son of his father Kuppuswamy Goun-der and his mother the first respondent herein. Defendants 2 to 5, who are respondents 2 to 5 herein, and his sisters. The appellant and his father Kuppuswamy Gounder were members of a joint family for which his father was the joint family manager. His father died on 6-7-1977 leaving behind the appellant and the respondents as his legal representatives. There was no partition during his lifetime. The properties described in the second schedule of the plaint belonged to the joint family consisting of the appellant and his fathes Kuppusamy Gounder. Respondents 2 to 5 got married and they have settled in different places. After the death of Kuppusamy Gounder, the respondents also became entitled to a share in the plaint schedule properties as per law. The debts payable by the family to the tune of Rs. 24,000 are described in the third schedule of the plaint. The appellant is entitled to 7/12th share in the suit properties and each of the respondents is entitled to 1/12th share in the same. After the death of the appellant's father, the appellant and the respondents were enjoying the suit properties as co-owners. But, however, later on misunderstandings arose between them. The second respondent issued a notice on 6-10-77 to the appellant and other respondents calling upon them to effect a partition for which the appellant

caused a suitable reply notice on 27-10-77 expressing his willingness for partition of the suit properties by metes and bounds. Now respondents 1 to 5 are colluding together and they have prevented the appellant from cultivating the suit properties, and from realising any income. The house described as item B in the second schedule of the plaint is a dwelling house, and the respondents have no share in the said house. In these circumstances, the present suit for partition was filed.

3. The second respondent herein, who was the second defendant in the suit, filed a written statement which was adopted by the other respondents raising the following contentions. The properties mentioned in the plaint belonged to one Ponnu-samy who is the grandfather of the appellant and" respondents 2 to 5. Upto the date of the death of the appellant's father kuppuswamy Gounder, the properties were in the management of the appellant's father. After his death, respondents 2 to 5 demanded partition which was not conceded by the appellant and he did not even allow them to enjoy the lands. The debts mentioned in the plaint are not true. The appellant did not care to pay the Co-operative Bank mortgage loan and hence the husband of the second respondent had paid the same. The dwelling house mentioned in the plaint does not belong to the appellant exclusively. It is also available for partition and the respondents are having equal rights in the same.

4. During the pendency of the suit, the appellant took up a stand that the house property is not divisible and the respondents are not entitled to a share in the dwelling house in view of the bar created u/s 23 of the Hindu Succession Act, 1956. Therefore, he amended the plaint as per the order in I.A. No. 880 of 1978 praying for partition and separate possession of his 7/12th share with reference to the agricultural lands described in the plaint as item A in the second schedule. However, during the course of the hearing of this appeal, learned Counsel for the appellant found it necessary to seek an alternative prayer in respect of the said house property as otherwise the appellant could not get appropriate relief from this Court. Therefore, he filed a petition in C.M.P. No. 8275 of 1987 to amend the plaint by including the following prayer as sub-paragraph 13 (1)(a):

Petitioner submits that in the event of this Hon"ble Court coming to the conclusion that the dwelling house described in item (b) of the second schedule to the plaint is available for partition, this Hon"ble Court may be pleased to pass a decree in favour of the plaintiff/petitioner herein with reference to is 7/12th share and direct partition and separate possession of his 7/12th share in the dwelling house described in item (b) in the Second Schedule to the plaint.

By consent of the parties, the amendment was allowed and therefore, the present position is that the appeal relates to all the properties of the plaint schedule.

5. The learned Subordinate Judge came to the conclusion that the lands described as item A in the plaint schedule-2, are joint family properties of the

appellant and his deceased father Kup-pusamy Gounder. As regards the house property described as item B, he held that it is the separate property of the deceased Kuppuswamy Gounder and that the appellant and the respondents are each entitled to 1/6th share in the suit house property. So far as the debts are concerned, the learned Judge held that the debts are bound to be discharged by the appellant and respondents 1 to 5 in accordance with the shares to which each party is entitled, that no provision need be made for these debts in this suit and as and when the creditors filed the suit to prove their claim before a Court of law, the genuineness of some of these debts can be established. In those circumstances, he found it unnecessary to make a provision for the same now. The learned Subordinate Judge decreed the suit and passed a preliminary decree directing a division of item A lands in the plaint schedule-2 into 12 equal shares and directing a division of the house mentioned as item B in the plaint schedule-2 into six equal shares and declaring that the appellant is entitled to 7/12th share in the lands and the respondents are each entitled to 1/12th share in the same and the appellant and respondents 1 to 5 are each entitled to 1/6th share in the house described as item B in the plaint schedule-2.

6. The appellant, being aggrieved against the decree in respect of the house property alone, has come up with this appeal.

7. The only short point to be decided in the present appeal is, whether the house property described as item B in schedule 2 in the plaint was the joint family property or the self-acquired property of the father late Kuppuswami Gounder, learned Counsel appearing for the appellant points out that nowhere in the pleadings, the respondents have raised the plea that the house property was the separate property of late Kuppuswami Gounder. In paragraph 3 of the written statement, the following passage occurs :

The properties mentioned in the plaint belonged to one Poonusamy Gounder who is the father of Kuppusamy Gounder and the grandfather of plaintiff and respondents 2 to 5. Upto the death of the father of the plaintiff, the properties were under full control of him and not with the plaintiff.

Even in the lawyer's notice dated 6-10-77 marked as Ex.A.I issued on behalf of the second respondent, it was specifically claimed that the landed properties and the house property were the properties of the grandfather Ponnusamy Gounder, after his death, the father Kuppuswami Gounder was in possession and management of the joint family properties. Thus it is seen that the respondents have now come forward with a case that the house property was the self-acquired property of late kuppuswami Gounder. Nobody was examined on the side of the respondents to speak about this fact in evidence. However, during the course of trial the respondents produced a sale deed dated 21-7-36 in the name of the deceased Kuppuswamy Gounder marked as Exhibit B-2 with a plain attached to the sale deed. It was solely on the basis of this sale deed, the lower Court held that the house described as item B to the plaint schedule-2 was the separate property of the deceased Kuppuswami Gounder.

8. It is urged on behalf of the appellant that merely because the sale deed, in respect of the site on which the house was built, stands in the name of the father Kuppuswami Gounder it is not enough to prove that it was his self-acquired property and that it did not form part of the joint family property. In this connection, learned Counsel for the appellant would urge that when a joint family is found to be in possession of nucleus sufficient to make the impugned acquisitions, then a presumption arises that the acquisitions standing in the name of the persons who were in the management of the family properties, are family acquisition. In support of this position, he relies upon a decision of the Supreme Court in B.N. Pramanik (1972) 2 S.C.W.R. 406.

9. In so far as the presumptions in respect of joint family are concerned, the law is well-settled now. 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 property is joint family property, the burden of proving that it is so rests on the party asserting it. According to the judicial pronouncements, to prove that a particular property is 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 is to be noted that in 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 affirmatively that the property was acquired without the aid of the joint family. Relying on this principle, learned Counsel for the respondents urges that 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. In support of the said contention, he relies upon the ruling of the Supreme Court in Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, , which lays down the following principle.

Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established 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 burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property." "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 acquisition could be made, even though it must 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. These are not abstract questions of law, but questions of fact to be determined on the evidence in the case.

He also relies upon the decision of this Court in *V. Srinivasan and Others Vs. Sundaramurthi and Another*, and *Ranganayaki Ammal and Others Vs. S.R. Srinivasan and Others*, in support of his contention that if the property stands in the name of a co-parcener of joint family, mere proof of the existence of the joint family owning some joint family property does not give rise to any presumption and that it must be established that there was sufficient nucleus of the joint family for purchasing the property which stands in the name of the co-parcener. In so far as the principles laid down in all these cases are concerned there cannot be any difference of opinion.

10. 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. Whether the evidence adduced by party is 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 extent of the nucleus. What is to be shown is that the family had as a result of the nucleus sufficient surplus income from which the subsequent acquisitions could be made. Alternatively, this may be shown from the nature and relative value of the nucleus itself. It is to be noted that this question of presumption differs from case to case and there cannot be a principle which will apply to all the cases. Even though the initial burden is on the plaintiff in case to prove that the house property, which is the subject matter of the present appeal, was purchased out of the joint family nucleus, when there is intrinsic evidence in the case to show that there was sufficient income from the admitted joint family properties, an inference can be drawn that the said property was purchased out of the joint family funds. Peculiarly in this case, the respondents have not pleaded that the late Kuppaswami Gounder had any other source of income excepting the income from the joint family lands. Learned Counsel for the respondents relied upon a passage from Mulla's Hindu Law Fifteenth Edition at pages 304 and 305. The very same author at page 306 observes as follows:

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, the burden lies upon him in any such case to show that it was acquired by him in circumstances which would constitute it his separate property.

The said view was based upon the principles laid down by the Supreme Court. Therefore, it is clear on the facts of the present case that there is absolutely no evidence to show that the late Kuppuswami Gounder had any other source of income excepting the income from the joint family properties, namely agricultural lands. The description of property and the evidence regarding the income show that there was sufficient income from the lands and it was possible for the late Kuppuswami Gounder to purchase the house property out of the joint family income derived from the lands. In the absence of an allegation to the effect that he had other separate source of income, it cannot be presumed that the property was acquired but of his separate funds.

11. One other important factor which will have to be borne in mind in this case is that the house property was acquired by the late kuppuswami Gounder who was the father kartha of the joint family. The general principles of presumption in respect of acquisition of properties by the joint family members may not be applicable in a case of this nature, In dealing with the acquisition of property by manager of a joint family, the Supreme Court in Mallesappa Bandeppa Desai and Others Vs. Desai Mallappa and Others, lays down the following principles:

...there is no doubt that where as manager claims that any immovable property has been acquired by him with his own separate funds and not with the help of the joint family funds of which he was in possession and charge, it is for him to prove by clear and satisfactory evidence his plea that the purchase money proceeded from his separate fund. The onus of proof must in such a case be placed on the manager and not on his coparcenars.

In view of this clear principle, there is no difficulty in deciding that the suit house property is one of the items of joint family property which is available for partition. Merely by showing that at one point of time the sale deed in respect of the site on which the house property stands stood in the name of the late Kuppuswami Gounder, it cannot be presumed in the absence of any evidence to show that he had separate income, that the said property was the separate property. The respondents have neither pleaded nor let in sufficient evidence on this material point. None of them have gone into the box to speak about this matter. In these circumstances, we have no hesitation in coming to the conclusion that the said property is an item of joint family property and division has to be effected only on that basis.

12. Learned Counsel for the appellant further contended that having found that the landed property is joint family property, the lower Court should have found that the house property is also a joint family property and as such the female heirs' right of partition does not arise and could not arise at the present juncture and should have applied the provisions of Section 23 of the Hindu Succession Act, 1956, and the right to claim share did not arise at the time of the suit. According to him, such rights should be postponed till a division is sought to be made by the male heirs and in any event the female heirs under the Hindu Succession Act cannot have a right for partition. Section 23 of the Hindu

Succession Act cannot have a right for partition. Section 23 of the Hindu Succession Act, 1956 reads as follows:

When a hindu intestate has left surviving him or her both male and female heirs specified in Class I of the Schedule and his or her property includes a dwelling house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition or the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein: Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

The action is intended to ensure easement of disruptive influences which would operate if the right of a female heir to claim partition of the family dwelling-house were left unrestricted. The restriction imposed by this section is applicable where the intestate of female is survived by male and female heirs enumerated in Class I of the schedule. The restriction does not affect in any manner the devolution of the family dwelling house upon all the heirs including female heirs of intestate. The restriction is strictly confined to the right of such female heirs to ask partition of the family dwelling-house until the male heirs choose to divide their shares in it. Therefore, the right of the female heir to have a division of the dwelling-house is postponed until the male heirs choose to divide the same. In this case, we find that the plaintiff being the only male heir to the deceased has chosen to file the present suit for partition both in respect of the landed properties as well as the dwelling-house. He has not chosen to claim any benefit conferred u/s 23 of the Hindu Succession Act. It was only later on, a second thought, the plaint was amended restricting the claim only to the landed properties. Once it is shown that the plaintiff as a male heir has chosen to file the present suit for partition, the right to claim a share in the house property would automatically enure to the benefit of female heirs.

13. The subsequent amendment cannot take away such a vested right. Finding this difficulty, the appellant has rightly amended the plaint and claimed a share in the house property also as an alternative prayer. In these circumstances, there is no difficulty in holding that the respondents are entitled to partition of the said property and allotment of their share.

14. In the result, judgment and decree of the court below, in so far as the house property is concerned, are modified and the appeal is allowed to that extent and a preliminary decree is passed directing a division of item 8 in the plaint schedule-2 also into 12 equal shares and declaring that the plaintiff is entitled to 7/12th share in the said property and the defendants 1 to 5 are each entitled to 1/12th share in the same and the plaintiff shall be allotted and put in separate possession of the separated shares in the house property mentioned as item B in the plaint schedule-2. Both parties will bear their own costs in this appeal.