

(1996) 03 MAD CK 0004

In the Madras High Court

Case No : S.A. No's. 1691 of 1986 of 393 of 1987

S. Krishnamurthy

APPELLANT

Vs

S. Venugopal and 13 others
S. Varadarajan Vs S.
Venugopal and 13 others

RESPONDENT

Date of Decision : 12-03-1996

Acts Referred:

Citation : (1996) 03 MAD CK 0004

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

Bench : Single Bench

Advocate : V.K. Muthuswami in S.A. 1691 of 1986, for the Appellant; S.V. Jayaraman, for 1st Respondent in S.A. 1691/86, Mr. V.K. Muthuswami, for 2nd respondent in S.A. 393/87 and Mr. M. Venkatachalapathy, for 3rd Respondent in S.A. 1691/86, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Subramani, J.—Both these Second Appeals arise from O.S. No. 356 of 1982, a suit filed for partition. Plaintiff therein is the appellant

in S.A. No. 1691 of 1986. Third defendant in that suit is the appellant in the connected Second Appeal. As per judgment dated 29-7-1985,

preliminary decree was passed in favour of the plaintiff holding that he is entitled to 8/35 shares in the plaint item. The said judgment was set aside

in appeal. Third defendant also claimed a share. When the suit was dismissed, the third defendant, being aggrieved, has also filed the connected

Second Appeal.

2. The material averments in the plaint are as follows:-

Plaintiff, defendants 1,2,3,5 and 6 are children of the 4th defendant born through late K.V. Subramaniam Chettiar. Defendants 5 and 6 are

daughters. Others are sons. 7th defendant is the wife of the first defendant. The other defendants in the suit are tenants, occupying portions of the suit property.

3. It is the case of the plaintiff that late K.V. Subramaniam Chettiar, who died in the year 1978 at the age of 91, was permanently residing at

Salem, and the entire family migrated to Coimbatore for earning a better income. It is his case that Subramaniam Chettiar and the family were

doing traditional handloom weaving business and they were owners of some looms. They used to get yarn from various merchants, and after

weaving, the same was supplied to various merchants, and they had a flourishing business at Salem. About 30 years prior to the institution of the

suit, it is said that the entire family migrated to Coimbatore where they lived initially in the house of the elder daughter of Subramaniam Chettiar and

thereafter they resided in a rented house. It is the plaintiff's case that the family members were contributing their labour and exertion to augment the

income of the family, and out of savings, the plaintiff A Schedule property was obtained. It is said that the family members had absolute faith in the

first defendant, who is the elder son, and so the property was purchased in his name. Misunderstandings arose after the death of the father, and

therefore, plaintiff has filed the suit for partition. The sale deed in Ex.A-1 or Ex.B-1 dated 1-12-1976.

4. In the written statement filed by the 1st defendant, he said that the family did not have any income nor was there any contribution either by

exertion or labour. Father and himself were the only members who knew weaving and both of them were conducting independent, separate

business. It was out of his own exertion, he could make some savings and purchase the plaintiff property in his name and, therefore, the same is his

self-acquisition. It is also said that the first defendant during the relevant time, was having his own business and was also having partnership

business with strangers, and the plaintiff was employed separately. It is also said that even though the father and the brother were all residing in the

same house, they were not having a common mess. It was only because of love and affection, all of them were living together, and not because the

plaintiff property was joint family property.

5. The 3rd defendant filed a written statement contending that it was due to the

exertion of all the coparceners, the family property could be acquired. He also said that the first defendant has executed a settlement deed in his favour whereby he has gifted a portion of the property. Since it was acquired with the labour of the brothers, each of them will be entitled to an equal share. The 1st defendant has gifted his share to him as per Ex.B-6. Therefore, he claims that apart from the share in his individual right, he is also entitled to the share gifted to him by the first defendant as per Ex.B-6.

6. Before the trial court, elaborate evidence was taken. We find that Exs.A-1 to A-16 were marked on the side of the plaintiff. Apart from examining himself as P.W.1, plaintiff examined two more witnesses as P.Ws.2 and 3. On the side of the defendants, Exs.B-1 to B-36 were marked. Defendants 3 and 1 examined themselves respectively as D.Ws.1 and 2. Another witness was examined ad D.W.3.

7. Trial court came to the conclusion that the plaint property is a joint family property and the plaintiff is entitled to a share. A preliminary decree was passed.

8. The matter was taken before the lower appellate court as A.S. No. 164 of 1985. The lower appellate court reconsidered the entire evidence and came to the conclusion that the plaintiff has miserably failed to prove that the plaint property is a family property. Since the third defendant's right was not recognised in the preliminary decree, he filed a cross-objection before the lower appellate court. It held that Ex.B-6 was not accepted by the 3rd defendant. It also held that the entire plaint property is the self-acquisition of the 1st defendant and, therefore, neither the plaintiff nor the 3rd defendant is entitled to any share. The suit was, therefore, dismissed. It is against the conflicting judgments, plaintiff as well as the 3rd I defendant have preferred these Second Appeals.

9. At the time of admission, the following substantial questions of law were raised for consideration in S.A. No.1691 of 1986:-

1) Whether the lower appellate court has properly considered the material evidence, particularly the evidence of P.W.2 and D.W.2 while holding that the suit property is not the joint family property and that it is the self-acquired property of the 1st defendant?

2) Whether the lower appellate court has rightly cast the burden of proof?

3) Whether the lower appellate court has properly applied the law relating to the joint family properties and the burden of proof and the nature of evidence on the facts and circumstances of the case?

The following substantial questions of law were raised for consideration in S.A. No. 393 of 1987:-

1) Whether the lower appellate court misconstrued or omitted to construe the material evidence on record when it chose to reverse the judgment and decree of the trial court?

2) Whether the lower appellate court was right in law in holding that the attestation of the document dated 1-6-1977 (equitable mortgage) constituted admission of the exclusive title of the 1st defendant to the suit property?

3) Whether the lower appellate court was right in casting the burden of proof upon the plaintiff and appellant instead of on the first defendant?

4) Whether the courts below were right in law in holding that the settlement deed in favour of the appellant, though true, is not valid and not acted upon allowing the plea of unilateral retreat by the first defendant?

5) Whether the lower appellate court was right in its conclusions in law regarding the character of the suit property?

6) Whether the lower appellate Court was right in its conclusions about the plea of joint ownership of the suit property by joint exertions of all male members?

10. Before going to the law, let us consider the proved facts in this case.

11. Subramaniam Chettiar (late) is the father and 4th defendant is the mother. It is admitted that the 4th defendant was not on good terms with the

1st defendant and she was living with the plaintiff, when she deposed as P.W.2. The evidence of P.W.2 was given importance by the learned

counsel for the plaintiff/appellant and, therefore, her relationship with the 1st defendant is material when we consider her evidence.

12. It is also admitted by the plaintiff that originally late Subramaniam Chettiar and the family were residing at Salem. They did not have a house to

reside. They occupied a rented house on a rent of Rs. 25/-. It was also admitted that in the family except the father and the elder son, no other

person knew the family profession, namely, weaving. Plaintiff and defendants 2 and 3 were all employed elsewhere, and there is no evidence in this

case to show that they helped in any manner the business run in the name of the first defendant. Plaintiff was a student till 1971 and thereafter he got employment in a Bank, and at the time of the purchase of the plaintiff property, as evidenced by Ex.B-1. he was a Bank employee. It is not his case that any portion of his salary has been contributed for the purchase of the property. Likewise, second defendant or third defendant also has no case that they have contributed any share from their salary for the purchase of B Schedule property. The case put forward by the plaintiff is joint exertion and labour in acquiring the property.

13. Supporting the case of the plaintiff, we have also the evidence of the 5th defendant, elder sister of both the plaintiff and the 1st defendant. We must understand that she has also claimed partition, supporting the claim of the plaintiff. The father died only in the year 1978. So, naturally, if the father had any share, the daughters also will inherit under Hindu Succession Act. So, there was a common cause for both the plaintiff and defendants 2 to 5 against the 1st defendant. The evidence will have to be appreciated after taking into consideration that relationship.

14. The documentary evidence on the side of the plaintiff consists of Exs.A-1 to A-16. Ex.A-1 is a copy of the sale deed. Exs.A-3 to A-9 are certain vouchers issued during 1971 for purchase of fabrics. How far they have got any correlation with the purchase of Ex.A-1 property, is not explained. But it can be seen from those vouchers that they were issued in favour of the plaintiff. Plaintiff is the youngest son, and if it is a family business, either it would have been issued in the name of the father or elder son. Exs.A-3 to A-9 do not show that plaintiff also contributed any share for the purchase of the property. All the other documents are of the year 1982 and 1985, long after the purchase of the property under Ex.

A-1. So, the materials produced on the side of the plaintiff in the nature of documentary evidence are irrelevant for the purpose of coming to the conclusion that Ex.A-1 property was purchased with those funds.

15. When we appreciate the evidence, it is admitted by plaintiff that he does not know weaving, nor defendants 2 and 3. It is also admitted that even his mother (P.W.2) also does not know anything about weaving. The only person who has knowledge about the profession is their father and the first defendant. It is also admitted that the father was managing the entire

business at least upto two years prior to his death, and the entire income and expenditure of the business was accounted through him.

16. Ex.A-1 property was purchased in the name of the first defendant. The only reason that is mentioned is, that everyone had confidence in the first defendant and, therefore, irrespective of the fact as to who contributed or what is their share, the acquisition was made in the name of the first defendant, for the benefit of all the members. Why it was not acquired in the name of the father is not explained though he died only two years later.

17. It is further stated by the plaintiff that the family left Salem about 30 years prior to the institution of the suit, while he was a child. At that time, the father had two or three looms, and the same were also disposed of to strangers and with that meagre capital, they came to Coimbatore and resided with her first sister (examined as P.W.3 in the case). Later, they shifted to a rental building. It is admitted by P.W.1 that the rental arrangement was with the first defendant and that too in the year 1960. Admittedly, at that time, the father was hale and healthy. Why the first defendant took the building on rent is not explained. It was that rented building which was subsequently purchased under Ex.A-1.

18. In the evidence of P.W.2, she said that when they left for Salem, the father had a sum of Rs. 3,000/- or Rs. 4,000/- in his possession, and that amount was invested for purchasing looms. Initially, they purchased three looms and subsequently by hard labour, the number of looms increased, and finally it came to nearly hundred, it was out of the income from those looms, the plaint property was purchased. As stated earlier, we must first understand the relationship between the first defendant and the mother. Except for the interested testimony of P.W.2, we do not have any other evidence to support the case of the plaintiff. At the same time, we have got documentary evidence in this case to show that during the relevant time, the first defendant was having his own income. We find that years before Ex.B-1, he was having his own business. he was investing moneys in partnerships. He was also subscribing to various chits, and he was also borrowing amounts from persons and was discharging the same. P.W.2 was asked about the independent business of the first defendant. She only pleaded ignorance. If the father was in affluent circumstances at Salem

and the intention was to improve the business, we would have at least some evidence in this case to show that the assets belong to them.

Admittedly they did not have any immovable property at Salem. Admittedly they were residing in a rented building and that too on a meagre rent of

Rs. 25/-. We must also know the number of members in the family. Except the elder daughter, who is the 5th defendant, who was married at that

time, they had other sisters. Children had to be educated. They had to be provided with food, and other daughters also had to be given in

marriage. So, these expenses were to be met, and if at all the father was having any income, it would have been sufficient only to meet the

expenses of the family. To show that the father was having Rs. 3,000/- or Rs. 4,000/- at the time when they migrated to Coimbatore, we do not

have any evidence at all.

19. In the case of joint labour or joint exertion, plaintiff will have to substantiate as to what is the nature of contribution done by him, for the family.

He admitted that till 1971, he was a student and thereafter he got employment in the Bank. What is the nature of contribution he could have made

is only to be assumed. Likewise, during the relevant period, defendants 2 and 3 were also employed. They were full-time employees, both in

Government service. That also shows that they would not have contributed anything towards the alleged joint labour or joint exertion.

20. It is in these circumstances, we have to consider the decision reported in Bhagwan Dayal Vs. Mst. Reoti Devi, and thereafter his heirs and

legal representatives v. Mst. Reoti (deceased) and after her death, Mst. Dayavathi), wherein their Lordships held thus:-

Coparcenary is a creature of Hindu Law and cannot be created by agreement of parties except in the case of reunion. It is a corporate body or a

family unit. The law also recognizes a branch of the family as a subordinate corporate body. The said family unit, whether the larger one or the

subordinate one, can acquire, hold and dispose of family property subject to the limitations laid down by law. Ordinarily, the manager, or by

consent express or implied, of the members of the family, any other member or members can carry on business or acquire property, subject to the

limitations laid down by the said law, for or on behalf of the family. Such business or property would be the business or property of the family. The

identity of the members of the family is not completely lost in the family. One or more members of that family can start a business or acquire property without the aid of the joint family property, but such business or acquisition would be his or their acquisition. The business so started or property so acquired can be thrown into the common stock or blend with the joint family property in which case the said property becomes the estate of the joint family. But he or they need not do so, in which case the said property would be his or their self-acquisition, and succession to such property would be governed not by the law of joint family but only by the law of inheritance. In such a case, if a property was jointly acquired by them, it would not be governed by the law of joint family; for Hindu law does not recognise some of the members of a joint family belonging to different branches, or even to a single branch, as a corporate unit. Therefore, the rights inter se between the members who have acquired the said property would be subject to the terms of the agreement whereunder it was acquired. The concept of joint tenancy known to English law with the right of survivorship is unknown to Hindu law except in regard to cases specially recognized by it. The acquisitions made by the members of different branches jointly cannot be impressed with the incidents of joint family property. They can only be co-sharers or co-tenants, with the result that their properties pass by inheritance and not by survivorship.

21. In 1968 - II S.C.W.R. 895 (G.Narayana Raju (dead) by his legal representative v. G. Chamaraju & others), the Supreme Court held that if a business stands in the name of any member of a joint family, it is for the coparcener to prove before Court that it is a family business. It was held thus:-

It is well established that there is no presumption under Hindu Law that a business standing in the name of any member of the joint family is a joint family business even if that member is the manager of the joint family. Unless it could be shown that the business in the hands of the coparcener grew up with the assistance of the joint family funds or that the earnings of the business were blended with the joint family estate, the business remains free and separate. The question therefore whether the business was begun or carried on with the assistance of joint family property or joint family funds or as a family business is at question of fact.

22. In 1976-I-M.L.J.105=89 L.W. 19 S.N. (R. Selvaraj v. R. Radhakrishna Pillai), a Division Bench of this Court also considered a similar

question and held thus:-

It is not every sporadic or unimpressive contribution by a member of the joint family, may be the father, that would make the resultant activity, a

joint family activity. The contribution of labour, service or money by one member of the joint family to the other should be so conspicuous and

impressive that on a prima facie examination of such material, a reasonable and prudent person should gain the impression that the two members

were so associated with the common object of exploiting a commercial activity to the advantage of the joint family as a whole and in general. In the

absence of such essential features, which would make such contribution by one member to the other a commercial activity the intendment and

purpose of which is to make it a joint family trade, it is hazardous to infer that such unsigned activity between the members would be equated to a

co-ordinated activity on their part equitable to the activity of members of a Hindu joint family resulting in the properties acquired by such common

exertions joint family properties.

23. In Mulla - "Principles of Hindu Law" - 15th Edition (1982) at pages 297 and 298, the learned Author says thus:-

Property jointly acquired -(1) Where property has been acquired in business by persons constituting a Joint Hindu family by their joint labour, the

question arises whether the property so acquired is joint family property, or whether it is merely the joint property of the joint acquirers, or whether

it is ordinary partnership property. If it is joint family property, the male issue of the acquirers take an interest in it by birth. If it is the joint property

of the acquirers, it will pass by survivorship, but the male issue of the acquirers do not take interest in it by birth. If it is partnership property, it is

governed by the provisions of the Indian Partnership Act, 1932, so that the share of each of the joint acquirers will pass on his death to his heirs,

and not by survivorship.

(2) If the property so acquired is acquired with the aid of joint family property, it becomes joint family property.

(3) If the property so acquired is acquired without the aid of joint family property, the presumption is that it is the joint property of the joint

acquirers, but this presumption may be rebutted by proof that the persons constituting the joint family acquired the property not as members of a joint family, but as members of an ordinary trade partnership resting on contract, in which case the property will be deemed to be partnership property.

24. In N.R Raghavachariar''s Hindu Law - Principles and Precedents - 8th Edition (1987), at page 212, the learned author has said thus:-

Where some of the collaterals in a coparcenary acquire property without the aid of ancestral assets, they cannot set up a sub-coparcenary as between themselves and to the exclusion of the other coparceners because a coparcenary cannot be created by an act of parties.

25. On the basis of evidence, it cannot be held that Ex.B-1 property was purchased out of joint exertion or labour of the members of the family.

As stated earlier, of the five coparceners, only the father and the elder son had contributed labour or exertion for the business: If that be so, it

cannot be said that the other coparceners also contributed in any way. The father and the elder son alone cannot be a joint family to the exclusion

of the other members, nor can there be a coparcenary to the exclusion of defendants 2 and 3. Since the other coparceners have not contributed

anything, there cannot be any question of joint exertion and getting the benefit of the acquisition to them. If that be so, the question of treating the

plaint property as a family property will never arise.

26. The case of the first defendant was that all along, the father and the first defendant were doing separate business. The lower appellate court

appreciated the evidence and came to the conclusion that the statement must be true.

27. There is one big circumstance against the plaintiff in mis case, that is, long before the purchase under Ex. A-1, an agreement for sale was taken

as evidenced by Ex.B-12. That agreement for sale is dated 20-9-1972. It was years after, the sale was taken. The agreement for sale also stands

in the name of the first defendant. The subsequent conduct also shows that all the members treated the plaint property as property belonging to the

first defendant alone. On 1-6-1977, i.e., within a few months after the purchase of the property, it was mortgaged for a sum of Rs. 30,000/-. The

mortgage deed is attested by the plaintiff and the third defendant who are now

the rival claimants for the property. The document was executed by the first defendant claiming absolute ownership. Even though attestation may not amount to estoppel, that is also a relevant circumstance to be considered in this case. To the knowledge of the plaintiff and the third defendant, the 1st defendant was dealing with the property as his own is clear from Ex.B-9. The document is not impeached in the suit.

28. The trial court, while discussing the evidence, assumed that the first defendant should prove that the property is his self- acquisition. The trial court was of the view that since the first defendant was in difficult circumstances, he would not have acquired the property. According to me, the burden was wrongly cast on the first defendant.

29. The law is well-stated. Merely because there is a joint family, it does not follow that the family possessed any property. It is also well-settled that if a person wants to claim a property as family property, it is for him to substantiate the same. As held in Achuthan Nair Vs. Chinnamu Amma and Others, 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. On the admission of plaintiff himself, the father was managing the day-to-day affairs of the business till two years prior to his death. The first defendant had nothing to do with that. The father was the manager. If the first defendant had nothing to do with the property or business, it is for the plaintiff to prove why the family purchased the property in the name of the first defendant. The plaintiff has miserably failed in that attempt.

30. The lower appellate court had considered the evidence in its entirety, and has come to the conclusion that the burden is only on the plaintiff, and that the available materials also shown that the first defendant had his own source of income, and the property was purchased by him. The mistake committed by the trial court was corrected by the lower appellate court. I do not think, the lower appellate Court has misread the evidence that has been let in this case, nor has it omitted to consider any relevant piece of evidence, including the evidence of P.W.2 in coming to the conclusion that the property is the self-acquisition of the first defendant. The lower appellate court has also rightly cast the burden of proof only on the plaintiff, and on a correct approach, it came to the conclusion that the

plaintiff is not entitled to any relief. The substantial questions of law in Second Appeal No. 1691 of 1986 are therefore, found against the plaintiff.

31. Second Appeal No. 393 of 1987 is an appeal by the third defendant, who supported the case of the plaintiff, to a certain extent He does not

say that there was a joint family property. But he supports the allegation in the plaint that the property was purchased out of joint exertion and

labour and, therefore, the beneficiaries are the male members and, therefore, the first defendant is entitled to a share, and that the first defendant's

share has been gifted to him under Ex.B-6. On the questions of law raised in that Second Appeal, I hold that Ex.B-9 was rightly interpreted by the

lower appellate court. If the third defendant had any right in the plaint property, as is now claimed, he would not have attested the mortgage deed

wherein the first defendant claimed absolute title. With open eyes, he has attested the document and allowed the first defendant to borrow on the

security. This, according to me, amounts to estoppel. It also amounts to an admission. The second question of law raised in S.A. No.393 of 1987

is found against the appellant. Question Nos. 1, 3, 5 and 6 raised in this Second Appeal have already been answered in the other appeal, namely,

S.A. No. 1691 of 1986.

32. On Question No. 4, the lower appellate court has come to the conclusion that there is no evidence to show that Ex.B-6 settlement deed has

been executed (accepted?) by the third defendant. That is purely an appreciation of evidence. Learned counsel for the appellant was not in a

position to put forward any argument against the said finding. Question No. 4 in S.A. No. 393 of 1987 is also found against the appellant/third

defendant. In the result, all the substantial questions of law that are raised in both the Second Appeals are answered against the respective

appellant. The Second Appeals are dismissed with costs.