(2013) 08 MAD CK 0037

In the Madras High Court

Case No : A.S. (MD) No. 1096 of 1995

Sirumbayee, Sembayee and Thirupathy	APPELLANT
Vs	
Seerangammal, Thiruvengadam, Mangan Muthiriar and P. Sivalingam	RESPONDENT

Date of Decision : 01-08-2013

Acts Referred:

Citation : (2013) 08 MAD CK 0037

Hon'ble Judges : R. Karuppiah, J

Bench : Single Bench

Advocate : N. Krishnaveni, for the Appellant; P. Jayaprakash Narayanan for (R1 and R2), No Appearance for Respondent-3 and P. Thiagarajan for Respondent-4, for the Respondent

Final Decision : Allowed

Judgement

R. Karuppiah, J.—This Appeal Suit has been filed by the appellants, who are defendants 3 to 5 in the Suit, as against the decree and

judgment, dated 30.06.1994, made in O.S. No. 356 of 1983, on the file of the I Additional Subordinate Court, Tiruchirapalli. For the sake of

convenience, the parties arrayed in the suit is referred in this appeal.

2. The respondents 1 and 2, who are the plaintiffs, filed a Suit for partition and other reliefs. Briefly the case of the plaintiffs stated in the plaint is

that the plaintiffs are the sisters of the 1st defendant, who are the children of one Samundan and his wife Sembayee. Both Samundan and

Sembayee were died 1-1/2 years and 5 years ago respectively. Originally Samundan owned ""A"" Schedule (five items), totalling 56 cents of Punja

Lands, as his ancestral properties. The income from the ""A"" schedule properties were not sufficient even for maintenance of the family. From out of the income from lease hold land and brokerage, the entire ""B"" Schedule properties were purchased by Samundan for the benefits of members of

the family in his name as well as in the name of his wife. Samundan also advanced loans to 3rd parties for interest and from out of the income, he

had constructed a pacca terraced house. Therefore, the entire ""B"" schedule properties are self-acquired properties of the deceased Samundan and

his wife Sembayee. Till the death of Samundan, the entire suit properties were enjoyed all the members of the family including the plaintiffs and 1st

defendant. After the death of Samundan, at the instigation of his wife, the first defendant has sold the lands in Item 1 and 3 of ""B"" schedule i.e., 1

Acre 9 cents out of 3 acres 51 cents in S.F. No. 331/4 and 1 acre 24 cents, out 6 Acres 39 cents in S.F. No. 338/10, totalling 2 acres 33 cents,

situated in Kallai Village in favour of the 2nd defendant. The 2nd defendant was fully aware that the 1st defendant alone was not the absolute

owner of the properties and the plaintiffs are also entitled to equal share in the properties. Therefore, the 2nd defendant is not a bonafide purchaser

for value without notice. Since the plaintiffs are not parties, the sale deed is not binding on the plaintiffs and hence, no necessity to set aside the sale

deed. At the time of death of Samundan, the family had no debts and hence, there was no need and necessity to alienate the properties without the

knowledge and consent of the plaintiffs. Inspite of repeated demand, the 1st defendant and his wife were not agreeable to divide the suit

properties. Hence, the plaintiffs filed this suit for their 2/3 share in the suit properties. During the pendency of the Suit, the first defendant died on

12.01.1985, leaving defendants 3 to 5, as his legal heirs and hence they were impleaded as defendants in the Suit on 29.03.1986. Further, the

plaintiffs have issued notice to 6th defendant/Sivalingam and in the reply notice issued by the 6th defendant viz., Sivalingam, it is stated that he had

purchased the house property from the 1st defendant, and therefore, impleaded as 6th defendant in this Suit. The above said sale deed is not true,

valid and not supported by consideration and also not binding on the plaintiffs. ""C"" schedule mortgaged amount of Rs. 1000/- is the assets due to

the deceased Samundan and hence, the plaintiffs are entitled to 2/3 share in the mortgaged amount also and therefore, filed the suit for partition and

separate possession of 2/3 shares in the suit properties in favour of both plaintiffs.

3. The deceased first defendant while alive filed written statement in which it is denied the various averments in the plaint that the properties

standing in the name of Samundan and Sembayee were purchased by Samundan from out of his income from leasehold lands and brokerage and

also denied the averments that Samundan owned only 56 cents of agricultural lands and it is insufficient for the maintenance of the family.

According to the first defendant, the joint family consisting of 1st defendant and his father had considerable properties produced enough income

and formed the nucleus, out of which, the other suit properties also acquired and hence ""B"" schedule properties are not the self acquired properties

of Samundan and his wife Sembayee. The 1st defendant was looking after the lands contributing all his energy and labour, even during his father''s

life time, since his father was imbecile and only out of such exertion, the properties came to be acquired out of productive ancestral nucleus, though

in the name of his father Samundan, being the eldest male member of the family out of respect for his father. The properties were also treated as

joint family property of the first defendant and his father and they were enjoyed as co-owner. Further, the sale deed in favour of the 2nd defendant

was for legal necessity and binding on the family and hence, the plaintiffs cannot ignore the sale. As a co-owner and coparcener with his father, he

is entitled to half share and remaining half share of Samundan and his mother, this defendant has 1/3 share as one of the legal heirs of the deceased.

The plaintiffs cannot claim anything more than 1/6 share each in the available properties of the family including those alienated items and ""C

schedule property also. The suit has not been properly valued and paid court fee and also barred by limitation. Therefore, prayed for dismissal of

the suit.

4. The 2nd defendant in the Suit remained ex-parte. Defendants 3 to 5 adopted the written statement filed by the deceased 1st defendant.

5. The 6th defendant filed separate written statement in which it is denied the allegation that the suit properties are family properties of Samundan

and his wife Sembayee and all the properties were purchased from out of his income from the leasehold lands in his name as well as in the name of

his wife. It is further denied that Samundan owned only 55 cents of Punja lands as his ancestral property and the income from the ancestral property was hardly sufficient for maintaining his family and from out of the income from the leasehold lands, brokerage, ""B"" schedule properties

were purchased by Samundan for the benefits of his members of the family are all false. The 6th defendant purchased Item Nos. 5 to 8 of ""B

schedule properties from the defendants 1 and 3 on 15.03.1983 for a sum of Rs. 47,000/-. The deceased first defendant purchased the properties

from out of his earnings and also income from the joint family properties in the name of his father and they are joint family properties and therefore,

the properties are not separate properties of Samundan and his wife Sembayee. The 6th defendant purchased suit property Item No. 7, which is

only an old house. After purchase, it was demolished and put up pukka construction in the site after spending more than Rs. 6,00,000/- by the 6th

defendant. The plaintiffs have been keeping quiet and having been watching and hence, the plaintiffs are estopped from demanding partition. The

6th defendant denied the averments that the first defendant was sick person and has been under the control of his wife Sembayee. It is also averred

in the written statement that Samundan or Sembayee have no independent means or resources to purchase any property. Further, the 6th

defendant, is a bonafide purchaser for valuable consideration and hence even for any reason, the Court comes to the conclusion that the suit

properties are liable for partition, the item Nos. 5 to 8 of ""B"" Schedule may be allotted to the share of defendants 1 and 3. Hence, he prayed for

dismissal of the suit.

6. The trial Court has framed the following issues for consideration:--

1. Whether the plaintiffs are entitled to share in suit A, B Schedule properties and C schedule mortgage? If so, to what extent?

2. Whether the defendants are bound to render accounts as to the income of the properties?

3. To what relief?

7. To prove the case of the plaintiffs, the 2nd plaintiff alone deposed as P.W.1 and marked 12 documents as Exs.A1 to A12. On the side of the

defendants, 2 witnesses were examined as D.Ws.1 and 2 and no documents were marked.

8. On perusal of the above said oral and documentary evidence, the trial Court has answered for first issue and held that the plaintiffs 1 and 2

together entitled to 2/3 share in ""B"" and ""C"" schedule properties and 2/6 share in ""A"" schedule properties and also held that the plaintiffs are

entitled to mesne profits, except item No. 4 in ""B"" schedule and passed a preliminary decree accordingly.

9. Aggrieved over the above said preliminary decree and judgment passed by the trial Court, the appellants, who are defendants 3 to 5 in the

above said Suit, preferred this first appeal.

10. The points for consideration in this appeal are:--

1. Whether the suit second schedule properties are self acquired properties of the deceased Samundan and his wife, as contended by the plaintiffs

or the second schedule properties purchased out of income from the joint family properties and treated as joint family properties, as contended by

the appellants/defendants.

2. Whether the findings of the trial Court that the respondents 1 and 2, who are plaintiffs in the Suit, are entitled to 2/3 share in ""B"" and ""C

Schedule properties and 2/6 share in Suit ""A"" schedule property, is correct?

3. Whether the appeal is to be allowed?

11. The relationships between the parties i.e., the plaintiffs are sisters of the deceased first defendant, who are children of one deceased Samundan

and his wife Sembayee is not disputed. Both sides admitted that ""A"" schedule properties viz., S. No. 250/7 - 0.13 cents; S. No. 252/4 - 0.5 cents;

257/13 - 0.17 cents; S. No. 267/3 - 0.14 cents; S. No. 267/7 - 0.7 cents, totalling 56 cents Punja lands are joint family properties of the plaintiffs

and defendants 1 to 5. The trial Court has considered the oral and documentary evidence adduced on either side and finally held that the plaintiffs,

who are daughters of the above said Samundan, are entitled to 2/6 share in the above said ""A"" schedule properties, since they are joint family

properties. The trial Curt correctly held that the deceased first defendant is entitled to half share and father of the plaintiffs are entitled to half share

and in the father''s half share, the plaintiffs entitled to 2/6 share, as daughters of the deceased Samundan. Therefore both sides not disputed the

findings of the trial Court that both the plaintiffs are entitled to 2/6 share i.e., 1/6 each in ""A"" schedule properties and the deceased first defendant is

entitled to 4/6 share. Now after the death of first defendant, his legal heirs viz., the appellants/defendants 3 to 5 are entitled to the above said 4/6 share.

12. There is no dispute between the plaintiffs and defendants in respect of 4th item of ''B'' schedule properties. Admittedly, the 4th item was

purchased by the mother of the plaintiffs and 1st defendant viz., Sembayee. The trial Court has discussed in detail and applying the provision of

Hindu Succession Act, and finally held that, since the above said property purchased by the mother of the plaintiffs and the first defendant, the

above said property is self acquired property of the mother and therefore, both the plaintiffs are entitled to 1/3 share each and the first defendant is

entitled to 1/3 share. The learned counsel appearing for the appellant not disputed the above said findings and admitted the view of trial Court.

13. The main dispute between the plaintiffs and defendants in this appeal is only relating to ''B'' schedule items, except item No. 4 alone. According

to the plaintiffs, the above said ''B'' Schedule items, except item No. 4 were purchased in the name of the deceased Samundan, who is the father of

the plaintiffs and the first defendant and the above said properties are self acquired properties of Samundan and hence, the plaintiffs are entitled to

1/3 share in the above said properties. According to the defendants, the Samundan, who is the father of plaintiffs and first defendant, was

Kartha/Manager of the Hindu Joint family and the family had five items of ''A'' Schedule landed properties and out of income from the above said

''A'' schedule properties, the ''B'' schedule properties were purchased and enjoyed the above said properties, as joint family properties and the

above said properties are treated as joint family properties and hence, the plaintiffs 1 and 2 are not entitled to 1/3 share in ''B'' schedule properties,

(except Item No. 4) only 1/6 share entitled to each plaintiffs. Therefore, the main dispute is whether the entire items in ''B'' schedule, except 4th

item, are self acquired properties of Samundan, as contended by the plaintiffs or purchased in the name of Kartha out of the income from joint

family properties and treated as joint family properties, as contended by the defendants.

14. As already stated both sides admitted that the availability of five items of ""A"" schedule properties viz., Punja lands as joint family properties and

also admitted the availability of income from the above said properties. The contention of the plaintiffs is that the above said income from the above said properties is not sufficient to purchase the properties and therefore, ""B"" schedule properties, except 4th item, were purchased from the own

earnings of father viz., Samundan.

15. The learned counsel appearing for the appellants/defendants submitted that the trial Court has not at all considered the averments made in the

written statement and also not looked into the oral evidence adduced by P.W.2, who is the 2nd plaintiff but only relied on certain portion of oral

testimony of defendants witnesses at the time of cross examination, decreed the suit, as prayed for by the plaintiffs.

16. Per contra, the learned counsel appearing for the respondents/plaintiffs would submit that the trial Court has rightly discussed the settled

principles of law i.e., the onus is on the side of the defendants to prove the fact that the above said properties are joint family properties but the

defendants failed to prove the initial burden and therefore, the findings of the trial Court is valid and no interference needs in the above said

findings.

17. As already discussed, the five items of ''A'' schedule landed properties are available as joint family properties and also admitted that Samundan

was Kartha of Hindu undivided joint family at the time of purchase of the above ''B'' schedule properties.

18. A perusal of Ex.A1, sale deed, reveals that the properties purchased on 24.06.1946 for sale consideration of Rs. 1400/- only. But the above

said amount of Rs. 1400/- not paid entire amount at the time of execution of sale deed, but the vendor has received the amount earlier from

Samundan on various dates and also undertook to discharge the mortgaged loan of the vendors and on that condition, executed the above said

sale deed. It is relevant to extract the relevant portion regarding the payment of consideration in the above said sale deed hereunder:--

(***)

A perusal of the above said averments made in Ex.A1 clearly proves that the above said Samundan only paid meagre amount at the time of above

sale deed and undertook to discharge the loans on various dates subsequently.

19. A perusal of Ex.A2, sale deed, reveals that the properties purchased after 11 years from Ex.A1 sale deed i.e., on 07.08.1957. The

consideration for the above said property is only Rs. 3000/-. The above said

Samundan has purchased the properties under Ex.A5 on 26.06.1969

only for sale consideration of Rs. 8000/- but the above said amount also not paid at the time of execution of sale deed as one time payment and

only paid Rs. 1000/- on the date of sale deed and the amount of sale consideration of Rs. 7000/- retained for discharging the mortgaged loan of

the vendors. The relevant portion in the sale deed is extracted hereunder:--

(***)

20. A perusal of the above said averments made in the sale deed reveal that Samundan has paid only Rs. 1000/- on the date of sale and undertook

to discharge the mortgaged loan amount of Rs. 7000/-. In the instant case, absolutely no oral and documentary evidence adduced on the side of

the plaintiffs that when the above said balance sale consideration were paid by the said Samundan. All the ''B'' schedule properties, except item

No. 4, purchased under Exs, A1, A3 and A5 by Samundan, who is admittedly Kartha of the family.

21. In the above said circumstances, the learned counsel appearing for the plaintiffs submitted that the above said ''B'' schedule properties, except

4th item, purchased in the name of Samundan, who is the father of the plaintiffs and 1st defendant and the defendants have not proved the sufficient

nucleus from the ancestral properties or joint family properties to purchase the above said properties and therefore the above said properties are

self acquired properties of the above said Samundan. To substantiate the contention of the plaintiffs, the learned counsel relied on the decisions

reported in AIR 2003 3800 (SC); K.V. Ramasamy Vs. K.V. Rahgavan, K.V. Sridharan, Lalitha Viswanathan and Jeyalakshmi Sridharan, (Sri

Chandru Vs. K. Nagarajan & Others) and 2012 (4) L.W. 179 (Padmini Vs. Easwari & Others) and submitted that the above said ''B'' schedule

properties, except 4th item purchased in the name of Samundan, who is the father of the plaintiffs and first defendant and hence, the above said

properties are self acquired properties of Samundan. Further the learned counsel for the plaintiffs pointed out that, as if the above said properties

were purchased by Samundan out of joint family properties and for the purpose of joint family and therefore, the onus is on the defendants to

prove the above said fact that the joint family having sufficient nucleus to purchase the above said properties and then only the burden was shifted to the plaintiffs to prove that the properties were purchased out of own earnings of the deceased Samundan. But, in the instant case, the defendant

has failed to prove the income of ancestral properties and therefore, the trial Curt has correctly held that the above said properties are self acquired

properties of Samundan.

22. Per contra, the learned counsel appearing for the defendants would submit that admittedly five items of ""A"" schedule properties are available as

ancestral joint family properties and also admitted that both the above said Samundan and his son i.e., the deceased first defendant and the

plaintiffs were lived jointly as joint family and therefore, the above said properties were purchased out of income from joint family properties and

also treated as joint family properties. Further, the learned counsel submitted that the sale consideration of above said Exs.A1, A2 and A5 are

meagre amounts and also not paid on the date of sale deed and purchased the above said properties several years one after other and therefore,

the above said properties are joint family properties and in the above said circumstances, the onus is on the plaintiffs to prove that ""B"" schedule

properties, except 4th item purchased out of independent income of the above said Samundan, but in the instant case, the plaintiffs miserably failed

to prove the income of Samundan by adducing any oral and documentary evidence, except the oral testimony of P.W.1.

23. The learned counsel appearing for the defendants further submitted that in the instant case, the plaintiffs themselves admitted the availability of

''A'' schedule landed properties and also admitted in the plaint itself that ''B'' schedule properties were purchased by Samundan for the benefit of

the members of the family. The above said admission in the plaint itself proved that the suit ''B'' schedule properties, except 4th item purchased out

of income from joint family properties and also for the benefit of family members and also treated the above said properties as joint family

properties and therefore, the above said properties are not separate properties of Samundan. It is further pointed out by the learned counsel for the

defendants that except the mere averments made in the plaint and the interested oral testimony of P.W.1, who born only after several years from

the date of sale deed, no other reliable oral and documentary evidence to prove that the above said Samundan was having separate income from other sources and therefore, from the averments in the plaint and oral evidence itself clearly shows that except the income from joint family

properties, no other income to purchase ''B'' schedule properties, except item No. 4. Therefore, the trial Court has failed to properly appreciate

and consider the facts and wrongly held that the above said properties were self acquired properties of Samundan.

24. As rightly contended by the learned counsel appearing for the defendants, in the plaint itself, the plaintiffs have admitted and averred as

follows:--

From out of the income from lease hold items and brokerage, the entire ''B'' schedule properties were purchased by Samundan for the benefits of

members of the family. Till the date of death of Samundan, the entire suit properties were enjoyed by all the members of the family including

plaintiffs and first defendants.

25. A careful reading of the above said averments made in the plaint itself clearly proved that the plaintiffs themselves admitted in the plaint that the

suit properties were purchased for the benefit of joint family members and also the properties are enjoyed by all the joint family members and

hence, the properties are not treated as self acquired properties of the above said Samundan, as rightly contended by the learned counsel for the

appellants.

26. The case of the plaintiffs, as per the plaint is that Samundan taken lease hold lands, doing brokerage and also advanced loans to the 3rd parties

for interest. Out of which, the above said ''B'' schedule properties were purchased and also constructed a house in the properties. Except the

averments made in the plaint and the oral testimony of interested witnesses viz., P.W.1, no other documentary or oral evidence to prove the above

said facts. Admittedly, the age of P.W.1, who is the 2nd plaintiff in the Suit was 35 years as on 13.06.1994. Therefore, at the time of purchase of

''B'' schedule properties viz., 1946, 1957, 1969 P.W.1 not born or minor and therefore, he cannot have any knowledge about the income and

payment of consideration for the above said sale deeds. Except P.W.1, no other witnesses to prove the above said fact. Therefore, P.W.1 is not a

competent witnesses to speak about the avocation and income of the deceased at the time of purchasing the suit ''B'' schedule properties.

27. Per contra on the side of the defendants, D.W.2, one Gopalan was examined, who was 72 years old. He has deposed that the joint family

having half acre ancestral properties in which cultivated Sugarcane, plantain trees and flowers and the family having excess income from the above

said agricultural income out of which the said ''B'' schedule properties were purchased. As already discussed, the ''B'' schedule properties were

purchased by Samundan in the year 1946, 1957 and 1969 for meagre amount and also not paid the entire consideration at the time of sale deeds.

It is not disputed that all the family members were leaving together and the plaintiffs themselves admitted that ''B'' schedule properties purchased

only for the benefit of joint family and also all the joint family members enjoyed the suit properties till the death of Samundan. Therefore, the above

said admission in the plaint and also from the oral testimony of P.W.1 and D.Ws.1 and 2 clearly proved the fact that the family having ancestral

landed properties and out of the above said income, ''B'' schedule properties were purchased by one after other after several years and also reveal

that Samundan has no other income, except the agricultural income from ancestral properties. Therefore, the decision relied on by the learned

counsel for the respondents/plaintiffs not applicable to the facts of the present case.

28. The first decision relied on by the plaintiffs i.e AIR 2003 3800 (SC) it is stated as under:--

15. ...After noticing these settled propositions, it was observed that if a property is acquired in the name of a karnavan, there is a strong

presumption that it is a Tarwad (joint Hindu family) property and the presumption must hold good unless and until it is rebutted by acceptable

evidence. This Court did not hold that if a property is acquired in the name of karta, the law as to presumption or shifting of onus would be

different. The question of presumption would depend upon the facts established in each case.

17. In view of the aforesaid discussion, the respondents having failed to discharge the initial burden of establishing that there was any nucleus in the

form of any income whatsoever from Item 2 property and no other nucleus was claimed, the burden remained on the respondents to establish that

Item 1 property was joint family property. In this view, the fact that the first appellant has not any evidence to establish his separate income is of no consequence insofar as the claim of the respondents is concerned....

18. The legal principle, therefore, is that there is no presumption of a proper being joint family property only on account of existence of a joint

Hindu family. The one who assets has to prove that the property is a joint family property. If, however, the person so asserting proves that there

was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would

shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family

nucleus that was available.

29. In the above said decision viz. AIR 2003 3800 (SC) is concerned, as rightly pointed out by the learned counsel appearing for the defendants,

in the instant case, the properties purchased by Kartha of the family and A scheduled joint family property also available at the time of purchase

and also pointed out that the question of presumption would depend upon the facts established in each case and in the above said case, it is not

proved there was nucleus in the form of any income and therefore, the facts of the above said case is not applicable to the instant case.

30. The next decision relied on by the learned counsel for the respondents i.e. K.V. Ramasamy Vs. K.V. Rahgavan, K.V. Sridharan, Lalitha

Viswanathan and Jeyalakshmi Sridharan, in which in para 47, it is stated as under:--

47. The specific contention of the plaintiff is that the remaining suit properties have been acquired through the income derived from the business run

by the first defendant and therefore, it can also be clothed as joint family properties. It has already been pointed out that the business run by the

first defendant and his elder brother K.V. Srinivasan Iyer is their separate business. The plaintiff himself has clearly admitted that by utilising the

surplus income of the business run by his father and his senior paternal uncle, the remaining suit properties have been acquired. Since the business

itself is a separate business, it is needless to say that the acquisition of the remaining suit properties are also self-acquisition.

31. In so far as the second decision viz. K.V. Ramasamy Vs. K.V. Rahgavan, K.V. Sridharan, Lalitha Viswanathan and Jeyalakshmi Sridharan, is

concerned, as rightly pointed out by the learned counsel for the defendants, in the above said decision it was held that the plaintiff failed to prove

the possession of sufficient nucleus, surplus income and also held that the defendant established that the partnership business was run by the first

defendant and his elder brother Srinivasan Iyer as separate business and the disputed properties purchased out of income derived from the

separate business run by the first defendant and his elder brother Srinivasan Iyer and hence concluded in the above said case as disputed

properties were separate properties not joint family properties and therefore, the facts of the above said case is not applicable to the facts of the

present case.

32. In yet another decision relied on by the respondents/plaintiffs i.e., (2012 (2) L.W. 326) (cited supra) in which in para 28, it is stated as under:-

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28. Case of the plaintiffs is that the acquisitions were made from out of the income from ancestral property/joint family property. To prove that the

suit properties are joint family properties, the plaintiffs are to adduce evidence as to existence of nucleus. The mere existence of nucleus alone is

not enough to hold that the acquisitions were made utilising the income from nucleus. Absolutely, there is no evidence as to the existence of nucleus

and what was the income derived from such nucleus. On behalf of the plaintiffs, it was submitted that the plaintiffs cannot be deprived of their share

in item No. 1. By perusal of the description of the suit properties, it is seen that item No. 1 is only the house site and house thereon. In the absence

of any proof regarding nucleus or the income of the joint family and in the absence of any evidence, the contention of the plaintiffs that the suit

properties are the joint acquisitions does not merit acceptance.

33. In so far as the above decision viz., (2012 (2) L.W. 326) (cited supra) is concerned, as rightly pointed out by the learned counsel for the

defendants, it is also not applicable to the facts of the present case, since in the above said case, no evidence was adduced as to the existence of

joint family property and the income derived there from, since the only property available is house and house site. Therefore, the fact of the above

said case is also not applicable to the present case.

34. In the another decision relied on by the respondents/plaintiffs i.e., (2012 (12) L.W. 179) (cited supra) in which in para 23, it is stated as

under:--

23. Admittedly, the plaintiff has not produced any document to prove that item Nos. 1 to 6 in second schedule properties were purchased by

Elumalai out of the income from joint family properties. Except oral evidence, no other documents were produced to prove the above said facts. In

the oral evidence also, the plaintiff has not stated about the excess income from the joint family properties so as to purchase the second schedule

properties. No reason is stated as to why the above said properties were purchased in the name of sons and daughter-in-law while Elumalai was

alive at that time. Admittedly, the sons of Elumalai viz., Raman and Lakshmanan were employees in Railway and having independent income and

therefore the contention of the plaintiff that the second schedule properties are joint family properties, is also not sustainable.

35. In so far as the above decision viz., (2012 (12) L.W. 179) (cited supra) is concerned, as rightly pointed out by the learned counsel for the

defendants, this decision is also not helpful, since in the above said case, the properties were purchased in the name of sons and daughter-in-law

while the Kartha of the family viz., Elumalai was alive at that time and also the above said purchasers viz., Raman and Lakshmanan were

employees in the Railway and having independent income and hence, the contention that the properties are purchased within the joint family

properties income, not accepted and hence, the above said facts of the above said case are also not applicable to the facts of the present case.

Therefore, all the four decisions relied on by the learned counsel for the plaintiffs are not helpful to the plaintiffs, since the plaintiffs have failed to

prove the case by reliable oral and documentary evidence and also admitted several facts in the plaint itself, as already discussed.

36. The trial Court, as already discussed, not at all considered the pleadings in the plaint and oral testimony of P.W.1 and only considered the stray

lines of the defendants witnesses and held that ''B'' schedule properties (except 4th items) are self acquired properties of Samundan. The above

said findings of the trial Court is not supported by any evidence and it is perverse, as rightly contended by the learned counsel for the defendants

and therefore, the second schedule properties (except 4th item) are joint family properties, as rightly contended by the learned counsel for the defendants and these properties are not self acquired properties of the deceased Samundan, as contended by the plaintiffs and answered the first

point for consideration in favour of the defendants and as against the plaintiffs.

37. In view of the reasons stated above, the finding of the trial Court i.e., the plaintiffs are entitled to 2/3 shares in entire ''B'' schedule properties is

not correct and the plaintiffs are entitled to only 2/6 share in ''B'' schedule (except 4th item) properties and 1/3 share in 4th item in ''B'' schedule

properties. With regard to ''C"" schedule mortgaged amount is concerned, the learned counsel appearing for the defendants has not seriously

objected to the about the findings and hence, the plaintiffs are entitled to 2/3 share in ''C'' schedule mortgaged amount also and therefore, the

plaintiffs are entitled to 2/6 share in entire ''A'' schedule, 2/6 share in ''B'' schedule (except 4th item) properties, 2/3 share in item 4 in ''B'' schedule

and ''C'' schedule properties and answered the second point for consideration also as against the plaintiffs and in favour of the defendants.

38. From the above said discussion, the decree and judgment passed by the trial Court is to be set aside and the appeal is to be allowed and to be

held that the plaintiffs are jointly entitled to 2/6 share in entire ''A'' (each 1/6 share) schedule properties and except 4th item in ''B'' schedule

properties and 2/3 share in 4th item in ''B'' schedule and ""C"" schedule. In the result, the Appeal Suit is allowed and the preliminary decree and

judgment passed by the trial Court is modified and passed preliminary decree for partition and allotted 1/6 share each to both the plaintiffs in ''A''

schedule properties and ''B'' schedule properties, (except 4th item) and 1/3 share each in 4th item in ''B'' schedule and ''C'' schedule properties.

Considering the relationships between the parties, there shall be no order as to costs.

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