

(2012) 11 MAD CK 0146

In the Madras High Court

Case No : S.A. No's. 738 and 2048 of 2002 and C.M.P. No. 648 of 2002

S/o. Subbu Gounder

APPELLANT

Vs

S. Duraisamy, S. Viswanathan, Rukmani and V. Suresh
Kumar
S. Duraisamy, S. Viswanathan, Rukmani and V.
Suresh Kumar Vs Velappan

RESPONDENT

Date of Decision : 02-11-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27

Citation : (2012) 11 MAD CK 0146

Hon'ble Judges : S. Vimala, J

Bench : Single Bench

Advocate : V. Ragupathy, in S.A. 2048 of 2002 assisted by P.P. Shanmugasundaram for Mr. V. Bharathidasan, for the Appellant; S.V. Jayaraman, in S.A. 2048 of 2002 Senior Counsel for Mr. Mohana Sundararajan in S.A. 738 of 2002, for the Respondent

Final Decision : Dismissed

Judgement

Honourable Mrs. Justice. S. Vimala

1. What is the scope of the presumption in the case of acquisitions in the names of male members of a joint family and the female members of a joint family?

1.1. What is the foundation for the distinction in the presumptions arising when the male/female member of the family acquiring the property in his/her name?

These are the main issues to be answered in the second appeal.

S.A. No. 738 of 2002 has been filed by the plaintiff, as against the non-granting of partition in respect of "A" schedule property, by the first appellate court.

1.2. S.A. 2048 of 2002 has been filed by the defendants, as against the granting of partition in respect of "B" schedule property, by the first appellate Court.

2. The Trial Court dismissed the claim for partition in O.S. No. 1724 of 1996. As

against the dismissal of the claim, the plaintiff preferred the first appeal in A.S. No. 58 of 2001. The first appellate court decreed the claim for partition in respect of "B" schedule property and confirmed the dismissal of the claim for partition in respect of "A" schedule property.

2.1. As against the judgment and decree of the first appellate court, the respective parties have preferred these appeals and the second appeal has been admitted in each of the appeal under the following substantial questions of law:

S.A. 738 of 2002

- a. Whether the findings of the lower appellate court that the suit properties are not joint family property is vitiated by misreading of evidence when PW. 1 to PW. 4 deposed to the effect that the suit properties are joint family properties ?
- b. Whether the lower appellate court, as a final court of fact, erred in not advertng to the evidence on record independently as held by various decisions of apex court and also this Hon"ble Court ?
- c. Whether the courts below are right in rejecting the evidence of PW. 3, paternal uncle and PW. 4, sister, of both appellant and 1st respondent?

S.A. 2048 of 2002

1. Whether the courts below are right in decreeing the suit in respect of the second item of the property after holding that the first item is not a joint family property ?
2. Whether the courts below are right in holding that the second item of the suit property is purchased by the first appellant without any pleading and evidence by the plaintiff for the same ?
3. The case of the plaintiff:

The plaintiff and the first defendant are the brothers. The suit properties described as "A" and "B" schedule belong to the joint family. The sale deed to the suit properties were taken in the name of the members of the joint family. The plaintiff and the first defendant are equally entitled to the suit properties. The suit properties were looked after by the first defendant as the plaintiff was away from the village for his job requirement. However, he was a frequent visitor to the suit property. The plaintiff's request for the partition of "A" and "B" schedule property was not responded to by the first defendant. Instead of granting the partition of properties, the first defendant sold the property in favour of defendants 2 to 4 who have been impleaded as parties in I.A. No. 150 of 1994.

4. The suit claim was resisted by the first defendant, as supported by the defendants 2 to 4 and the grounds are:

(i) The suit property is not the joint family property of the plaintiff and the first defendant and the plaintiff was not in joint possession of the property.

(ii) Plaintiff is not living in the suit property.

(iii) The plaintiff's bereft of details regarding source of purchase money, the name of the person in whom the property stands and the character of the suit property.

(iv) the first item of the suit property was purchased by Perumayee Ammal, through a registered sale deed dated 14.6.1936 with her own funds. There was no ancestral nucleus at all at the time of purchase. The first defendant purchase item No. 1 of the suit property from Perumayee Ammal and her daughters for a proper and valuable consideration by virtue of sale deed dated 4.11.1965.

(v) The second item of the suit property was purchased by the first defendant from the previous owner through the sale deed dated 6.1.1990. Plaintiff did not even know the whereabouts of the property.

(vi) Both the items are self acquired property of the first defendant.

(vii) Subsequent to the suit, the first defendant has sold the properties to defendants 2 to 4 (Exs. B1 to B3, dated 17.8.1992). Hence, the plaintiff is not in joint possession.

(viii) There is no cause of action for the suit.

5. The trial court framed as many as seven issues, but, recasted the same on 5.8.1999 and again recasted on 25.3.1994.

(i) Whether the suit properties are in joint family possession of the plaintiff and the first defendant.

(ii) Whether the plaintiff is entitled to the relief of partition and separate possession of the suit properties ?

(iii) To what other reliefs, the plaintiff is entitled to ?

6. In order to substantiate the contention, the plaintiff has examined four witnesses as P.Ws. 1 to 4 and Exs. A1 to A14 were marked. The first defendant himself has been examined as D.W. 1 and Exs. B1 to B8 were marked.

7. Rightly the trial court has made an observation that the plaintiff's allegations are very vague and that the particulars and details regarding the purchase of suit property, source of funds, the name in which the sale deed was taken and why it was taken and so on have not been furnished in the plaint. Relying upon the fact that the title deed stood in the name of the plaintiff's mother vide Ex. A1 dated 14.6.1936 and the evidence adduced on the side of the plaintiff himself, the trial court came to the conclusion that the plaintiff failed in proving that the properties are joint family properties. It was the case of the plaintiff through P.W. 2 (third party) that in order to avoid the paternal uncle of the plaintiff from making any claim for partition, the properties were purchased in the name of the mother, not in the name of the father. P.W. 2 conceded that he has no direct knowledge over the same. Through P.W. 3, one of the paternal uncles, it was

sought to be proved that there had been joint labour, joint possession and joint contribution by the brothers of the plaintiff's father, but in the cross examination, he has admitted that one of the brother became a carter because of insufficient income. P.W. 3 who is the sister of the plaintiff did not speak anything about the purchase of property under Ex. A1. Therefore, the suit came to be dismissed.

8. When the appeal was filed before the first appellate court, the first appellate court made very relevant and important observations with regard to omission in pleadings.

(i) The plaintiff nowhere stated in the plaint that it is his father who lent money to purchase the property in the name of the mother.

(ii) The reasons for purchasing the property in the name of the mother is not explained in the plaint. Even though it is alleged that if the property is purchased in the name of Subbu Gounder, it would lead the way to brothers of Subbu Gounder to claim right over the suit property and that only in order to avoid the same, the property was purchased in the name of the wife of Subbu Gounder, i.e., the mother of the plaintiff, it is not stated so in the pleadings.

(iii) Even though sale by the plaintiff's mother to the first defendant is sought to be impeached through the evidence of P.W. 4 by explaining that it was done so only for the purpose of making D.W. 1 to get married to the maternal uncle's daughter. This was also not pleaded.

(iv) It was neither pleaded that the suit transaction was sham and nominal.

9. With all these observations, the first appellate court concurred with the findings of the trial court that the plaintiff failed in proving that the suit properties are joint family properties. But, so far as "B" schedule properties are concerned, as the first defendant did not produce any sale deed to prove his contention that it is a self acquired property by virtue of the purchase made by him on 6.1.1990 has not been proved and therefore, the first appellate court came to the conclusion that the contention of the first defendant was not proved and therefore, the plaintiff is entitled to partition in respect of "B" schedule property. As the relief in respect of "A" schedule property was declined, the plaintiff preferred the second appeal in S.A. No. 738 of 2002 as against granting of relief of partition in respect of "B" schedule property, S.A. No. 2048 of 2002 has been filed.

10. At this juncture it is relevant to point out the petition filed by the appellant in C.M.P. No. 648 of 2002 in S.A. No. 2048 of 2002 under Order 41 Rule 27 seeking to produce the documents to be marked as Exs. B9 to B12.

The following are the details of documents now sought to be produced are extracted hereunder:

11. Contending that petition to receive additional evidence should not be

admitted and that there is no case made out for receipt of additional evidence, the following decisions are relied upon to support the proposition.

1. 2002 (4) CTC 705 (N. Rathina Reddy and four others Vs. N. Rani Ammal and 7 others)

2 Smt. Pramod Kumari Bhatia Vs. Om Prakash Bhatia and Others,

12. Contending that where the genuineness of the documents sought to be received cannot be doubted, those documents should be received and that the decision should depend upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause and in support of the contention the following decisions are relied upon:

1. 1996-2-L.W. 752 (M.V. Venkatasamy Pillai and 10 others Vs. S. Swaminatha Rao)

2. 2012 (4) L.W. 359 (Union of India Vs. Ibrahim Uddin and another)

13. No doubt, there had been inordinate delay in filing the documents and also there is no reason as to why it could not have been produced at the earliest point of time. But, the documents sought to be adduced would be helpful for the Court to decide the issue in proper perspective and to deliver judgment, but, already the matter is pending subjudice from the year 1996. If those documents are admitted, the other side should be given an opportunity to cross examine the witnesses and that would take another decade to reach a finality. As it is found that it is possible to dispose off the second appeal without the additional documents, this Court is of the view that those documents need not be received at this stage.

14. The important issue to be decided is when the property stands in the name of a female member of the family whether the presumption that the property belongs to the joint family applies or not. Admittedly, the "A" schedule property stands in the name of the plaintiff's mother. It is the contention of the plaintiff that it is the property of the joint family and not the separate property of the mother. But, it is the contention of the first defendant that it is the separate property of the mother and that it is not the joint family property. On whom is the burden of proof to show the nature and character of the property, i.e., whether the property is joint family property or separate property. What is the scope of the presumption in the case of acquisitions in the names of male members of a joint family and the female members of a joint family.

14.1. In the case of male members of a joint family, there is a presumption that if the joint family had sufficient ancestral nucleus, the properties standing or acquired in the name of junior members are joint family properties unless the presumption is rebutted by showing that the properties are the separate properties of the particular member or members in whose names the properties stand or were acquired. There is no such presumption in the case of properties

standing in the name of female members. In the latter case, it is for the party who claims properties as joint family properties to specifically plead the particulars and details, in the pleadings and establish the same by adducing necessary evidence.

14.2. Whether the plaintiff has placed necessary pleadings on record furnishing the particulars and details with regard to purchase made in the name of the mother and the circumstances under which the purchase was made in the name of the mother. There is absolutely no pleading and this has been taken note of by the first appellate court.

14.3. The object of pleading is to give fair notice to the other side as to the case he has to meet. The other side should not be taken by surprise. The pleadings should enable the court to give necessary attention to the point for decision. Therefore, unless there is pleading, no amount of evidence can be looked into.

15. Then the next question is what is the foundation for the distinction in the presumptions arising when the male/female member of the family acquiring the property in his/her name. This question is answered by the decision reported in Pattusami Padayachi Vs. Mullaialammal and Others, Where a family lives in coparcenary, the presumption which exists in the case of male members arises from the circumstance that they are coparceners. On the other hand, the ladies are not in an undivided family coparceners; (before Act 29/2012) whatever property they acquire by inheritance or gift is their separate estate, and, although it is not unusual for property to be transferred to the name of a female member to protect it from the creditors of the male members, or to place it beyond the risk of extravagance on the part of the male members, such dealings are exceptional and can afford no ground for a general presumption.

15.1. The same principle was laid down in a Bench decision of the Calcutta High Court Protap Chandra Gope and Others Vs. Sarat Chandra Gangopadhyaya, where Mookerjee, A.C.J., pointed out that it was manifestly erroneous to draw the presumption and put the burden of proof on the female member to establish that the property is her own separate property.

It was pointed out that in the case of coparcener, the presumption is founded on the fact of union and that there can be no such presumption where the property stands in the name of a non-coparcener such as a son-in-law or a female member of the family ...

... Our attention was also drawn to another Bench decision of this Court of Krishnan and Venkatasubba Rao, JJ. reported in Official Assignee of Madras Vs. Natesa Gramani, . The earlier Bench decision of this Court in Narayana v. Krishna (1884) ILR 8 Mad. 214, was followed and it was observed that it would be quite an illogical and dangerous doctrine to say that a lady in whose name the property stands is not its owner and that it must be presumed that the male members of the family are the owners.

15.2. It may be useful to refer to the following observations of Venkatasubba Rao, J., at page 196:

It is contended that when a property stands in the name of a Hindu lady it should be presumed that the real ownership vests in the male members of her family. In the case of a Hindu married woman, her family is the family of her husband and according to this contention, any property standing in her name must be presumed to belong to her husband, her brother-in-law or her son as the case may be. This argument involves in the first place that we must presume that a lady in whose name the property stands is not its owner and that we must secondly presume that the male members of her family are the owners. I cannot conceive of a more illogical or dangerous doctrine.

Is there any reason for starting with the presumption that a person is not the owner of the property when the document says she is?

chowdaury Is there again any reason for assuming without proof that the transaction had its origin in some act of the person related in a particular manner to the lady, in whose name the document stands?

For this somewhat strange contention the appellant's learned Counsel relied upon Chunder Nath Moitra v. Kristo Komul Singh (1871) 15. W.R. 357, and Nobin Chunder Chowdhry v. Dokhobala Dasi (1884) ILR 10 Cal. 686, On the facts, the decisions in these cases may be perfectly correct but if there are any observations in the judgements which maybe construed as to lend support to the contention put forward, I must most respectfully but emphatically disagree with them. I may refer to Narayana v. Krishna (1884) ILR 8 Mad. 214, where it was held that when property stands in the name of a female member of a Hindu family, there is no presumption that it is the common property of the family. The person who asserts that the owner is different from the one whose name appears on the face of the document, must prove that he asserts.

15.3. It is important to notice that this Bench decision of this Court dissents from the observations made in Nobin Chunder Chowdhry v. Dokhobala Dasi (1884) ILR 10 Cal. 686, in which the view was indicated that the presumption would be against the female member and in favour of the joint family. The Nagpur High Court has taken the same view in the decision reported in AIR 1955 290 (Nagpur) In that case, it was observed, "the mere fact that husband possessed considerable property raises no presumption that the property found in the possession of the widow belonged to the husband and that it is for the person making the claim to adduce evidence as to the source from which the property was acquired and if no account is given, it has to be held that the property belongs to her...

The plaint allegations are very vague and that the particulars and details regarding the purchase of suit property, source of funds, the name in which the sale deed was taken and why it was taken and so on have not been furnished in the plaint. The first appellate court made very relevant and important

observations with regard to omission in pleadings which has been already dealt with in detail in the previous part of the judgment. In such circumstances no amount of evidence would be of any use. Even assuming that the evidence could be looked into, the evidence did not prove that the father provided source from which the property was acquired. Therefore the plaintiffs case is found to fail.

16. In the result, Second Appeal No. 738 of 2002 is dismissed. The judgment and decree passed in A.S. No. 58 of 2001 dated 31.01.2002 on the file of the District Court, Salem, partly allowing the judgment and decree passed in O.S. No. 1724 of 1996 dated 22.1.2001 on the file of the Second Additional District Munsif Court, Salem, in respect of "A" schedule property is confirmed. Second Appeal No. 2048 of 2002 is allowed. The judgment and decree passed in A.S. No. 58 of 2001 dated 31.01.2002 on the file of the District Court, Salem, partly reversing the judgment and decree passed in O.S. No. 1724 of 1996 dated 22.1.2001 on the file of the Second Additional District Munsif Court, Salem, pertaining to "B" schedule property is set aside. Consequently, connected Miscellaneous Petition is closed. No costs.