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**(2013) 08 MAD CK 0143**

**In the Madras High Court**

**Case No :** SA (MD) No's. 245 and 602 of 2011 and MP (MD) No's. 1 and 2 of 2011

Subban (died), Arumugathammal and Mani

APPELLANT

Vs

Chandran <BR>Chandran Vs Subban (died),  
Arumugathammal and Mani

RESPONDENT

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**Date of Decision :** 05-08-2013

**Acts Referred:**

**Citation :** (2013) 08 MAD CK 0143

**Hon'ble Judges :** A. Selvam, J

**Bench :** Single Bench

**Advocate :** S. Parthasarathy, for Mr. P. Natarajan in SAMDNo. 245/2011 and Mr. P.T.S. Narendravasan in SAMDNo. 602/2011, for the Appellant; P.T.S. Narendravasan in SA(MD)No. 245/2011 and Mr. S. Parthasarathy, for Mr. P. Natarajan in SA(MD)No. 602/2011, for the Respondent

**Final Decision :** Dismissed

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**Judgement**

A. Selvam, J.—These Second Appeals have been directed against the concurrent Judgments and decrees passed in Original Suit No. 103 of 1997 by the Sub Court, Sivagangai and in Appeal Suit Nos. 213 and 236 of 1998 by the District Court, Sivagangai. The Appellant in Second Appeal No. 602 of 2011 and respondent in Second Appeal No. 213 of 1998 as plaintiff has instituted Original Suit No. 103 of 1997 on the file of the trial Court for the reliefs of declaration, permanent injunction and also for recovery of possession in respect of suit items 1 to 3, wherein the appellants in Second Appeal No. 245 of 2011 and the deceased have been shown as defendants.

2. In the plaint it is averred that the defendants 1 and 2 are the parents of the plaintiff and third defendant and their native place is Keelavaniyangudi. The erstwhile Hindu joint family consisted of the plaintiff, first and third defendants has had owned a small extent of ancestral property. In the year 1973 a compromise has been effected and the same has been given to maintenance of

the first defendant. Except the said property, the erstwhile Hindu Joint family has not possessed of any ancestral properties. In the year 1973 the plaintiff has gone to Mumbai and served in the house of an Advocate by name A.D. Mansunkhan and in the year 1976 the plaintiff has gone to Kuwait and by utilising his earnings, suit items 1 and 2 have been purchased in the name of the first defendant by virtue of the sale deed dated 06.02.1975. The suit third item has also been purchased by the plaintiff in the name of the first defendant by virtue of the sale deed dated 14.05.1979 and thus, the suit items 1 to 3 are the separate properties of the plaintiff. The first defendant has managed suit items 1 to 3 for the benefit of the plaintiff. The plaintiff has come down to India in the year 1983 and purchased the suit items 4 and 5 by virtue of the sale deed dated 10.03.1983 and after some time, by utilising his separate earnings the suit 6th item has been constructed. The plaintiff has sent various amounts to the second defendant who is none other than his mother as well as third defendant. Now the defendants have started to make a novel claim over the suit properties by way of denying title of the plaintiff. Under the said circumstances, the present Suit has been instituted for the reliefs sought for in the plaint.

3. In the written statement filed on the side of the defendants, it is averred that it is false to contend that suit items 1 and 2 are the separate properties of the plaintiff. The first defendant has purchased the same by utilising separate earnings and subsequently he purchased suit item 3 by utilising his separate funds and thus suit items 1 to 3 are the separate properties of the first defendant. For the benefit of the plaintiff and defendants, suit items 4 and 5 have been purchased by utilising the amounts sent by the plaintiff as well as third defendant. On 15.06.1987, a registered partition has taken place in respect of the suit 6th item and now the plaintiff and other defendants have been enjoying their respective shares. The plaintiff has asked the second defendant to lease out the house bearing door No. 11-I and the second defendant has leased out the same on a monthly rental of Rs. 700/-. The plaintiff has paid rent properly for some months and subsequently refused. There is no merit in the Suit and the same deserves to be dismissed.

4. In the reply statement filed on the side of the plaintiff it is averred that it is false to contend that on 15.06.1987 a partition has come into existence in respect of suit 6th item. On 15.06.1987 as well as on 16.06.1987 the plaintiff has executed power of attorney deeds in favour of the second defendant so as to enable her to collect rents from tenants. The partition deed dated 15.06.1987 is nothing but concocted.

5. On the basis of the divergent pleadings raised on either side, the trial Court has framed necessary issues and after analysing both the oral and documentary evidence has decreed the Suit only in respect of suit items 4 to 6 and dismissed the same in respect of suit items 1 to 3. Against the allowed portion, the defendants as appellants have preferred Appeal Suit No. 213 of 1998 and against the disallowed portion, the plaintiff as appellant has preferred Appeal Suit No.

236 of 1998.

6. The first appellate Court after hearing both sides and upon reappraising the evidence available on record has dismissed both the Appeals and thereby confirmed the Judgment and decree passed by the trial Court. Against the concurrent Judgments and decrees passed by the Courts below, the present Second Appeals have been preferred at the instance of the defendants 1 and 2 and also at the instance of the plaintiff respectively.

7. As agreed by the learned counsel appearing on either side, the present Second Appeals are disposed of on merits at the stage of admission.

8. In Second Appeal No. 245 of 2011, on the side of the appellants/defendants 2 and 3, the following substantial questions of law have been raised for consideration:

(a) When the plaintiff is literate person admitted his signature in Ex. A73 whether the Courts below are correct in holding that the plaintiff has no knowledge of its contents

(b) Whether the Courts below are correct in holding that plaintiff has not estopped as far as Ex. A73 concern?

(c) Whether the plaintiff admitted the joint family and admitted that the 1st defendant is the "kartha" of the joint family whether the expectation of the courts below that for each and every expenses every member of the joint family has to contribute the amount to their proportionate share alone?

9. In Second Appeal No. 602 of 2011, on the side of the appellant/plaintiff, the following substantial questions of law have been raised for consideration:

(a) whether the Courts below are right in finding that the plaintiff is not entitled to the relief sought for in respect of schedules 1 to 3 particularly when the Courts below right in rendered that the schedules 4 and 5 purchased out of his funds and constructed houses in schedule 5 which has been shown as 6th schedule?

(b) Whether the Courts below are right in rejecting the plea of benami transaction, particularly when the plaintiff proved by producing the original sale deeds Exs. A4 and A7 as evidence to show that the plaintiff purchased schedules 1 to 3 in the name of his father?

(c) Whether the Courts below are right in finding that the 1st defendant purchased schedule 1 to 3 in his name out of his funds, particularly when the 1st defendant failed to prove that he has means and source of income to purchase the same?

10. Before considering the rival submissions made on either side, it would be condign to narrate the following admitted facts. The first defendant is the father of the plaintiff and third defendant. The second defendant is their mother. The first defendant has started his life with nothing and he served as a village Menial

in his native village. The erstwhile Hindu joint family consisted of the first defendant and his two sons, has had not owned any income yielding property. The suit items 1 to 3 have been purchased by the first defendant by virtue of the sale deeds dated 06.02.1975 and 14.05.1979 and the same have been marked as Exs. A4 and A7. It is also equally an admitted fact that the suit items 4 and 5 have been purchased in the name of the plaintiff by virtue of two registered sale deeds dated 10.03.1983. It is also equally an admitted fact that a cluster of houses have been shown as suit 6th item and the same have been constructed in the name of the plaintiff.

11. The consistent stand taken on the side of the plaintiff is that the erstwhile Hindu joint family has had not possessed of any income yielding property and the plaintiff has gone to Mumbai and served in the house of an Advocate and by utilising his separate earnings, suit items 1 to 3 have been purchased in the name of the first defendant in benami for the benefit of the plaintiff and therefore, suit items 1 to 3 are his separate properties. Further it is averred on the side of the plaintiff to the effect that in the year 1976, the plaintiff has gone to Kuwait, wherein he earned enormous money and by utilising the same, he purchased suit items 4 and 5 in his name and subsequently by utilising his separate amounts, he put up a cluster of houses which have been shown as suit 6th item and therefore, the suit items 4 to 6 are also separate properties of the plaintiff and since the defendants have made a novel claim over the suit properties, the present Suit has been instituted for the reliefs sought for in the plaint.

12. In the written statement filed on the side of the defendants it has been specifically averred to the effect that suit items 1 to 3 are the separate properties of the first defendant and suit items 4 and 5 have been purchased for the benefit of the plaintiff, first and third defendants and only by way of joint exertion, the suit 6th item has been constructed and subsequently on 15.06.1987 a partition has taken place, wherein the suit 6th item has been divided amongst sharers and separate house property has been allotted to each sharer and thus, the plaintiff is not the owner of suit items 1 to 6. Under the said circumstances, the present suit deserves to be dismissed.

13. As stated earlier, the trial Court has dismissed the Suit in respect of suit items 1 to 3 and decreed the Suit in respect of suit items 4 to 6 as prayed for.

14. The first appellate Court after evaluating the available evidence on record has confirmed the Judgment and decree passed by the trial Court. Under the said circumstances, apart from the substantial questions of law raised on either side, the Court has to look into the following aspects.

(a) Whether suit items 1 to 3 are the separate properties of the plaintiff or the same are the absolute properties of the first defendant?

(b) Whether the suit items 4 and 5 have been purchased in the name of the plaintiff for the benefit of the first defendant and his two sons namely the

plaintiff and first defendant?

(c) Whether the suit 6th item has been divided amongst the alleged sharers by virtue of the partition deed dated 15.06.1987?

15. It is an admitted fact that the plaintiff has initially been employed in Mumbai and subsequently in the year 1976 he has gone to Kuwait. The first defendant has been examined as DW1 and his specific evidence is that the plaintiff has frequently sent money from Kuwait. Further he deposed that he used to do some works in the native village and thereby earned some amounts and by utilising the same, he purchased suit items 1 to 3.

16. The Courts below have concurrently found that the suit items 1 to 3 are the separate properties of the first defendant.

17. At this juncture, it would be apropos to look into the following settled law. It has already been pointed out that the erstwhile Hindu joint family consisted of the first defendant and his two sons viz., the plaintiff and third defendant has had not owned any income yielding property and the first defendant has started his life with nothing and he served as a village Menial in his native village.

18. If a member of Hindu joint family proves that there is sufficient joint family nucleus, from and out of which, the property in question could have been acquired, the burden shifts to the member of the family, setting up claim that it is his personal property to establish that the said property has been acquired without any assistance from the joint family property.

19. It is also equally a settled principle of law that failure to prove existence of nucleus, no question of acquiring property by a joint family will arise. Presumption as to acquisition by a coparcener, being his self-acquisition. It is an everlasting principle of law that nucleus must have left sufficient surplus income to enable acquisition. Otherwise, there is no presumption that the property in question has been acquired by utilising surplus income of joint family and further if there is no sufficient nucleus, question of acquisition of property by a joint family would not arise.

20. In the instant case, as stated in many places, the erstwhile Hindu joint family consisted of the first defendant and his two sons namely the plaintiff and first defendant has had not possessed of any income yielding property. Since the said erstwhile Hindu joint family has had not possessed of sufficient nucleus for the purpose of making further acquisition, it is needless to say that the first defendant has had purchased the suit items 1 to 3 by utilising his separate funds.

21. The learned counsel appearing for the appellant in Second Appeal No. 602 of 2011/plaintiff has not advanced much argument in respect of suit items 1 to 3 and in fact, it is fairly conceded to the effect that the suit items 1 to 3 are the separate properties of the first defendant. Further Second Appeal No. 602 of 2011 has been preferred only in respect of suit items 1 to 3 for holding that the same have been purchased by the plaintiff by utilising his separate funds.

22. On the side of the plaintiff, certain vital documents have been filed for the purpose of proving his separate earnings. Ex. A5 is the passport of the plaintiff issued on 14.05.1975. Suit items 1 and 2 have been purchased by the first defendant on 06.02.1975 by virtue of Ex. A4 and the suit third item has been purchased in his name by virtue of sale deed dated 14.05.1979 which has been marked as Ex. A7. Considering the aforesaid factual aspects and also considering the fact that no sufficient evidence is available on the side of the plaintiff for the purpose of showing that he has sent money to the first defendant from Mumbai, it is totally unwarranted on the part of the plaintiff to contend that the suit items 1 to 3 have been purchased by the first defendant for the benefit of the plaintiff. The Courts below have concurrently found that the above factual aspects and uniformly negated the contention put forth on the side of the plaintiff and therefore, the Court can easily come to a conclusion that the suit items 1 to 3 are the separate properties of the first defendant. Under the said circumstances, Second Appeal No. 602 of 2011 filed by the plaintiff as appellant is liable to be dismissed by way of confirming the concurrent Judgments and decrees passed by the Courts below with regard to the said aspect.

23. Now the Court has to analyse the suit items 4 to 6. The first defendant himself has clearly admitted in his evidence that the plaintiff has gone to Kuwait in the year 1976 and he sent lot of money from Kuwait. The suit items 4 and 5 have been purchased by virtue of two sale deeds dated 10.03.1983 in the name of the plaintiff. The suit 6th item, as stated earlier, is a cluster of houses and the same have been constructed in the name of the plaintiff.

24. The main contention put forth on the side of the appellants/defendants 2 and 3 in Second Appeal No. 245 of 2011 is that suit items 4 and 5 have been purchased for the benefit of all the members of erstwhile Hindu joint family and also by way of joint exertion, the suit 6th item has been constructed and in order to ascertain the right of each and every sharer, partition deed dated 15.06.1987 has come into existence amongst the plaintiff and the defendants and therefore, the plaintiff cannot claim any absolute right, title and interest over the suit items 4 to 6.

25. The Courts below have concurrently rejected the contentions put forth on the side of the defendants and ultimately found that the suit items 4 to 6 are the separate properties of the plaintiff.

26. The learned Senior Counsel appearing for the appellants/defendants 2 and 3 in Second Appeal No. 245 of 2011 has strenuously contended that the suit items 4 and 5 have been purchased in the name of the plaintiff by way of utilising the amounts sent by him as well as his younger brother who has been arrayed as third defendant from Kuwait and that too for the benefit of all the members of erstwhile Hindu joint family and all of them are having common interest over the suit items 4 to 6 and in recognition of their interest, the partition deed dated 15.06.1987 has come into existence and for the purpose of proving its due execution, plethora of oral as well as documentary evidence have been let in. But

the Courts below without considering the available evidence on record on the side of the defendants, have erroneously rejected their claim with regard to suit items 4 to 6 and therefore, the concurrent Judgments and decrees passed by the Courts below with regard to suit items 4 to 6 are liable to be set aside and the present Suit is also liable to be dismissed in toto.

27. In order to resile the argument advanced by the learned Senior Counsel in Second Appeal No. 245 of 2011, the learned counsel appearing for the appellant/plaintiff in Second Appeal No. 602 of 2011 has also equally contended that the plaintiff has executed a power of attorney deed on 16.06.1987 in favour of his mother (second defendant) for the purpose of collecting rents from the tenants and the same has been exhibited on the side of the plaintiff. Under the said circumstances, absolutely no circumstance is in existence for the purpose of entering into the alleged partition on 15.06.1987 and due to urgency, the plaintiff has put his signatures on various stamp papers and by utilising the same, the defendants and their henchmen have concocted partition deed dated 15.06.1987 and the Courts below after considering the aforesaid evidence available on record have rightly found that the partition deed dated 15.06.1987 is not genuine and further with regard to the said factual aspect, the Courts below have already given concurrent findings and this Court need not look into the findings already arrived at by the Courts below and therefore, the concurrent Judgments and decrees passed by the Courts below with regard to suit items 4 to 6 are not assailable and therefore, Second Appeal No. 245 of 2011 is liable to be dismissed.

28. The power deed alleged to have been executed by the plaintiff in favour of second defendant has been marked as Ex. A73. The partition deed alleged to have been come into existence on 15.06.1987 has been marked as Ex. B1. Both Exs. A73 and B1 have been registered on the same day. In Ex. B1 it has been stated to the effect that the suit items 4 to 6 have been divided as mentioned therein.

29. In the reply statement filed on the side of the plaintiff, it has been specifically averred that no such partition has come into existence and the same is nothing but concoction. In Ex. A73, it has been clearly mentioned that the second defendant has been authorised to collect rents from the suit 6th item for the benefit of the plaintiff and she has also directed to maintain correct accounts. If really the partition deed has come into existence as put forth on the side of the defendants, definitely Ex. A73 would not have come into existence so as to enable the second defendant to collect rents for the benefit of the plaintiff.

30. The first defendant has been examined as DW1 and he has been cross-examined at length, wherein he has clearly admitted to the effect that even after Ex. B1, the second defendant has used to collect rents from all the tenants for the benefit of the plaintiff. Therefore, it is quite clear that Ex. B1 is nothing but concoction and the same is a product of machination hatched by the defendants so as to grab suit items 4 to 6 which stand in the name of the plaintiff. Further DW1 has clearly admitted in his evidence that he used to write letters to the plaintiff while

he has been in Kuwait and thereby demanded money. The letters alleged to have been written by him have been marked as Exs. A76 and 77, wherein it has been clearly stated that the first defendant is in a state of penury. On the side of the plaintiff, Ex. A78 has been filed and the same has been marked through DW4 by name Raju who has been examined on the side of the defendants. He has clearly admitted to the effect that Ex. A78 has been executed by the third defendant in favour of the plaintiff, wherein it has been clearly stated that the third defendant has received the entire amount given to the plaintiff. If really, the suit items 4 and 5 have been purchased as well as suit item 6 has been constructed for the common benefit of all the members of the erstwhile Hindu joint family by utilising the funds of the plaintiff as well as third defendant, definitely, Ex. A78 would not have come into existence. Therefore, on the basis of the documents filed on the side of the plaintiff coupled with clear admission given by DW1 who is none other than father of the plaintiff as well as third defendant, the Court can safely come to a conclusion that Ex. B1, partition deed dated 15.06.1987 is nothing but concoction and the suit items 4 to 6 are the separate properties of the plaintiff.

31. The learned Senior counsel appearing for the appellant in Second Appeal No. 245 of 2011 has drawn the attention of the court to the following decisions:

(a) In Ranganayaki Ammal and 4 others Vs. V. Balakrishna Naidu and 24 others this Court has held that "a suit has been framed without a prayer to set aside the partition deed whether is maintainable, although, relief of partition in the suit is in time. Mere repudiation of the document is not enough. If Article 59 of the Limitation Act is applied, then the suit is definitely out of time. Evidence of PW1 is clear that he has acted upon the partition effected by his father and hence plaintiff has to be non-suited on that ground.

32. The facts mentioned in the decision referred to supra are that a Hindu after effected partition amongst his sons and they are also parties to partition, subsequently some of the sons have challenged the partition deed by way of saying that the father has effected unequal partition. Under the said circumstances, this Court has held that as per Article 59 of the Limitation Act, concerned plaintiffs ought to have sought relief of setting aside the partition deed within the stipulated time."

33. In the instant case, such factual circumstances are not in existence. It is not the case of the plaintiff that he is also one of the consenting parties to the partition deed dated 15.06.1987. In fact, in the reply statement filed on the side of the plaintiff, it has been stated that due to urgency at the time of going to Kuwait he executed Ex. A73 by way of putting his signatures on various stamp papers. Even by way of relying upon evidence adduced on the side of the defendants, there is no incertitude in coming to a conclusion to the effect that Ex. B1 is not a genuine document. Since Ex. B1 is not a genuine document, the same need not be set aside within a period of limitation prescribed under Article 59 of the Limitation Act, 1963. To put it in short, in the decision referred to

supra, execution of partition deed has been admitted. But the only contention raised in that case is that the father of erstwhile Hindu joint family has made unequal partition among the sharers. Therefore, it is needless to say that the decision referred to supra is not at all applicable to the facts and circumstances of the present case.

(b) In *K. Jagannathan Vs. A.M. Vasudevan Chettiar and 12 others*, the Division Bench of this Court has held that "a minor member of Hindu Joint family has been made eo-nominee party to partition deed, representing by his natural guardian, minor filed a suit for partition ignoring earlier partition deed, such Suit is not maintainable, since he has not sought for the relief of setting aside such document.

34. The factual situation in the present case is not at all identical to the facts of the case mentioned in the decision referred to supra and therefore, the same cannot be attuned.

(c) In *V. Grasim Industries Ltd. and Another Vs. Agarwal Steel*, , the Hon"ble Apex Court has held that "when a person signs a document, presumption is that he has read the document properly and understood it and only then affixed his signatures thereon, unless there is proof of force or fraud. Such presumption is much stronger in case of businessmen.

35. The specific defence put forth on the side of the plaintiff is that Ex. B1 is a concocted document. As pointed out earlier, both Exs. A73 and B1 are contemporaneous documents and the same have been registered together. The main defence put forth on the side of the plaintiff with regard to partition deed is that he executed Ex. A73 in favour of his mother so as to enable her to collect rents for him. The first defendant (DW1) has clearly admitted in his evidence that even after execution of Ex. B1, the second defendant has used to collect rents from all the houses for the benefit of the plaintiff. If really Ex. B1 has come into existence or Ex. B1 is a genuine document, definitely the second defendant would not have collected rents from all the houses and further if really, the suit 6th item has been constructed by using joint exertion as well as the funds alleged to have been generated by the plaintiff and third defendant, the third defendant would not have executed the receipt dated 31.03.1991 in favour of the plaintiff. Therefore, it is quite clear that by way of exercising fraud, Ex. B1 has been created and as pointed out earlier, the same is nothing but a product of flam.

(d) In *Inum Beevi Vs. K.S. Syed Ahamed Kabir (died) and 15 others*, , this Court has held that "once the respondent has admitted the execution, it is not necessary for appellant to prove the same."

36. In the instant case, no such admission has taken place on the part of the plaintiff with regard to Ex. B1, partition deed dated 15.06.1987. Since no such admission has been in existence with regard to execution of the partition deed dated 15.06.1987, the dictum given in the decision referred to earlier is not

applicable to the present case.

37. It has already been dealt with that the suit items 1 to 3 are not the separate properties of the plaintiff, whereas the same are the absolute properties of the first defendant. Likewise, it has already been discussed in detail and ultimately found that the suit items 4 to 6 are the separate properties of the plaintiff.

38. The present Suit has been instituted so as to declare that all the suit properties are the absolute properties of the plaintiff and consequential reliefs of recovery of possession, permanent injunction have been sought for. Considering the fact that the defendants have not fully established the alleged execution of Ex. B1, this court is of the considered view that the contentions put forth on the side of the appellants in Second Appeal No. 245 of 2011 with regard to suit items 4 to 6 are not factually and legally sustainable and altogether the substantial questions of law raised in both the Appeals on the side of the respective appellant/appellants are not having substance at all and therefore, the present Second Appeals deserve to be dismissed. In fine, these Second Appeals deserve dismissal and accordingly are dismissed without cost at the stage of admission. Connected Miscellaneous Petitions are closed. The concurrent Judgments and decrees passed by the Courts below are confirmed.