

Kandaswami Chettiar and ors. Vs. Gopal Chettiar and ors.

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Court : Chennai

Decided On : Oct-11-1974

Reported in : (1975)2MLJ184

Appellant : Kandaswami Chettiar and ors.

Respondent : Gopal Chettiar and ors.

Judgement :

T. Ramaprasada Rao, J.

1. Defendants 2, 5, 6 and 7 in O.S. No. 109 of 1963 on the file of the Court of the Subordinate Judge, Chingleput, are the appellants. The suit was laid for partition and allotment of plaintiff's one-fourth share in the properties described in schedules B to G in the plaint.

2. The plaintiff's case is as follows : One Devaraja Chettiar had four sons, the plaintiff and defendants 1 to 3. He is said to have carried on a business in coconuts and plantains in Tiruvallur town, with the income from the family properties. The plaintiff : has set out in schedule B to the plaint all such joint family properties in which the appellants and respondents 1 to 3 as members of the same, are entitled to a share. It is not disputed that Devaraja Chettiar, by himself inherited certain properties, which became joint family properties, of the plaintiff and respondents 1 to 3 after the demise of Devaraja Chettiar. It is also said that certain properties were bequeathed to plaintiff and respondents 1 to 3 under a Will

Exhibit A-1 dated 12th August, 1940, whereby one Masi Ammal, paternal grandmother of the plaintiff bequeathed certain properties of hers to the sons of Devaraja Chettiar. The plaintiff's further case is that defendants 1 and 2, soon after their marriage were living separately for purposes of convenience. Even so, the third defendant was living separately after marriage. The case of the plaintiff is that Devaraja Chettiar provided the first and second defendants with funds and entrusted with them the responsibility of the conduct of the family trade, which the father was running. The plaintiff, who was a minor and was living with his mother, the fourth defendant in the family house is said to have assisted when he became of age, defendants 1 and 2 in the continuance of the family trade. It is also claimed that the first and second defendants were in charge of the management of the joint family properties and in the course of such management, they colluded together and lent moneys on mortgages and promissory notes in the name of second defendant's wife, namely, the fifth defendant and such instruments now standing in the name of the fifth defendant ought to be held to be for the benefit of the joint family, as the consideration thereunder flowed from such surplus income. The plaintiff's case is that schedule B-1 property was also purchased in the name of the fifth defendant from the joint family income and funds. It is said that the second defendant from and out of the joint family funds gifted jewels worth Rs. 5,000 to the sixth defendant, who is his concubine. Besides this, the plaintiff claims that jewels of the family worth about Rs. 3,000 are with defendants 1 and 2. He would assert that the properties described in schedules C to E.I. are joint family properties and excepting for the debts mentioned in Schedule F, which are to be paid by the family, there were no other debts. A similar assertion is made in the plaint that the properties described in Schedule G are joint family properties in which the plaintiff has an interest and that those properties were acquired with the joint family fund in the name of the seventh defendant, who is the mother-in-law of the second defendant. A positive claim is made that the seventh defendant had no funds of her own to acquire those properties and in this view the plaintiff demands a partition of the properties described in Schedules B to C in the plaint and for an allotment of his separate one-fourth share therein. He had come to Court, since there was no proper response to the suit notice given by him prior to the action.

3. Defendants 1, 2 and 5 filed a common written statement. According to these defendants they never lived as members of the joint family and they had no occasion to enjoy any joint family properties in common. Their case is that the fourth defendant, who is the mother, is in possession and enjoyment of the B Schedule properties which were bequeathed to her by Devaraja Chettiar under a will and she is also in possession of the properties bequeathed by the paternal grandmother of the plaintiff. Defendants 1 and 2 would say that they have been living separately and carrying on separate business and that the business carried on by them had no connection with the father's trade, which was stopped by him sometime before his death. Out of love and affection, the first defendant used to assist his mother in the management of the properties described in B Schedule. In fact, they had to spend a sum of Rs. 3,000 for installing a pumpset in the B Schedule lands. The specific averment is that the first four items of advances referred to in the C Schedule were made by the seventh defendant from and out of her own funds and that the fifth item in Schedule C never existed at all. These defendants deny that the sixth defendant is the concubine of the second defendant and that he ever gave any jewels worth Rs. 5,000 to her. They would also state that the first two items of the out-standings mentioned in D Schedule do not exist and the third and the fourth items were the separate funds of the second defendant in which the plaintiff cannot claim a share. The sum and substance of the defence is that excepting for the properties mentioned in schedule B, all the other properties are respectively the properties of those in whose favour they were purchased or in whose name moneys were advanced and that the plaintiff cannot claim any interest therein. The sixth defendant denied that she was the concubine of the second defendant and that he has given any jewels to her. The seventh defendant's contention is that the mortgages and sale deeds mentioned in C Schedule were all taken with her own funds and that the second defendant did not contribute any funds for these transactions and that she was otherwise well off, being the wife of a Shroff merchant and the plaintiff, therefore, cannot have any right in the C Schedule properties. The third defendant did not file any written statement and the fourth defendant remained ex parte.

4. On the above pleadings, the following issues were framed:

1. Whether the B Schedule properties are available for partition ?
2. Whether the plaintiff and the 4th defendant are liable to account to the defendants 1, 2 and 5 for profits from B schedule ?
3. Whether the business as carried on by the parties is joint family business ?
4. Whether the C and D Schedule out-standings belong to the family ?
5. Whether the items in E.E.I and F schedule exist If so, whether they belong to the family of the parties?
6. Whether the lands in Vadathur are joint family properties?
7. Whether the suit is bad for partial partition ?
8. To what relief, if any is the plaintiff entitled Additional issues:
 1. Whether the properties in C Schedule were purchased benami in the name of the seventh defendant by the second defendant?
 2. Whether the plaintiff can claim a share in those properties?

Issue 4 was amended as B-1 schedule item had been omitted to be put in issue in the suit and it is as follows: Whether the C and D schedule outstandings and B-1 schedule item belong to the family.

The learned Judge on issues 1 and 2 under the impression that the plaintiff made a concession at the trial that the B schedule properties are not joint family properties and that they are at present, in the possession of the fourth defendant as mother of plaintiff and defendants 1 to 3 and that those properties will be available for partition only after the lifetime of the fourth defendant between her and her sons, did not deal with these issues at all. On issue No. 3, the learned Judge held that the business carried on by defendants 1 and 2 was a joint family business belonging to the plaintiff and defendants 1 to 3 and that the business carried on by the third defendant also formed part of the joint family property. On issues 4 and additional issues 1 and 2, he held that the moneys advanced in the

name of the fifth defendant referred to in C schedule excepting item No. 5 are joint family properties in which the plaintiff has a share. He also held that the C schedule properties are such joint family properties in which the plaintiff has one fourth share. Regarding the property described in schedule B-1, which stood in the name of the seventh defendant, he held that it ought to be brought into the hotchpot for division. As regards the properties described in schedules D, E-1 and F he did not decide whether such outstandings were available for partition, but relegated the investigation to the final decree proceeding. He found, however, that there were no jewels mentioned in plaint E schedule with defendants 1 and 2. On issue 6 he did not give a definite finding, but left it to the parties to seek in appropriate proceedings such remedies as are available to them in law over those properties, which, according to the defendants, are said to be properties, obtained by the mother from and out the income of the B Schedule properties. In the result, a preliminary decree in favour of the plaintiff for partition of his one-fourth share in B-1 Schedule and C Schedule properties was passed. As regards the division of the outstandings and debts, due to the family as stated in D and E 1 Schedules, the learned Judge thought that they could be considered at the time of the passing of the final decree. In other respects, he dismissed the plaintiff's suit, but directed defendants 1 and 2 to pay half costs of the suit and asked others to bear their own costs. It is as against this, the present appeal has been filed.

5. The appellants contend that the lower Court was wrong in having treated the properties standing in the name of the fifth and seventh defendants as properties of the joint family. Their main contention is that the second defendant was having a business of his own and this had no reference to the joint family business at all and in any event it is said that there was no surplus income from the so-called joint family trade carried on by Devaraja Chettiar, and that, therefore, the properties in the name of his wife, the fifth defendant and in the name of his mother-in-law, the seventh defendant, cannot, as a matter of course, be treated as joint family properties.

6. In the above behalf Mr. Rangaswami Aiyangar contends that the properties or the advances made in the name of the fifth defendant and/or the seventh defendant, should be deemed to be properties which are not partible properties,

on which the plaintiff could lay hands upon as a sharer therein.

7. The plaintiff has filed cross-objections and it stated that the lower Court was wrong in not having directed a partition of the B Schedule properties, as they are joint family properties, though for purposes of convenience, the mother is managing the same with the assistance of the one or other of the defendants. The other objection is that item 5 of the C schedule ought to have been held as joint family property and that the defendants did not discharge their burden in proving that item No. 5 of C schedule did never exist at all. The legitimate grievance of the cross-objector is that the lower Court having found that the moneys advanced on mortgages in the name of the fifth defendant referred to in C schedule, excepting item No. 5, are joint family funds, the Court ought to have granted a one-fourth share therein to the plaintiff. Again the cross-objector would state that the lower Court went wrong in having relegated to the final decree proceedings the investigation as to the existence or otherwise of the properties described in schedules D, E. I and F to the plaintiff. A vague contention is raised that the finding that there are no jewels mentioned in E schedule to the plaintiff is not correct.

8. Before we consider the relative contentions of either parties it is necessary to set out the scope of the contentions either parties. We shall first take up the items of properties described in schedule E to the plaintiff. In the plaintiff, a claim is made over moveable properties, such as jewels said to be in the possession of the second defendant and alleged to be joint family properties. The plaintiff, when he was in the box, admits that the second defendant was living separately, but would add that he was having the joint family trade of Devaraja Chettiar. His case is that though the first and the second defendants were living apart, the goods, which his father used to receive from the suppliers, used to be divided and it was that corpus with which defendants 1 and 2 were trading. He would admit that the third defendant was having a separate business established, but would vaguely add that the second defendant was supplying things to him and, therefore, it was a common business. He does not know when the second defendant or the third defendant started their business. He is not aware of the capital so invested in such business. Excepting for the bare ipse dixit of the plaintiff that the jewels mentioned in schedule E are with him and that they have been purchased from the joint family

trade, no other evidence was let in to substantiate such a contention. In those circumstances, the learned Judge rightly held that there is no proof that the family even owned the jewels mentioned in plaint E schedule and that the said jewels are either with the first defendant or the second defendant. We accept this finding and hold that there are no jewels mentioned in the E schedule with defendants 1 and 2, which are liable to be partitioned as claimed by the plaintiff.

9. As regards the allegation of the plaintiff that the second defendant made jewels worth about Rs. 5,000 from and out of the family funds and gave them to the alleged concubine of his, namely, the sixth defendant, there is absolutely no proof. The learned Counsel for the respondents also is unable to refer to us in the record any acceptable material on which we could hold that the sixth defendant has in her possession jewels worth about Rs. 5,000 which she has to account to the family. We accept the finding in this issue and hold that the sixth defendant is not in possession of any of the joint family properties moveable or immoveable.

10. The next point for consideration is, whether the learned Judge was right in having relegated to the final decree proceedings both the investigation and the determination as to rights of parties over the properties mentioned in schedules,, D, E, I and F. Schedule D properties. are said to be outstandings in the name of A.D. Kandaswami Chettiar, the second defendant herein. Excepting for a bare enumeration of such debts, the plaintiff has not attempted to establish them. Even so, as regards the properties mentioned in the name of the first defendant,, the plaintiff's evidence is, his own self-serving testimony. F schedule relates to. the alleged debts due by the joint family. Whether such debts were incurred as stated by the plaintiff and whether they are for the benefit of the joint family are all matters which have to be decided while passing a preliminary decree. The learned Judge was, therefore, not correct in having left open these items for being. taken up and adjudicated upon at the time of passing of the final decree. No-particular reason has been given as to why the items of properties mentioned in schedules D. E. I and F should be considered only at the time of the passing, of the final decree. We are, therefore, constrained to set aside this portion of the judgment of the Court below relating. to these three schedules and as we shall presently state it is obligatory on the part of the Court below at the time of the passing of the

preliminary decree to under-take the investigation as to the existence of such properties or liabilities and thereafter quantify the rights of parties. In the nature of things in a preliminary decree for partition and allotment of a litigant's share in joint family properties, it is but essential for the trial Court to find out what are all the assets of the joint family, whether moveable or immoveable, and after ascertaining such properties, determine the liabilities of the joint family as well and thereafter reckon the litigant's share in the available surplus. It is only in that perspective that a Court can pass a preliminary decree for partition. It cannot avoid its responsibility by postponing the determination of the relevant factors to the final decree proceedings.

11. We are, therefore, left with the consideration of properties described in schedules B, B-1, C and G.

12. As regards B schedule properties the learned Judge misunderstood the contentions of parties. It is common ground that the properties described in B schedule are the properties now in the possession of the fourth defendant and, that they are joint family properties. If Devaraja Chettiar made a will of such properties, it is invalid in the eye of law. Exhibit A-1 therefore, cannot be sustained as a will, as it related to joint family properties. Regarding Exhibit B-3, which is also a will left by the paternal grandmother of the plaintiff, the properties which are the subject-matter therein should be deemed and accepted to be properties in which the plaintiff has a defined one-fourth share along with defendants 1 to 3. The fourth defendant, obviously by consent, is enjoying for her life the properties mentioned in schedule B. That would not be a ground to deny the plaintiff's right to obtain a declaration even in this suit as regards his one-fourth share in such properties. It would be idle to postpone the issue of such a declaration in favour of the plaintiff as also concurrently the right of defendants 1 to 3 to get their respective shares in the B schedule properties. The learned Counsel for the appellants also does not keenly contest before us that such a concession was made by the learned Counsel for the appellant at the trial stage. In the background of such materials placed before us, we find that the plaintiff is entitled to an one-fourth share in the B schedule properties and division of such properties will be effected only after the life-time of the fourth defendant, who has been jointly and

by consent held out for a considerable length of time as the person entitled to such income during her lifetime. There will, therefore, be a preliminary decree in favour of the plaintiff declaring his one-fourth right in the B schedule properties. He and defendants 1 to 3 would obtain their separate possession of their one-fourth share-only after the lifetime of the fourth defendant and this shall be borne in mind by the Court which passes the final decree in this partition action.

13. It is convenient for us to deal at this stage with the so-called trade conducted by Devaraja Chettiar and the income which could have arisen therefrom. Besides examining himself, there is no acceptable evidence on the side of the plaintiff to touch upon the nature of the business and its productivity. In the plaint, the plaintiff's allegation is that the father entrusted the first and second defendants with the conduct of the family trade started by him and provided them with funds. His case is that it yielded good income and the family assets were augmented therefrom. He would add that the income from the properties and trade was considerable and it is only from the savings of the income from the land, house and trade, the second defendant purchased properties either in the name of his wife or his mother-in-law. In the written statement, these allegations are specifically denied. They would say that none of the four brothers had any community of interest with the others and that the father did never entrust any family trade to the first and or the second defendant. Whilst admitting that the first and second defendants carried on business, it is alleged that they had no connection with the trade that was carried on by the father, which he stopped sometime before his death. The second defendant denies that he purchased the properties mentioned in B-1 schedule in the name of his wife the fifth defendant, the nucleus being the joint family income.

14. The seventh defendant in her written statement alleges that she had considerable means from which she could advance moneys over mortgages and purchase properties in her own name and that many of the transactions in the G schedule are transactions effected after the institution of the suit and that it is ridiculous to suggest that the income from the joint family was the nucleus from which such properties were purchased. When P. W. 1 was in the box, he merely exaggerated the income from the family business. We have already stated while

dealing with the B schedule properties, that the income from the joint family properties enumerated in schedule B was enjoyed by the fourth defendant and it is not the fourth defendant's case that she ever contributed or gave any moneys to defendants 1 to 3 for them to utilise the same to augment the joint family properties. As a matter of fact, the common case of all parties is that the fourth-defendant was enjoying the joint family income and such life-enjoyment of the income of the properties in schedule B was acceded to by all the members of the joint family. From the very nature of things, therefore, it follows that the income from the joint family properties in schedule B could not have formed the nucleus for further augmentation of the joint family properties or for the purpose of advancing moneys on mortgages over immoveable properties in the name of either the co-parceners or their kith and kin. We are unable to lay any reliance upon the evidence of P. W. 1 who does not even know as to the circumstances under which, the first, second or the third defendant started their own business, when he says that there was considerable income from the family business. He admits that his mother was receiving all the rents from the family properties. He would not state in his chief-examination as to what would be the income from the so-called joint family trade. On the other hand, the second defendant, when he was in the box, was searchingly cross-examined. When he stated that he would get a maximum income of Rs. 150 per month in his own coconut business, there was not even a suggestion that the income from the alleged joint family trade could be considerable and that the properties purchased by him in the names of his mother-in-law or his wife or the mortgages taken in the name of his wife or his mother-in-law are to be deemed to be transactions for the benefit of the joint family, as the consideration therefrom should be deemed to have been flown from the joint family income. In cross-examination, the second defendant would say that himself and the third defendant were running shops even during the life-time of their father. Reliance is placed upon Exhibits A-21, A-38, A-39, A-36, A-50 A-51 and A-52 to show that there was a family trade and that the second defendant ought to be deemed, in the circumstances, to have taken over that family trade and continued. Exhibit A-21, is a promissory note for Rs. 100 executed by Devaraja Chettiar and the second defendant, in favour of one Subramania Chettiar. Exhibit A-38, is a mortgage deed executed by Devaraja Chettiar and his

sons over certain items of B schedule properties. Exhibit A-39 is again a mortgage executed after the life-time of Devaraja Chettiar by the fourth defendant (the mother) and the son over certain items of B schedule properties. Exhibit A-36 is a promissory note for Rs. 1,000 executed by the first, second and the fourth defendant for the business of the first defendant and the second defendant. Exhibit A-50 is a notice issued by the supplier of the goods to the first and the second defendant, calling upon them to pay all the dues. Exhibit A-51 and A-52 are similar letters. It is significant to note that all these transactions are during. 1940 to 1949, when the plaintiff was a minor. The mother, who was examined on the side of the plaintiff, curiously-enough supports the plaintiff and says. that the income from the lands was put in the business. She miserably fails in the cross-examination, when she confesses that she does not remember as to how much and on what occasion she gave money for the business of her sons. She says that she used to visit the second defendant's shop about seven or eight years, ago. She would assert that the sons have a right in the B schedule properties only after her lifetime. She is not aware as-to whether the seventh defendant is a. well-to-do woman. The trend of evidence of the mother, who was desperately desirous of helping the plaintiff, does not touch upon the real aspect arising in the instant case as to whether the sons carried on any joint family business and' whether such a business was productive enough to form the foundation or the substratum for the augmentation of the joint family properties by the first, second or the third defendants. The exhibits referred to above related to the years 1940 to 1949. The account book Exhibit A-20, produced by the second defendant belies that there could have been-any joint family business. The most important feature in this case is that the plaintiff did not establish to the hilt that the B schedule properties or the so-called joint family business could ever produce such a large sums of money, which could form the nucleus and the source for the purchase of properties under Exhibit B-6, or for advancing moneys on mortgages under Exhibits A-6, A-7, B-15 and B-14.

15. It is in this context that the question of law, looms large in this case, namely, whether the burden of proof, which lay heavily on the plaintiff, has been discharged for him to obtain an entitlement so as to demand a share in the properties set out in schedules B-1, C and G to the plaint.

16. Before dealing with it, we shall state the particular facts with reference to the properties claimed by the plaintiff Exhibit B-6 dated 26th December, 1959, is a registered sale deed of the property in question in favour of the fifth defendant the wife of the second defendant. In the C schedule, there are five items of which the fifth item has been found to be not in existence. We are accepting this finding, as the plaintiff has failed to prove that any amount was due to the family or even to the second defendant as stated in item 5 to the C schedule. The other four items in schedule C are covered by Exhibits A-8, A-4, A-5, A-6 and A-7 respectively. Exhibit A-8 is a mortgage, for Rs. 1,500 in which the fifth defendant is described as the mortgagee and as the person, who advanced moneys thereunder. Similarly Exhibits A-4, A-5, A-6 and A-7 are mortgages in her name. The recitals in the mortgage do support the fifth defendant's case that it was either her money or moneys given to her by her foster-mother, the seventh defendant, that went towards the consideration of all the above mortgages. The C schedule consists of three items. The first two items relate to one property, which was 'purchased by the seventh defendant after the suit was instituted, the consideration for which is said to have flown from her own funds. Even so, under Exhibit B-14 the seventh defendant, long after the filing of the present suit, purchased the house property, which is the subject matter of this exhibit. The seventh defendant's case is that it is ridiculous to say that these properties could have been purchased from and out of the income of the joint family consisting of the plaintiff and defendants 1 to 3 and that the consideration for such purchases-was provided for by the second defendant. The learned Subordinate Judge went into the question, whether the seventh defendant could have provided funds to the fifth defendant either for purchasing the B-1 schedule property or for advancing moneys on the four items of mortgages described in the C schedule. He also went into the fact whether the seventh defendant was possessed of funds-at all for her to purchase the properties under Exhibits B-15 and B-14. We have already expressed the view that the plaintiff who went into the box, did not even-know as to how much income the joint family lands yielded. He is not even aware as to whether from any funds of the joint family, his father or his mother purchased one or the other of the items in schedule B, which are admittedly, joint family properties. He does not know, who pays the kist for the land. He would not produce the so-called account books

of the family for the years 1940 to 1956, though he has them in his custody. He would hesitantly say that the rent will be collected by his mother and his brothers. Regarding the schedule C properties, he would say that he was in the library and the Vakil's house is adjoining it and from the library had overheard when the second defendant consulted the Vakil for transferring the sale of the house in the name of the seventh defendant. The mother, examined as P. W. 3, would spin out a case that the income from the land was put in the business and would add that she alone did not enjoy the joint family properties, but she was enjoying the same along with her sons. She would assert that her sons could get a share in the properties only after her lifetime. She would admit that she alone used to collect the rents from the family properties, but would correct herself by saying that her son also would collect the rents. She candidly admits that she sold certain properties and that she did not consult her sons. She would not even remember how much and on what occasion she gave moneys to the shops. She would reiterate that her sons have a right in the joint family properties only after her lifetime. P. W. 4 did not help the plaintiff in any manner. On the other hand, the second defendant, when he went into the box admitted that the properties in schedule B are enjoyed by his mother and the income from his own properties would be about Us. 150 per month and that he joined in exhibits A-21, A-38, A-39 and A-36 because his father and his mother as also the creditor wanted him to join in those documents. Lastly, he would say that his wife did not have any property and that the properties or the mortgages standing in the name of his wife were all secured by her from the funds given to her by her foster-mother, the seventh defendant.

17. On a fair reading of the evidence let in by the plaintiff , we are unable to find as to what was the income of the joint family and even if there was any income from the so-called joint family trade, what was the surplus, which was available to enable the coparceners of the family to augment the same by purchasing properties. The plaintiff has come to Court with a definite case that the properties described in schedule B-1, C and G are joint family properties. He cannot merely plead such a fact without proving them by acceptable material. We are unable to hold that the second defendant was dubbed as the manager of the family. He was an younger member of the family. More reliable evidence is required to impress on

the second defendant the badge of a joint family manager. There is not even a whisper either in the pleadings or in the witness box by the plaintiff or his witnesses that the joint family income was handed over to the second defendant for purchase of other properties in the names of the fifth defendant or the seventh defendant. If a co-parcener desires to establish that a property in the name of a female member of the family or in the name of the manager himself has to be accepted and treated as property acquired from the joint family nucleus, it is absolutely essential that such a co-parcener should not only barely plead the same, but also establish the existence of such joint family funds or nucleus. Even if the joint family nucleus is so established, the presumption that the accretions made by the manager or the purchases made by him should be deemed to be from and out of such a nucleus does not arise, if there is no proof that such nucleus of the joint family is not an income-yielding apparatus. The proof required is very strict and the burden is on the person, who sets up a case that the property in the name of a female member of the family or in the name of the manager or any other co-parcener is to be treated as joint family property. Such burden could be said to have been discharged and the usual presumption that such acquisitions are attributable to the joint family nucleus and its income would not automatically arise, but would depend upon proof of the availability of such surplus income or joint family nucleus on the date of such acquisition or purchases. The same is the principle even in cases where moneys were advanced on mortgages over immovable properties. That such a presumption would arise only in the above circumstances, are now very well established.

18. In *M. Girimallappa v. R. Yeliappagonda* A.I.R. 1959 S.C. 906 considering the nature of the presumption, which would arise in the case of new acquisitions made by a manager in his own name, the Supreme Court held:

Where the manager of a joint Hindu family acquired certain properties in his own name and there was sufficient nucleus of joint family property out of which those properties might have been acquired and apart from those properties the manager had no other source of income, the presumption arises that the newly acquired properties were the properties of the joint family. Unless that presumption was rebutted, it must prevail.

In *Mallesappa v. Mallappa* : [1961]3SCR779 , this principle is reiterated in a slightly different way. The Supreme Court held as follows:

Where a manager claims that any immovable property has been acquired by him with his own separate funds and not with the help of the joint family funds of which he was in possession and charge, it is for him to prove by clear and satisfactory evidence his plea that the purchase-money proceeded from his separate fund. The onus of proof must in such a case be placed on the manager and not on his co-parceners.

We would also refer for completion to a general proposition also laid down by the Supreme Court in *M. Gowdappa Hankh v. R. Revgowda Sankh* : [1969]3SCR245 , which is as follows:

There is no presumption that a Hindu family merely because it is joint, possess any joint property. The burden of proving that any particular property is joint property, is therefore, in the first instance upon the person, who claims it as co-parcenary property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. This is, however, subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired-It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate.

18. If the above principles laid down by the Supreme Court are borne in mind, there is no evidence in the instant case that the second defendant was manager of the joint family. Therefore, it is not for him to establish that the properties standing in the name of his wife or his mother-in-law, should be deemed to be joint family properties and that he should be deemed to have provided the joint family funds for acquiring the same.

19. Again, the plaintiff did not establish that there was sufficient nucleus of joint family properties, out of which the properties described in schedules B-1, C and G

could have been purchased.

20. The plaintiff lastly failed to establish that the joint family properties, the B schedule properties in this case, are such as with its aid the properties in the disputed schedules could have been acquired or moneys could have been advanced on the mortgages referred to herein.

21. We have no hesitation to hold that the Court below wrongly placed the burden on the seventh defendant to establish that she had sufficient funds for her to advance moneys to her foster-daughter, the fifth defendant or for her to purchase properties in her own name. We feel it unnecessary to go into that question, as in law, the onus is not on the seventh defendant to establish that she was possessed of funds. On the other hand, it is for the plaintiff to show that the seventh defendant got the funds from the second defendant and she passed it on to the fifth defendant to acquire the properties mentioned in schedules B-1 and C besides purchasing properties mentioned in the G schedule.

22. Before parting with the case, we have to also consider the nature of proof required, when the property is secured in the names of female members of the family or female relatives. No doubt, the Supreme Court in *Narayanaswami v. Ramakrishna* : [1964]7SCR490 , after noticing the fact, that the acquisitions were made in the name of the karta's wife, his son etc., held on a consideration of the evidence that it did not appear that the joint family had at the date of the acquisitions made sufficient nucleus from which these properties could be acquired. In that context, the learned Judges said:

Where in fact at the date of acquisition of a particular property, the joint family had sufficient nucleus for acquiring it, the property in the name of any member of the joint family should be presumed to be acquired from out of family funds and so to form part of the joint family property, unless the contrary is shown.

A division Bench of this Court consisting of Ramamurti, J. and Alagiriswami, J., had occasion to consider the judgment of the Supreme Court in *Narayanaswami v. Ramakrishna* : [1964]7SCR490 , in *Nagayasami v. Kochadai* : AIR1969 Mad329 . There, our Court said:

There is no essential distinction as to 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. 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. If there is no pleading and if on the side of the plaintiffs there is no evidence, there is no need for detailed scrutiny of the case of the female members or persons claiming through them, as to the resources of the female members and as to how they acquired the properties in question. If the plaintiff on whom the burden lies adduces no evidence, no further question arises and the female member in whose name the property stands, must be held to be the beneficial owner of the property in question.

23. The learned Judges went elaborately into the question with reference to the established precedents, and said that the Supreme Court did not consider a general situation like the one which arose before them and observed:

We are not prepared to hold that the Supreme Court intended to overrule the uniform view taken by all the High Courts in a series of cases and upset this well settled and well established rule of distinction in the matter of presumption.

24. In the light of the above well said and well laid principles of law, we are unable, with great respect, to approve of the decision in *Ramudu Mudaliar v. Ellammal* : AIR1974 Mad51 . There, Raghavan, J., observed thus:

When a family continues to be a joint family, there is no reason why the purchase by a member in a revenue auction should be exclusively for himself and not for and on behalf of the family of which he was a member. It is, of course, open to a member of a joint Hindu family to acquire property in his own name. But the

acquirer has to establish that the fund for the purchase did not come from the joint family funds but that it was his own.

With great respect to the learned Judge the onus is not on the acquirer to prove that the property standing in his name was purchased from joint family funds. That may be so, in the case of manage of the joint family, but not so in the case of all coparceners. For a greater reason it is not so in the case of female members. We are, therefore, of the view that, in the absence of any evidence in this case that there was such income yielding apparatus in the nature of a joint family nucleus and in the absence of such joint family properties being available to the coparceners even for purposes of enjoyment, as in this case the mother is admittedly enjoying the income therefrom, we are unable to hold that the properties described in schedule B-1, C and G ought to be deemed and considered as joint family properties. The properties in the name of the female members and female relatives respectively of the family such as the fifth and the seventh defendants should stand without being disturbed. This is so because the plaintiff has failed to prove that on the date of acquiring these properties, the family had sufficient income from which the disputed accretions or acquisitions might have been made.

25. We shall now take up the memorandum of cross-objections filed by the plaintiff-first respondent. As regards schedule B properties, Mr. Sivamani says that no concession was made in the lower Court about this schedule. But on the other hand it was the common case of all parties that the B Schedule properties are with their mother, the fourth defendant and that she was allowed to enjoy the properties for her life. It does not appear to us that the parties ever agreed, as stated by the learned Subordinate Judge that issue No. 1, need not be considered at all by him. In the light of the events already traversed by us in this judgment and in the wake of the present contentions before us, we have already held that the B schedule properties are to be held as joint family properties and, there will be a preliminary decree for partition and separate possession of the one-fourth share of the plaintiff therein. But at the same time, we make it clear that the plaintiff as well as defendants 1 to 3 could obtain their separate possession of their one-fourth share only after the lifetime of the fourth defendant. The preliminary decree ought to have been passed declaring such rights in the parties and it is only at the time of

the passing of the final decree that the above convenient method of separate enjoyment shall be borne in mind by the lower Court.

26. We have already found that item 5 of schedule F does not exist and we do not agree with Mr. Sivamani that there is any substance in the plaintiff's contention that this item should also be deemed to be in existence and forms part of the joint family nucleus. There is no tittle of evidence in this behalf. Even so, we have in the previous paragraphs upheld the contention of the fifth defendant that the assets mentioned in schedule C are her properties and not the properties of the joint family. We have already rendered our reasons for it. There is, therefore, no substance in the cross-objections of the plaintiff in this respect.

27. As regards the outstandings mentioned in schedules D, E-1 and F we have already accepted on principle that the lower Court ought not to have fudged its obligation to investigate on the said items for purposes of finding whether they are available at all and if available whether they are the joint family assets. We have already, in the course of our judgment, indicated that it is for the lower Court to enquire whether the properties mentioned in schedules D, E-1 and F are joint family properties even before it passes a preliminary decree.

28. As regards the E schedule properties we found earlier that no such jewels are in existence and Mr. Sivamani, was unable to place before us any material to find to the contrary.

29. In the result, therefore we allow the appeal with costs and allow cross-objections in part, but each party will bear their own costs in the cross-objections.

30. We, however, set aside the direction of the lower Court against defendants 1 and 2 to pay one half of the costs of the suit to the plaintiff, as before us, defendants 1 and 2 have substantially succeeded in almost all their contentions. The plaintiff, the cross-objector in the memorandum of cross-objections, shall bear the Court-fees payable by himself throughout, if they had not already paid the same.

31. In the light of our findings that the lower Court did not fully investigate into the assets of the joint family with particular reference to properties described in schedules D, D-1 and F and for the reason that we have allowed the present appeal, the preliminary decree rendered by the Court below has to be recast and hence the subject-matter is remitted to it for further investigation. The lower Court shall, on remit, after hearing the parties, and in the light of this judgment, pass a fresh preliminary decree setting out the entitlements of the plaintiff and defendants 1 to 3 in the joint family properties.

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