IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28/02/2003

CORAM

THE HONOURABLE MR.JUSTICE K.GNANAPRAKASAM

SA.No.1777 of 1989

Guruswami Mudaliar ... Appellant

-Vs-

1.M. Murugesan
2.Kannan ... Respondents

For Appellant: Mr.A. Seshan

For Respondents: Mr.M.N.Muthukumaran

Appeal filed against the against the judgement and decree of the Court of the Principal District Judge, North Arcot at Vellore in AS.No.3 4/1987, dated 4th April, 1989, reversing the judgement and decree of the Court of the District Munsif, Ranipet in OS.No.93 of 1983, dated 5.1.1987.

:JUDGEMENT

1.The 1st defendant in OS.No.93/1983, on the file of the District Munsif Court, Ranipet, is the appellant.
2.The plaintiff filed the suit for partition.
3.The plaintiff's case is that he and the defendants are brothers and the 1st defendant is the eldest, the 2nd defendant is the younger and the plaintiff is the youngest of all. There are two items of the suit property and the plaintiff's claim for partition of the 2nd item is not disputed. But, however, the plaintiff's claim that he and the defendants were living jointly, without any division of the suit properties, that the 1st item of the suit property was jointly acquired by the plaintiff and the defendants, and the 1st defendant being the eldest brother, as per custom, the 1st item was purchased in his name, as he was the Kartha of the joint family, till today, the 1st defendant was managing the affairs of the family and since the date of purchase, the plaintiff and the defendants are all residing in the 1st item of the property are not admitted by the 1st defendant. It is the further case of the plaintiff that the 1st item was purchased in and out of the nucleus from the income of the parties, by doing weaving work and the 1st defendant was not having any separate income to purchase the 1st item. The 2nd item of the property is the ancestral property of the parties, which was also being enjoyed jointly by the plaintiff and the defendants. On 17.6.1963, the 1st defendant mortgaged the property to one Seshachala Mudaliar and the said

document was attested by the plaintiff and the 2nd defendant. The recitals in the mortgage would disclose that the 1st defendant had recognised the joint rights of the plaintiff and the 2nd defendant in the 1st item of the property. Hence, the 1st defendant is estopped by his own conduct from denying the plaintiff's title in the 1st item of the property. The plaintiff further stated that he joined in the Tamil Nadu Electricity Board in the year 1970 and from his personal income, he was helping the 1st defendant. The plaintiff demanded for partition and the same was not complied in spite of the notice issued on 1.4.1980 and there was no reply and hence, the suit.

4.The 1st defendant, in his written statement, denied the claim of the plaintiff that the 1st item was purchased in his name, out of respect and as per custom, as he was the Kartha of the joint family. This defendant had purchased the 1st item of the suit property for a sum of Rs.1,000/- on 23.3.1959 in and out of his own money from one Lakshmikanthan and others. He paid Rs.500/-, that being his self-earned money, on 12.12.1959, towards the purchase of the suit property and had borrowed Rs.500/- from one Deivasigamani Mudaliar by mortgaging the 1st item of the suit property itself on the very day of purchase and thus, the entire sale consideration was paid only by the 1st defendant and neither the plaintiff nor the 2nd defendant had paid any amount towards the sale consideration of the 1st item of the property. It is true that the 1st defendant had mortgaged the 1st item to one Seshachala Mudaliar on 17.6.1963 and the said document was attested by the plaintiff and the 2nd defendant, but that by such attestation, both of them admitted the title of the 1st defendant and this defendant had not recognised the joint right of the plaintiff and the 2nd defendant, as contended by him. The 2nd item of the suit property was vacant and it was not yielding anything and that therefore, the plaintiff and the defendants were not having any income from the joint family property. The 1st defendant had purchased the 1st item, in and out of his own income and not from the income of the plaintiff and the 2 nd defendant, as contended by the plaintiff and thus, denied the plaintiff's claim.

5.The 2nd defendant filed a separate written statement, wherein, he has not opposed the plaintiff's claim for partition of the suit property.

6.The trial court framed the following specific issues, among other issues:-

i.Whether the first item of the suit property is a joint family property?

ii.Whether the first item of the suit property is the separate self acquired property of the first defendant?

7.The plaintiff was examined as PW.1 and marked Exs.A1 to A4. The 1 st defendant was examined as DW.1 and marked Ex.B1 to B28. The trial court, after taking into consideration all the aspects of the case, came to the conclusion that the 1st item of the suit property is not the joint family property of the plaintiff and the defendants and the plaintiff and the 2nd defendant are estopped in claiming any share in the 1st item of the suit property and the plaintiff and the defendants are entitled to 1/3rd share in the 2nd item of the suit property and ultimately, dismissed the suit.

8.The plaintiff preferred an appeal in AS.No.34/1987, before the District Court, North Arcot, at Vellore and the lower appellate court allowed the appeal, by holding that the 1st item of the suit property was not the separate and self-acquired property of the 1st defendant and it was purchased in and out of the joint family income of the plaintiff and the defendants and therefore, the plaintiff is entitled to 1/3rd share in the 1st item as well as

in the 2nd item of the suit property. Aggrieved by the same, the 1st defendant has preferred this appeal.

9.Heard both sides.

10.The plaintiff and the defendants are brothers and sons of Kodaikal Manicka Mudaliar and the 1st defendant is the eldest and the 2nd defendant is the second son and the plaintiff is the 3rd son of Kodaikal Manicka Mudaliar. It is the case of the plaintiff that the 2nd item of the suit property is the ancestral property, in which all of them are entitled to 1/3rd share and there is no dispute about the said claim by the defendants also. But, however, the plaintiff claimed that the 1st item of the suit property was purchased in the name of the 1st defendant, as he happened to be the Kartha of the joint family and he was managing the affairs of the joint family and the said property was purchased in and out of the nucleus of the earnings of the plaintiff and the defendants, derived from weaving work. The plaintiff also contended that the 1st item of the suit property was mortgaged to one Seshachala Mudaliar on 17.6.1963 (Ex.B1) and the said mortgage deed was attested by the plaintiff and the 2nd defendant and the recitals in the said document would recognise the joint right of the plaintiff and the defendants in the 1st item of the suit property and therefore, the plaintiff is entitled to 1/3rd share in the 1st item of the suit property.

11.It is the specific case of the 1st defendant that the 1st item of the suit property was purchased, in and out of his self-earnings and Rs.500/- was paid on 12.12.1959, under a sale agreement and the balance of the sale consideration of Rs.500/- was paid on the date of purchase i.e. on 23.3.1959, by borrowing from one Deivasigamani Mudaliar, by mortgaging the very same 1st item of the suit property on the same day i.e. on 23.3.1959 (Ex.B4) and therefore, the suit property was purchased by the 1st defendant in and out of his own money and not in and out of the joint family income, as contended by the plaintiff. It is further contended that the 1st item of the suit property was mortgaged to Seshachala Mudaliar on 17.6.1963 and in the said mortgage deed also, it is specifically recited that the said property belonged only to the 1st defendant, and the plaintiff and the 2nd defendant have attested the said document and hence, they are estopped from putting forward any manner of claim to the1st item of the suit property. The 1st defendant also made it clear that he has no objection for passing a decree for partition and allotment of 1/3rd share to the plaintiff and also to each of the defendants in respect of the 2nd item of the suit property.

12.Now let us consider, whether the 1st item of the suit property was purchased in and out of the self-earnings of the 1st defendant or it was purchased in and out of the joint family income of the plaintiff and the defendants?

13.The relationship between the plaintiff and the defendants as brothers is not in dispute. The 1st defendant is the eldest brother in the family. Except the 2nd item of the suit property, the joint family did not own any other property. It is also seen that the 2nd item was not yielding anything. No doubt, it is true that the plaintiff and the defendants were all doing weaving work and earning their lively hood. Just because the plaintiff and the defendants were living together, can it be concluded that the 1st item was purchased in and out of the joint family income. No doubt, there is a presumption in Hindu Family that it is a joint family and it is for the party, who claims partition said to have taken place, has to prove the partition.

The presumption is rebuttable. But, just because all the members reside under one room, it cannot be said that property was purchased in and out of joint family income, unless there is an acceptable evidence and the same is wanting in this case. But, on the other hand, the plaintiff and the defendants were working separately and getting some income, by which the family was run. There is absolutely no evidence on the part of the plaintiff that the joint family asset had any income, out of which money was saved and the suit property was purchased.

14.The lower appellate court from the evidence of PW.1, came to the conclusion that the plaintiff's father must have died in the year 1951 or 1952 and at that time, the plaintiff would have been 13 or 14 years old and the plaintiff also admitted, in his evidence, that his mother died within a short period from the date of death of his father and came to the conclusion that from the year 1952 to 1956, the parties were engaged in weaving work and they were also living together and that therefore, the 1st item of the suit property must have been purchased in and out of the joint family income of the plaintiff and the defendants, as the said property was purchased in the year 1959. The said finding of the lower appellate court cannot be accepted for the reason that by its own finding, the plaintiff was 13 or 14 years old at the time when his father died and as a minor, he was earning along with his brothers and contributing for the joint family income, cannot be accepted. But, on the other hand, there is a possibility of he, being the minor, might have been taken care by the 1st defendant, who happened to be the 1st son. Though the plaintiff had stated that the1st item of the property was purchased in and out of the joint family income, the 2nd defendant, who is elder to the plaintiff, has not chosen to give evidence in support of the plaintiff. That apart, we could see that the 1st item of the suit property was purchased only in the year 1959 i.e. on 23.3.1959 (Ex.B3). The recitals in the said sale deed disclose that the 1st defendant had paid Rs.500/- under an agreement of sale on 12.12.1959 and the balance amount of Rs.500/- was paid on the date of purchase i.e. On 23.3.1959 and on the same day, the 1st defendant had mortgaged the 1st item of the suit property to one Deivasigamani Mudaliar (Ex.B4), wherein it is clearly stated that the said mortgage was made for the following purpose, viz. "vd; mtrpak; ehd; j';fs; Ehy;kspifapy; nythnjtp bra;J te;j tifapy; gw;W tut[ngha; ehsJ tiu j';fSf;F mjpfk; bfhLf;Fk;go Vw;gl;l ghf;fp U:/300 ,d;W tPLth';Ftjw;fhf j';fsplk; buhf;fkha; gw;Wbfhz;l U:.500 Mf ,dk; , uz;ow;F U:/800/@ These recitals would clearly indicate that apart from the amount paid by the 1st defendant under the agreement dated 12.12 .1959, the balance of the sale consideration for Ex.B3 was met in and out of the mortgage amount under Ex.B4. These two documents would clearly establish that the 1st item of the suit property was purchased by the 1st defendant only in and out of his own income and not from the income of the joint family, as contended by the plaintiff. In fact, there is absolutely no evidence that the joint family had income from the 2nd item and that there was joint family nucleus, out of which, the suit item 2 was purchased. The very fact that the 2nd defendant, who is the elder brother of the plaintiff, had not chosen to support the case of the plaintiff, by offering any evidence, would also discredit the claim of the plaintiff. The lower appellate court had clearly committed an error in coming to the conclusion that the plaintiff and the defendants were residing together as joint family members, as there was no partition in the family and the 1st item of the suit property was mortgaged by

the 1st defendant to Seshachala Mudaliar on 17.6.1963 (Ex.B1) to meet the marriage expenses of the 2nd defendant would establish that the plaintiff and the defendants were all members of the joint family and the 1st defendant was the Kartha of the joint family and in and out of the joint family income, the 1st item of the suit property was purchased. The lower appellate court also relied upon Ex.A4 dated 10.9.1973 written by the 1st defendant to the plaintiff, addressed to one Panchatchara Mudaliar, wherein it is stated that the plaintiff was residing in the house of one Panchatchara Mudaliar at Thiruvalam Village, and the 1st defendant advised the plaintiff not to spend money unnecessarily, as it would help him to go to Sri Valli Malai and also not to indulge in unnecessary expenses and to avoid going to the picture often, as he used to do it when he was at Thimiri. That advice by the 1st defendant would not create or confer any right in the immovable property. It does not also mean that the 1st item was purchased in and out of the joint family income. Even assuming that the plaintiff and the defendants were all the members of the joint family because of the fact that no partition took place in respect of the 2nd item of the suit property, it cannot be stated, in the absence of acceptable evidence that the 1st item was purchased in and out of the joint family income. But, on the other hand, the 1st defendant has clearly established that the 1st item of the suit property was purchased in and out of his own income and also the money borrowed from one Deivasigamani Mudaliar under Ex.B4. In fact, The money borrowed under Ex.B4 was discharged by the 1st defendant in piecemeal and all the payments were made only by the 1st defendant and there is not even an iota of evidence to show that the other brothers also discharged the debt under Ex.B4. As such, the lower appellate court is not correct in coming to the conclusion that the suit property was purchased in and out of the joint family income and it also failed to take note of the fact of borrowing made by the 1st defendant under Ex.B4 and the same was discharged by him only. The house tax receipts filed by the 1st defendant from the year 1965 to 1984 were also not properly appreciated by the lower appellate court and only in the said circumstances, the lower appellate court fell into an error in coming to the conclusion that the suit property was purchased in and out of the joint family income.

15.The lower appellate court proceeded on the footing that the 1st defendant mortgaged the 1st item of the suit property to meet the marriage expenses of the plaintiff would amount to that the 1st defendant did so, as the Kartha of the joint family and therefore, it is the joint family property, but the said view is not supported by acceptable evidence. But, the recitals in Ex.B1, the mortgage deed, it is stated that the said property was his property, i.e. the 1st defendant' s property was not properly appreciated.

16.The plaintiff's contention is that he and the 2nd defendant have attested the mortgage deed and it is in recognition of their right in the suit property. But, on the other hand, it is the contention of the 1st defendant that by such attestation, the plaintiff and the 2nd defendant are estopped from making any claim in the 1st item of the property, as it was recited in Ex.B1 that it is the property of the 1 st defendant.

17.Now let us consider, What is the significance of attestation of a document and attestation by persons, who are having tangible interest in the specific immovable property.

18.Attestation in relation to an instrument is stated in Section 3 of the Transfer of Property Act, which states,

"attested', in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but, it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary." Attestation of persons to a document is to ensure that there is no fraud or other vitiating circumstances in the execution of the document. The one view is that person signing as a witness cannot be looked upon as signing in any other capacity (AIR-1938-Madras-90). But, where a document is required by law to be attested by at least two witnesses, no valid attestation can be said to have been proved unless there is evidence that two attesting witnesses, one of whom is examined in the case, have signed the document after witnessing the signature of the executant or receiving from him a personal acknowledgement of his signature (AIR-1954-SC-316), but that is not the matter in issue in this case.

19.The stand taken by the plaintiff that just because he and the 2 nd defendant have attested the mortgage, it is in recognition of their right in the suit property is a far-fetched one and the same cannot be accepted.

20.But, however, it has been held in the case of Ramaswamy Gounder, Chinnasami Gounder alias Chinna Gounder Vs. Anantapadmanabha Iyer (197 1-I-MLJ-392)=84-LW-176) that "Where a person having a tangible interest in the property affected by a deed, attests that deed, his attestation should be taken as proof of his consent to and knowledge of the correctness of the recitals in the deed."

21.In the case of K.Nagarathinam and another Vs. K.Rajammal (1987-IMLJ-257), [Srinivasan, J., (as he then was)], after considering several views of this court and also the views expressed by other High Courts, had stated, "After analysing all those decisions, I find that they lay down the proposition that if it is shown to the court that an attesting witness was a consenting party to a particular transaction, he would be estopped from questioning the effectiveness of the said transaction, on a later occasion on the ground that he was not a party thereto, though some of the decisions proceed on the footing that there is a sort of usage in this part of the country to obtain the signature of a party as an attesting witness whenever his consent is required for the said transaction. In all these cases, an inference has been drawn from all the facts and circumstances of the cases that the attesting witnesses therein were really consenting to the transaction in question. In fact, the Privy Council had occasion to refer to the so called usage in Pandurang Krishnaj Vs. Jundaya Thukaram (1922-42-MLJ-436, and observed that, "Before their Lordships consider the circumstances in which that attestation took place, they think it is desirable to emphasise once more that attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution by implication; and knowledge of the contents of the document, and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects. It is, of course, possible, as was pointed out by their Lordships in the case of Banga chandra Dhur Biswas Vs. Jagath Kishore Chowdri

(1916-31-MLJ-563=1916-LR-48-IA-249=4-LW-458=AIR-1916-PC-1 10) that an attestation may take place in circumstances which would show that the witness did in fact know all the contents of the document, but no such knowledge ought to be inferred from the mere fact of the attestation."

The decision rendered by this court, in which attestation has been held to bind the attestor on the basis of the law of estoppel in Ramaswami Gounder Vs. Ananthapadmanabha Iyer (1971-84-LW-176), Jayarama Chandra Iyer Vs. Thulasi Ammal (1975-88-LW-549) and Narayanasami Padayachi Vs. Sambanda Mudaliar (1977-90-LW-37-SN). It was held that, "in all these cases, it was found on the facts that the person, who attested the document was consenting party."

22.The Division Bench of this Court in Jagannatha Pillai Vs. Kunjithapatham Pillai [(1972)-85-LW-112=AIR-1972-Madras-390], has approved the earlier decision in Ramaswami Gounder Vs. Ananthapadmanabaha Iyer (1971-84-LW-176. The Division Bench has also pointed out that mere attestation proved no more that the signature of an executing party has been attached to a document in the presence of the attesting witnesses. The Division Bench quoted the observations made by the Privy Council in Raj Lukhee Dobea Vs. Gokool Chander Chowdry (1867-13-MIA-209) as under:-

"Their Lordships cannot affirm the proposition that the mere attestation of such an instrument by a relative necessarily imports concurrence. It might, no doubt, be shown by other evidence that when he became attesting witness, he fully understood what the transaction was, and that he was a concurring party to it, but from the mere subscription of his name that inference does not necessarily arise." The most considered and acceptable view is that "The correct position of law is stated by a Division Bench of the Kerala High Court in Govindan Vs. Chellamma (AIR-1959-Kerala-237),wherein their Lordships held that there can be no doubt that an attesting witness can be shown to have fully understood the particular transaction so that his attestation may support the inference that he was a consenting party. It was also observed that the question, is really one of facts and should be determined with reference to the circumstances". On the above said backdrop, if we consider Ex.B1 that being the mortgage, which was attested by the plaintiff and the 2nd defendant, it cannot at all be construed that the 1st defendant had recognised the right of the plaintiff and the 2nd defendant in the suit property and therefore, the argument advanced by the plaintiff to that effect is to be rejected. The mere fact that the plaintiff and the 2nd defendant have attested Ex.B1 would not cloth them with any right in the said property. But, at the same time, it is seen that the 2nd defendant has not come forward to give evidence in support of the plaintiff and it would clearly indicate that the 2nd defendant knows fully well that the 1st item in the suit property was purchased by the 1st defendant in and out of his own income. These factors would definitely weigh against the plaintiff and the finding contrary is perverse, liable to be set aside and accordingly, it is set aside.

23.In the result, the appeal is allowed and the judgement and decree of the lower appellate court is set aside and the judgement and decree of the trial court is restored. No costs.

28.2.2003
Index: Yes
Web: Yes

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To:

1.The Principal District Judge, North Arcot at Vellore
2.The District Munsif, Ranipet
3.The Record Keeper, VR Section, High Court, Madras