

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.03.2021

CORAM

THE HON'BLE Mr. JUSTICE **G.K.ILANTHIRAIYAN**

C.R.P.(PD) No.4056 of 2013
and M.P.No.1 of 2013

1. Ranganathan (died)
2. Krishnaveni (died)
2. R. Manonmani
4. R. Adhiyaman
5. Thamizhkani

(Petitioner 3 to 5 are brought
on record as Legal representatives
of the deceased first petitioner vide
order of this Court dated 17.03.2021
in C.M.P.No.5566 of 2021 in C.R.P.
No.4056 of 2021)

.... Petitioners

1. Valliammal
2. Pugazhenth
3. Saravanan
4. Vijaya
5. Anusya
6. Sankari

(Respondents 4 to 6 are brought
on record as Legal representatives
of the deceased second petitioner vide
order of this Court dated 17.03.2021
in C.M.P.No.5576 of 2021 in C.R.P.
No.4056 of 2021)

... Respondents

Prayer :- Civil Revision Petitions are filed under Article 227 of the Constitution of India, to set aside the order dated 12.09.2013 in I.A.No.382 of 2013 in O.S.No.16 of 2006 on the file of the Subordinate Judge, Gingee.

For Petitioners : Mr.N.Suresh

For Respondents

For R1 : Mr.A.Muthukumar

For R2 : Notice served

For R3 to R6 : Not ready in notice.

ORDER

This Civil Revision Petition has been filed as against the fair and decretal order dated 12.09.2013 passed by the learned Subordinate Judge, Gingee, in I.A.No.382 of 2013 in O.S.No.16 of 2006, thereby dismissing the petition seeking permission to include the properties stand in the name of the first respondent herein.

2. The petitioners are the defendants in the suit in O.S.No.16 of 2006 filed by the first respondent herein for partition. The suit was decreed and aggrieved by the same, the petitioners filed appeal suit in A.S.No.11 of 2011. While pending the appeal, the petitioners filed petition to include the properties stand in the name of the first respondent for partition. The appellate Court set aside the judgment and decree passed by the Court

below and remitted back for fresh disposal and directed the trial Court to dispose the petition filed to include the properties for partition. The trial Court dismissed the said petition and aggrieved by the same the present Civil Revision Petition.

3. The learned counsel appearing for the petitioners would submit that the properties which were purchased by the joint family income were already included in the suit for partition by the first respondent. When it being so, the properties purchased by the first respondent from the income derived by the joint family property also to be included in the partition. He further submitted that in the partition suit, the defendant also to be treated as one of the plaintiff and whatever the properties left out for partition by the plaintiff can be included for partition. In support of his contention, he relied upon the following reported judgments :-

- i) 2012 1 CTC 159 - Solavaiammal & ors Vs Ezhumalai Goundar & anr***
ii) 2020 (1) MLJ 8 - A.V. Murugan vs. K. Maheswari and Ors.

4. Per contra, the learned counsel appearing for the first respondent would submit that the suit is of the year 2006 for partition. The petitioners vehemently contested the suit and thereafter decreed in favour of the first respondent herein by the judgment and decree dated 20.10.2010. Aggrieved by the same, the petitioners filed appeal suit in A.S.No.11 of 2011. While pending the appeal suit, the petitioners came forward with the petition seeking permission to include the properties stand in the name of the first respondent for partition. While the appellate Court remitted back the suit for fresh disposal, also remitted the petition for seeking permission to include certain properties for partition. Therefore, the petitioners filed this petition to include the suit properties after disposal of the main suit that too when the appeal suit was pending, the said petition was filed. Therefore, there is absolutely no bonafide on the part of the petitioners and only to prolong the trial these kind of petitions filed.

4.1. He further submitted that the first respondent filed counter and specifically stated that the first respondent is not in possession and enjoyment of the joint family properties and the properties standing in the

name of the first respondent is presumed to be separate property of the individual unless there is proof for enjoyment of the joint family properties. Therefore, the properties which were sought to be included for partition are admittedly stand in the name of the first respondent and there is no proof to show that she was also in possession and enjoyment of the joint family properties. Therefore, the properties stand in the name of the first respondent cannot be included and the trial Court rightly dismissed the petition. He also relied upon the judgment reported in **2012 1 CTC 159** in the case of ***Solavaiammal & ors Vs Ezhumalai Goundar & anr*** which is cited by the learned counsel appearing for the petitioners.

5. Heard Mr.N.Suresh, learned counsel appearing for the petitioners and Mr A.Muthukumar, learned counsel appearing for the first respondent.

6. The petitioners are the defendants and the first respondent is the plaintiff in the suit filed for partition. The suit was decreed and aggrieved by the same, the petitioners preferred appeal suit. While pending the appeal

suit, the petitioners filed petition to include the properties stand in the name of the first respondent for partition. While the appellate Court remitted the suit for fresh disposal, the said petition was also sent along with the suit.

7. Now the point for consideration is that whether the properties stand in the name of the first respondent are to be included or not?

8. Besides that in a suit for partition, in the event the plaintiff has included only certain properties as if they are available for partition and leave some other properties which are also available for partition, the request of the defendant in such event to include the left out properties also in the plaint schedule would not in any way amount to altering or changing the nature or character of the suit and it would also avoid multiplicity of proceedings.

9. In the case on hand as stated supra, the suit is of the year 2006 and the same was decreed in favour of the first respondent herein. The petitioners filed appeal suit, while pending the appeal suit, the petitioners

filed this petition to include the properties stand in the name of the first respondent herein. The specific stand of the first respondent is that, she is not in possession and enjoyment of the joint family properties as such, the properties stand in her name are not purchased from the income derived from the joint family properties.

10. In this regard, both the learned counsels relied upon the judgment reported in **2012 1 CTC 159** in the case of ***Solavaiammal & ors Vs Ezhumalai Goundar & anr*** as follows :-

"17. In a Suit for partition, in the event the Plaintiff has included only certain properties as if they are available for partition and leave some other properties which are also available for partition, the request of the Defendant in such event to include the left out properties also in the Plaint schedule would not in any way amount to altering or changing the nature or character of the Suit, as such an amendment is also necessary for an effective adjudication of the case and to avoid multiplicity of proceedings.

.....

19. However, in an Application for amendment, the Court has to prima facie satisfy itself as to whether the properties are available for partition or not, as a detailed adjudication on the claim is improper. If there is a dispute over the inclusion of properties by the Plaintiff contending that those properties are not available for partition, the Court is certainly entitled to reject the Application for amendment on that ground. In such event, the only course open to the Defendant is to file a Suit for Partition by including those properties. As we have been called upon to answer the question as to whether the Application under Order 6, Rule 17 of the Civil Procedure Code seeking for amendment of the Schedule to the Plaint in a Partition Suit at the instance of the Defendant is maintainable or not, we answer the said issue by holding that while considering such an Application, it is for the Court to decide on the facts of each case. The reference is answered accordingly."

The Hon'ble Division Bench of this Court held that if there is a dispute over the inclusion of properties by the plaintiff contending that those properties

are not available for partition, the Court is certainly entitled to reject the application for amendment on that ground. In such event, the only course open to the defendant is to file a suit for partition by including those properties.

11. In the case on hand, admittedly the properties which are sought to be included for partition suit stand in the name of the first respondent herein. The first respondent also specifically pleaded that she is not in possession of the joint family properties and the properties which are sought to be included are not purchased from the income derived from the joint family properties. That apart, filing of the present petition is after though that too for the reason that the first respondent subjected the properties which are stand in the name of the petitioners also for partition and as such the petitioners wanted to include the properties stand in the name of the first respondent also.

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12. That apart, the petitioners did not chose to file any petition to include the properties in the original suit and they filed the present petition

only in the appeal suit. The petitioners filed this petition at the stage of appeal suit and it is nothing but to prolong the proceedings. Therefore, the Court below rightly dismissed the petition and this Court finds no infirmity or illegality in the order passed by the Court below. However, the petitioners are at liberty to file separate suit challenging the properties stand in the name of the first respondent in the manner known to law, if so advised.

13. Accordingly, the Civil Revision Petition stands dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

17.03.2021
(2/2)

Index : Yes/No

Internet : Yes/No

Speaking order/Non-speaking order

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To

1. The Subordinate Judge,
Gingee.
2. The Section Officer,
V.R. Section,
Madras High Court,
Chennai.

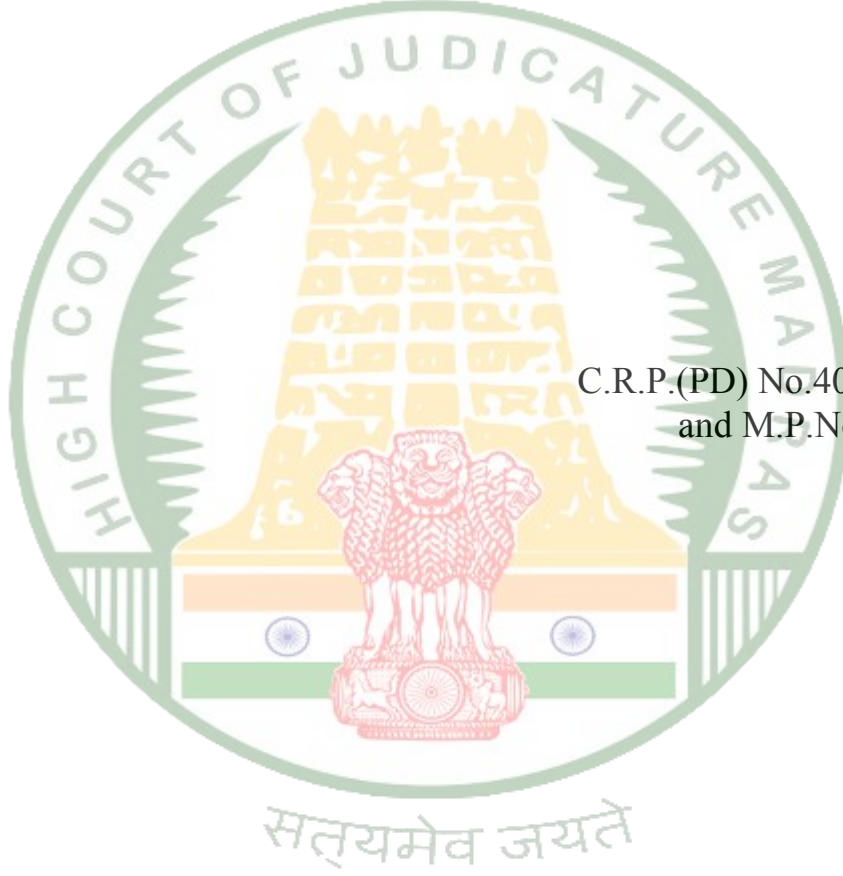


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