



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON	JUDGMENT PRONOUNCED ON
17.08.2022	12.10.2022

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI
and
THE HONOURABLE MR.JUSTICE S.SOUNTHAR

A.S.No.636 of 2016
and Cross Objection No.7 of 2017
and C.M.P.No.18389 of 2016

A.S.No.636 of 2016

- 1.Ganesan (died)
- 2.G.Rangarajan
- 3.Amsavalli

... Appellants

*(A1 died. A3 brought on record as Lr of
the deceased 1st appellant viz., Ganesan
vide Court order dated 21.07.2022 made in
C.M.P.No.11341/2022 in A.S.No.636/2016)*

Vs.

- 1.Sugantha Kundalam
- 2.Ramana Thilagam
- 3.Vaijayanthimala
- 4.Umamaheswari



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

5.Amaravathi

6.Maragatharani

7.The District Collector,
Cuddalore District,
Cuddalore.

8.The Sub Registrar,
Katcheri Road,
Parangipettai,
Chidambaram Taluk,
Cuddalore District.

9.The Tahsildar,
Kasimkanpettai Road,
Chidambaram Town.

10.The Executive Officer,
Parangipettai Town Panchayat,
Katcheri Road, Parangipettai.

11.The Assistant Executive Engineer,
TNEB, O & M, Parangipettai.

... Respondents

Prayer: This First Appeal is filed under Section 96 of C.P.C., read with Order XLI Rule 1 of C.P.C., against the judgment and decree dated 29.03.2016 made in O.S.No.27 of 2014 on the file of the II Additional District and Sessions Court, Chidambaram.



WEB COPY



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

For Appellants : Mr.V.Vijayashankar

For RR1 to 3,5 & 6 : Mr.K.Sudalaiyandi

For RR4, 7 to 10 : No appearance

For R11 : Mr.V.Viswanathan

Cross Objection No.7 of 2017

1.Sugantha Kundalam

2.Ramana Thilagam

3.Vaijyanthimala

4.Umamaheswari

5.Amaravathi

6.Maragatharani

... Cross Objectors

Vs.

1.Ganesan (died)

2.G.Rangarajan

3.The District Collector,
Cuddalore.

4.The Sub Registrar,
Katcheri Road, Parangipettai.

5.The Tahsildar,
Kasimkanpettai Road,
Chidambaram Town.



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

- 6.The Executive Officer,
Parangipettai Town Panchayat,
Parangipettai.
7.The Assistant Executive Engineer,
TNEB, O & M,
Parangipettai.
8.Amsavalli

... Respondents

*(R1 died. R8 brought on record as Lr of
the deceased 1st respondent viz., Ganesan
vide Court order dated 21.07.2022 made in
C.M.P.No.11341/2022 in A.S.No.636/2016)*

Prayer: This Cross Objection is filed under Order XLI Rule 22 of C.P.C.,
against the judgment and decree dated 29.03.2016 made in O.S.No.27 of
2014 on the file of the II Additional District and Sessions Court,
Chidambaram.

For Cross Objectors 1 to 3,5 & 6 : Mr.K.Sudalaiyandi
For Cross Objector 4 : No appearance
For RR1, 2 & 8 : Mr.V.Vijayashankar

For RR3 to 6 : No appearance

For R7 : Mr.V.Viswanathan

COMMON JUDGMENT

[Judgment of the Court was delivered by V.M.VELUMANI,J.]

The appellants 1 and 2 are defendants 1 and 2, 3rd appellant is legal heir
of the deceased 1st appellant, respondents 1 to 6 are plaintiffs and respondents



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

WEB COPY

7 to 11 are the defendants 3 to 7 in O.S.No.27 of 2014 on the file of the II Additional District and Sessions Court, Chidambaram. The respondents 1 to 6 filed the said suit against the appellants 1 and 2 and respondents 7 to 11 for partition and separate possession of the suit property, declaration that settlement deed dated 05.05.2014 is not valid and binding on the respondents 1 to 6, permanent injunction restraining the 2nd appellant from any manner encumbering or alienating the suit property in favour of third parties, 3 mandatory injunctions directing the respondents 9 to 11 not to effect any mutation of revenue records, transfer of assessment and transfer of service connection from the 1st appellant in favour of the 2nd appellant. The 1st appellant died pending appeal. The 2nd appellant and respondents 1 to 6 who are the children of the 1st appellant are already on record. One Amsavalli, wife of the deceased 1st appellant was impleaded and brought on record as 3rd appellant in the appeal vide order of this Court dated 21.07.2022 made in C.M.P.No.11341/2022 in A.S.No.636/2016.



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

Case of the respondents 1 to 6 -

WEB COPY

2(i).The respondents 1 to 6 and 2nd appellant are daughters and son of the appellants 1 and 3. The suit property was purchased by paternal grandmother Thiripurathammal, wife of Sarangapani, by the deed of sale dated 19.04.1936, bearing registered document No.378/1936, for a valuable sale consideration. The sale consideration was paid by their paternal grandfather viz., Sarangapani, as Thiripurathammal was house wife and she did not have any independent income. After death of Thiripurathammal and Sarangapani, in or about 1960, the 1st appellant/son of Thiripurathammal and Sarangapani continued to live in the suit property along with the appellants 2 and 3 and respondents 1 to 6. The respondents 1 to 6 and 2nd appellant were born and brought up in the suit property. The suit property was always held, enjoyed and treated as joint family property by the joint family consisting of respondents 1 to 6 and appellants 1 and 2. Even if the suit property was inherited by the 1st appellant from his mother as partaken character of joint family property, it cannot be treated as his separate property.

2(ii).The 1st appellant was employed as a Teacher and obtained loan



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

WEB COPY

from the State Bank of India, Chidambaram and put up two shops abutting the street. Even during life time of Thiripurathammal and Sarangapani, a Madras Terraced Building was put up. The market value of the property at the time of filing suit was Fifty Lakhs.

2(iii).The appellants 1 and 3 and 2nd appellant, along with his wife and children were living in the suit property. The 1st appellant, by the registered settlement deed dated 05.02.2014, settled the suit property on the 2nd appellant as though he is the absolute owner of the suit property. The 1st appellant has only 1/8th share in the suit property. The 1st appellant has no right to settle the entire property. The 2nd appellant has not acquired any right as the 1st appellant is not having any right over the entire property. The said settlement deed is not valid and is not binding on the respondents 1 to 6 and their legitimate share. The said settlement deed is invalid and unenforceable. As per deletion of Section 29-A of the Hindu Succession Act, 1955 by the introduction of Amended Act, 39 of 2005, the respondents 1 to 6 have every right to claim their share in the suit property. The 2nd appellant is employed as Draughtsman in the Revenue Department, Cuddalore and using his influence



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

and taking advantage of the settlement deed executed by the 1st appellant in favour of the 2nd appellant, he is trying to change the revenue records, property assessment record and Electricity service connections to the suit property from the name of the 1st appellant to the name of the 2nd appellant. In view of the same, the respondents 1 to 6 have come out with the present suit for the relief sought for.

Case of the appellants -

3.The 1st appellant filed written statement and 2nd appellant adopted the same. The appellants denied entire allegations made by the respondents 1 to 6 in the plaint, except the relationship between the parties. The mother of the 1st appellant viz., Thiripurathammal purchased the suit land with a hut by deed of sale dated 19.04.1936 by registered Document No.378/1936, out of her own funds. The parents of the 1st appellant viz., Thiripurathammal and Sarangapani had 5 sons and 2 daughters. The 1st appellant is 5th son. Thiripurathammal borrowed a sum of Rs.400/- from her brother Konjithapatham Pillai, in order to construct a house in the suit land. She mortgaged the suit property by registered mortgage deed dated 08.09.1947 in



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

favour of her brother Konjithapatham Pillai. Thiripurathammal did not redeem the mortgage. Her brother Konjithapatham Pillai had to pay the money to one Bakkiyalakshmi Ammal, W/o.Krishnamurthy Ayyair and he made over the mortgage deed vide document dated 15.03.1955 in favour of Bakkiyalakshmi Ammal. The other children of Thiripurathammal and Sarangapani were not willing to pay the money and discharge the mortgage from the said Bakkiyalakshmi Ammal. At the request of Thiripurathammal, the 1st appellant paid a sum of Rs.850/- to Bakkiyalakshmi Ammal, W/o.Krishnamurthy Ayyair and the said Bakkiyalakshmi Ammal made over the mortgage in favour of the 1st appellant by two made over documents both dated 18.12.1961. From that date onwards, the 1st appellant became absolute owner of the suit property. He was paying the property tax. The 1st appellant was in possession and enjoyment of the suit property for more than 53 years. He has perfected his title by adverse possession. The other sons and daughters of Thiripurathammal never claimed share in the suit property as they knew very well that suit property is absolute property of the 1st appellant. The 2nd appellant, in the year 2003, renovated the front portion of the house and has put up two shops abutting the street. The allegation that the suit



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

property is joint family property of appellants 1 and 2 and respondents 1 to 6 and 1st appellant has only 1/8th share are not correct. The suit property is absolute property of 1st appellant and settlement deed dated 05.02.2014 by the 1st appellant in favour of the 2nd appellant is valid and legal. The suit is bad for non-joinder of necessary parties as other sons and daughters of Thiripurathammal and Sarangapani are not made as party to the suit.

4.The respondents 1 to 6 are not in possession of the suit property and Court fee paid by the respondents 1 to 6 is not correct. The 1st appellant has celebrated marriage of the respondents 1 to 6 in a grand manner and gave 10 Sovereigns of gold jewels and Sridhana articles worth Rs.2,00,000/- to each of the respondents 1 to 6. The respondents 1 to 6 have no share in the suit property when 1st appellant is alive. The 1st appellant is an absolute owner. He has every right to alienate the suit property during his life time which cannot be questioned by the respondents 1 to 6.

5.Considering the pleadings, the learned Judge framed the following issues, which reads as follows:

“1. Whether the suit property was purchased in the name



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

*of Thiripurathammal with the funds of her husband
Sarangapani?*

*2.Whether the suit property is a Hindu Joint family
consists of plaintiff and defendants?*

*3.Whether the suit property belonged to
Thiripurathammal absolutely?*

*4.Whether the mortgage created over the suit property
was redeemed by the 1st defendant as per oral requisition of
Thiripurathammal and so 1st defendant became the absolute
owner of the suit property?*

*5.Whether the plaintiffs are entitled for 6/8th share in the
suit property?*

*6.Whether the suit is bad for non-joinder of necessary
parties?*

*7.Whether the suit is not properly valued for the purpose
of Court fee and Jurisdiction?*

*8.Whether the settlement deed executed by D1 in favour of
D2 is valid and enforceable?*

*9.Whether the plaintiffs are entitled for preliminary
decree for 6/8 share as prayed for?*

*10.Whether the plaintiffs are entitled for declaration and
permanent injunction as prayed for in the suit?*

11.Whether the plaintiffs are entitled for mandatory



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

injunction as prayed for?

12.To what relief?”

6.Before the learned Judge, the 2nd respondent examined herself as P.W.1 and marked 12 documents as Exs.A1 to A12. The 1st appellant examined himself as D.W.1, the 1st appellant's brother was examined as D.W.2, 2nd appellant was examined as D.W.3 and one Amaresan was examined as D.W.4 and 17 documents were marked as Exs.B1 to B17.

7.The learned Judge considering the pleadings, oral and documentary evidence, held that the suit property is a joint family property, appellants 1 and 2 failed to prove that the 1st appellant is absolute owner of the property and respondents 1 to 6 are entitled to partition and 6/16th share in the suit property. The learned Judge also granted decree of declaration and permanent injunction as prayed for and dismissed the relief of mandatory injunctions.

8.Against the said judgment and decree dated 29.03.2016 made in O.S.No.27 of 2014, the appellants 1 and 2 have come out with the present appeal. Pending appeal, the 1st appellant died. The wife of the 1st appellant



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

was impleaded as 3rd appellant in the appeal vide Court of this order dated 21.07.2022 made in C.M.P.No.11341 of 2022 in A.S.No.636 of 2016.

WEB COPY

9.Learned counsel appearing for the appellants reiterated the averments made in the written statement and submitted that the learned Judge erroneously held that the suit property is a joint family property without properly appreciating the oral and documentary evidence let in by the appellants 1 and 2. The suit property was purchased by the mother of the 1st appellant in the year 1936. She mortgaged the property, borrowed money and constructed a Madras Terraced Building. The mortgagee, who is the brother of Thiripurathammal, mother of the 1st appellant made over the mortgage to Bakkiyalakshmi Ammal, W/o.Krishnamurthy Ayyair. The 1st appellant paid the mortgage amount as other children of Thiripurathammal were not willing to pay the amounts to Bakkiyalakshmi Ammal. On receipt of amounts from the 1st appellant, the said Bakkiyalakshmi Ammal made over the mortgage in the year 1961 by two documents both dated 18.12.1961. The 1st appellant became absolute owner of the suit property and is in possession and enjoyment of the suit property from that date onwards. After the 1st appellant



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

WEB COPY

redeemed the mortgage, parents of the 1st appellant who were alive at the time of redeeming mortgage, did not object to the 1st appellant, holding the property as absolute owner. The learned Judge failed to consider oral and documentary evidence let in by the appellants to show that suit property is absolute property of 1st appellant.

10.The learned Judge failed to consider that the 1st appellant has perfected his title by adverse possession by holding the property openly and hostile manner with required animus with knowledge of all. The 1st appellant made improvements and made construction over the suit property and is in possession of the suit property for more than 30 – 40 years as owner and nobody, including the respondents 1 to 6, objected to the same. The 2nd respondent as P.W.1, admitted in the cross-examination that the 1st appellant is owner of the suit property. The learned Judge ought to have dismissed the suit on this ground alone. The learned Judge erred in holding that the suit property is joint family property, when there is no evidence to show that suit property was purchased from joint family nucleus. The Trial Court failed to see that Thiripurathammal had 7 children, including the 1st appellant and on



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

the death of Thiripurathammal, all her children and husband are entitled to equal share in the property of Thiripurathammal. The learned Judge erred in holding that father of the 1st appellant and 1st appellant had ½ share each in the suit property on the ground that other children of Thiripurathammal gave up their right over the property without there being any evidence to that effect. D.W.2, brother of the 1st appellant and one of the sons of Thiripurathammal deposed that 1st appellant is the absolute owner of the suit property and D.W.2 and other children of Thiripurathammal recognized the 1st appellant as absolute owner of the suit property. The suit is bad for non-joinder of necessary parties. The reason given by the learned Judge for holding that the suit is not bad for non-joinder of parties is erroneous. The 1st appellant proved that he is the absolute owner of the suit property, by letting in oral and documentary evidence. In such circumstances, the finding of the learned Judge that settlement deed executed by the 1st appellant in favour of the 2nd appellant is not valid, is erroneous. The settlement deed executed by the 1st appellant in favour of the 2nd appellant is valid as the 1st appellant is the absolute owner of the suit property.



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

WEB COPY

11.In support of his contentions, the learned counsel appearing for the appellants relied on the following judgments:

(i) 2018 (15) SCC 662 [Mangammal @ Thulasi & another]

“11. Before proceeding further, it is apt to have an understanding of the concept of ancestral property in a nutshell. Any property inherited upto four generations of male lineage from the father, father's father or father's father's father i.e. father, grandfather etc., is termed as ancestral property. In other words, property inherited from mother, grandmother, uncle and even brother is not ancestral property. In ancestral property, the right of property accrues to the coparcener on birth. The concept of ancestral property is in existence since time immemorial.”

(ii) AIR 1965 SC 271 [Kanakarathanammal vs V.S.Loganatha Mudaliar & another]:

“8. It is true that the actual management of the property was done by the appellant's father; but that would inevitably be so having regard to the fact that in ordinary Hindu families, the property belonging exclusively to a female member would also be normally managed by the



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

Manager of the family; so that the fact that the appellant's mother did not take actual part in the management of the property would not materially affect the appellant's case that the property belonged to her mother. The rent was paid by the tenants and accepted by the appellant's father; but that, again, would be consistent with what ordinarily happens in such matters in an undivided Hindu family. If the property belongs to the wife and the husband manages the property on her behalf, it would be idle to contend that the management by the husband of the properties is inconsistent with the title of his wife to the said properties. What we have said about the management of the properties would be equally true about the actual possession of the properties, because even if the wife was the owner of the properties, possession may continue with the husband as a matter of convenience. We are satisfied that the High Court did not correctly appreciate the effect of the several admissions made by the appellant's father in respect of the title of his wife to the property in question. Therefore, we hold that the property had been purchased by the appellant's mother in her own name though the consideration which was paid by her for the said transaction had been received by her from her husband.



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

9. *As soon as we reach this conclusion, it becomes necessary to consider whether the appellant's suit must fail for non-joinder of necessary parties. It is common ground that the appellant has brothers alive, and even in the trial Court respondents 1 and 2 took the alternative plea that if the property was found to belong to the appellant's mother, under the relevant Mysore law the appellant and her brother would be titled to succeed to that property and the non-joinder of the brothers was, therefore, fatal to the suit. In fact, as we have already indicated, the trial Court had dismissed the appellant's suit on this ground. The decision about the question as to the appellant's title to this property would thus depend upon the construction of the relevant provisions of the Act. Section 10 is relevant for the purpose. Section 10(1) defines 'Stridhan' as meaning property of every description belonging to a Hindu female, other than property in which she has, by law or under the terms of an instrument, only a limited estate. Section 10(2) prescribes an inclusive definition of the word 'Stridhan' by clauses (a) to (g). The appellant contends that the property in question falls under s. 10(2)(b), whereas according to the respondents it falls under s. 10(2)(d). There is no doubt*



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

that if s. 10(2)(b) take in the property, the appellant would be exclusively entitled to it and the plea of non-joinder of her brothers would fail. On the other hand, if s.10(2)(d) applies to the property, the appellant will not be exclusively entitled to the property and her brothers would be necessary parties to the suit. In that case the plea of non-joinder would succeed and the appellant's suit would be dismissed on that account. The position with regard to the heirs who succeed to Stridhan property belonging to a Hindu female dying intestate has been provided for by s. 12 of the Act and there is no dispute on that account.

.....

15. It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her two brothers to her suit, though on the merits we have found that the property claimed by her in her present suit belonged to her mother and she is one of the three heirs on whom the said property devolves by succession under s. 12 of the Act. That, in fact, is the conclusion which the trial Court had reached and yet no action was taken by the appellant to bring the necessary parties on the record. It is true that under O. 1 r. 9 of the Code of Civil Procedure no



WEB COPY



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

suit shall be defeated by reason of the misjoinder or non-joinder of parties; but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal.....”

(iii) 1983 100 LW 486 [A.Ramachandra Pillai vs Valliammal (died)]

“7. Though O.1, R.9 of the Code of Civil Procedure provides that no suit shall be defeated by reason of misjoinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of parties actually before it, there is a proviso which says that nothing in that rule will apply to non-joinder of necessary parties. In a suit for general partition, there could be no doubt that all the sharers are necessary parties as mentioned above. Apart from this, the main part of R.9 is only an enabling provision and the Court shall deal with each case with reference to the particular facts in that case. It is in that context, the decision of the Supreme Court in Kanakarathnammal v. Loganatha, is relevant. In that case, also, the plaintiff filed a suit for declaration and possession on the ground that the properties belonged to her mother



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

and on her death she, as the sole heir, was entitled to the entirety of the properties. The suit was filed against two defendants who claimed that the father of the plaintiff had executed a will under which the first defendant had been appointed as executor and that as such executor he obtained probate of the said will, got possession of the properties and handed over possession to the second defendant therein as directed in the will. Thus the defendants set up a title in respect of the suit properties in the appellant's father. Alternatively they also added that if the properties belonged to the plaintiff's mother, she would not be entitled to claim exclusive title to the same, because by succession, the suit properties would devolve upon the appellant and her two brothers and the appellant's failure to join her brothers made the suit incompetent for non-joinder of necessary parties. The trial Court held that the mother was the owner of the properties. However, it held that the suit is bad for non-joinder of necessary parties and on that ground the suit was dismissed. On appeal however, the High Court held that the properties belonged to the father. The appeal was dismissed on this ground and therefore there was no necessity to go into the question whether the suit was maintainable or not. On a further



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

appeal, the Supreme Court accepted the contention of the plaintiff that the properties belonged to the mother. However, the Supreme Court held that since she was one of the three heirs of her mother and since she had not impleaded her two brothers to her suit, the suit was liable to be dismissed. The Supreme Court further observed:

“It is true that under Order I, Rule 9 of the Code of Civil Procedure no suit shall be defeated by reason of the mis-joinder or non-joinder of the parties, but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal. Even in such cases, the Court can under Order 1. Rule 10, sub-rule (2) direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties' plea of limitation. Once it is held that the appellant's two brothers are co heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the character of a suit for partition and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents.”

This decision is thus an authority for the position that in a suit for partition, all the sharers are necessary parties and also for the position that the suit is liable to be dismissed for nonjoinder of any one of the parties. In (T.



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

Panchapakesan and others v. Peria Thambi Naicker and others) also, a Division Bench of this Court has taken a similar view by judgment dated 18-7-1972. We are accordingly of the view that the finding of the learned Subordinate Judge on issue No. 10 holding that the suit is not bad for non-joinder of Nagarathinam's heirs is unsound and liable to be set aside. Accordingly, we hold that the suit is liable to be dismissed for non-joinder of the heirs of Nagarathinam.”

(iv) 2011 (9) SCC 451 [Marabasappa (dead) by lrs. And others vs Ningappa (dead) by lrs and others]-

“24. Section 14 of the Hindu Succession Act, 1956 clearly mandates that any property of a female Hindu is her absolute property and she, therefore, has full ownership. The Explanation to Sub-section 1 further clarifies that a Hindu woman has full ownership over any property that she has acquired on her own or as stridhana. As a consequence, she may dispose of the same as per her wish, and that the same shall not be treated as a part of the joint Hindu family property.

25. This Court has time and again held that there is no presumption that of joint family property, and there must



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

be some strong evidence in favour of the same. In the case of Appasaheb Chamdgade v. Devendra Chamdgade and Ors. (2007) 1 SCC 521, after examining the decisions of this Court, it was held:

“17. Therefore, on survey aforesaid decisions, what emerges is that there is no presumption of a joint Hindu family but on the evidence if it is established that the property was joint Hindu family and the other properties were acquired out of that nucleus, if the initial burden is discharged by the person who claims joint Hindu family, then the burden shifts to the party alleging self-acquisition to establish affirmatively that property was acquired without the aid of the joint family property by cogent and necessary evidence.””

(v) AIR 1979 Mad 1 [The Additional Commissioner of Income Tax, Madras vs P. L. Karuppan Chettiar, Karur]

“12.....What has been illustrated also is the position under the Hindu Law untrammelled by statutes and it occurs in the commentaries to Section 6 of the Act which deals with survivorship and the saving by Section 6 of that principle to the extent to which it had been done. This passage is of no assistance in determining the impact of Section 8 on the principles of devolution of property on the



WEB COPY



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

death on the principles of inheritance. We have dealt with the effect of Section 8 earlier and it is clear that here Karuppan alone took the properties of his father Palaniappa which the latter had obtained in the partition, and irrespective of the question whether it was ancestral property in the hands of Karuppan or not, he would exclude his son. Since the existing grandson at the time of the death of the grandfather has been excluded, we think that an after-born son of Karuppan will also not get any interest which Karuppan inherited from his father. Thus, the principles of Hindu Law are not applicable. It is impossible to visualize or envisage any Hindu undivided family in regard to the property which Karuppan got. This is the view that we have taken in the decision in T. C. No. 276 of 1972 : (1977 Tax LR 1420) (Mad) Addl. Commr. of Income-tax Madras v. V. R. A. Manicka Mudaliar to which one of us was a party. We respectfully agree with the view expressed in that decision and answer the question referred to us in the affirmative i.e. in favour of the assessee and against the Department. The revenue will pay the costs of the assessee including counsel's fee Rs. 500."

(vi) (1969) 2 MLJ 125 [Samiappa Gounder and others Vs. Sivabalan

and others]



WEB COPY



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

“9.....It is true that under Order 1, Rule 9 of the Code of Civil Procedure, no suit shall be defeated by reason of the misjoinder or non-joinder of the parties, but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal. Even in such cases, the Court can under Order 1, Rule 10, Sub-rule (2) direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties plea of limitation. Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the character of a suit for partition and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents. The estate can be represented only when all the three heirs are before the Court.....”

(vii) (2013) 2 SCC 606 [Gian Chand and brothers and another Vs.

Rattan Lal alias Rattan Singh] -



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

“18.It is well-settled principle of law that a person who asserts a particular fact is required to affirmatively establish it. In Anil Rishi V. Gurbaksh Singh, it has been held that the burden of proving the facts rests on the party who substantially asserts the affirmative issues and not the party who denies it and the said principle may not be universal in its application and there may be an exception thereto.....

.....
21.*In A.Raghavamma Vs. A.Chenchamma, while making a distinction between burden of proof and onus of proof, a three-Judge Bench opined thus:*

“12.....There is an essential distinction between burden of proof and onus of proof: burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence.””



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

(viii) 2009 (2) LW 654 [*Kannammal and others Vs. Vembana*

WEB COPY

Gounder and others]

“25.In view of the above excerpts including the entire precedents cited supra, there could be no doubt that a coparcenar cannot settle or gift his undivided share in the coparcenary property. However, it is crystal clear that in this case, the said Nachimuthy Gounder, by virtue of Ex.B41 – the sale Deed, which I held supra as disguised donation and Ex.B14 – the settlement deed, alienated the items 1(a), 1(b), items 3 and 4 of the 'C' scheduled properties, and as such, those alienations are ineffective and would not bind the other coparcenars and the legal heirs.”

12.Learned counsel appearing for the respondents 1 to 6 reiterated the averments made in the plaint and submitted that the suit property was purchased by their grandfather Sarangapani, in the name of Thiripurathammal. Their grandmother had no independent income. Their grandfather, in the interest of joint family, purchased the suit property in the name of his wife. After the death of Thiripurathammal, her husband,



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

Sarangapani and 1st appellant inherited the suit property equally. Other legal heirs of Thiripurathammal are residing separately and are noway connected with the property. The 1st appellant was residing along with his parents. Hence, the respondents 1 to 6 filed suit against the appellants. By redeeming mortgage, the 1st appellant will not become absolute owner of the suit property. The learned Judge properly appreciating the oral and documentary evidence and provisions of the Hindu Succession Act, has granted relief to the respondents 1 to 6 by giving valid reason. The 1st appellant ought to have filed suit against his mother Thiripurathammal to enforce the mortgage based on redeeming the property and he cannot claim any title to the property. The 1st appellant, without having any title to the property, executed settlement deed in favour of the 2nd appellant. The said settlement deed is void *ab-initio*. The 1st appellant as D.W.1 admitted that suit property is joint family property and he handed over the document of title to the 2nd respondent after celebrating the marriage of last daughter. D.W.2, brother of the 1st appellant, who is not a party to the suit, admitted that suit property is a joint family property and respondents 1 to 6 have share in the suit property. The respondents 1 to 6 are entitled to 1/6th share in the suit property. Pending



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

WEB COPY

appeal, the 1st appellant died. Hence, they are entitled to $\frac{1}{2}$ share in the 1st appellant's share also. The learned Judge erroneously held that father of the 1st appellant had $\frac{1}{2}$ share in the suit property. The respondents have filed Cross Objection No.7 of 2017, claiming $\frac{6}{8}$ th share in the suit property. The learned Judge having held that brothers and sisters of the 1st appellant never claimed any share in the suit property, suit property is a joint family property, settlement deed executed by the 1st appellant in favour of the 2nd appellant is not valid and enforceable, ought to have decreed the suit as prayed for by the respondents 1 to 6. The 1st appellant has only undivided share in the suit property and he cannot settle the entire property to the 2nd appellant.

13.In the settlement deed, except mentioning the patta, the 1st respondent has not mentioned anything about his title. In any event, for non-joinder of parties, suit cannot be dismissed for the relief of mandatory injunction and it has to be remitted back to the Trial Court for fresh trial after impleading necessary parties.



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

WEB COPY

14. In support of their case, the learned counsel appearing for the respondents 1 to 6 relied on the following judgments:

(i) 2020 (1) TNLJ 521 (Civil) [Kuppammal & Anr vs. Palaniswamy &

Ors/-

“9. Coming to the first issue, we are of the view that the submissions of the learned counsel appearing for the appellant appears to be correct. The suit for partition cannot be dismissed on the sole ground of non-joinder of necessary parties. If the court is of the view that there are other parties which are to be heard, other than the persons arrayed as defendants, a direction should have been issued to the plaintiffs to implead them. In law, any number of preliminary decrees can be passed. Therefore, no finality can be attached to it. In such view of the matter, we are not inclined to accept the reasoning of the learned Single Judge.”

(ii) 2009-2-L.W. 654 [Kannamal & 2 others Vs Vembana Gounder &

5 others/];

“24. It is a trite proposition in Hindu Law that a coparcener cannot donate or settle his undivided share in the suit property.....



WEB COPY



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

25. In view of the above excerpts including the entire precedents cited supra, there could be no doubt that a coparcenar cannot settle or gift his undivided share in the coparcenary property. However, it is crystal clear that in this case, the said Nachimuthy Gounder, by virtue of Ex.B41 – the sale Deed, which I held supra as disguised donation and Ex.B14 – the settlement deed, alienated the items 1(a), 1(b), items 3 and 4 of the 'C' scheduled properties, and as such, those alienations are ineffective and would not bind the other coparcenars and the legal heirs.”

15.Points for consideration arising in this appeal are:

(i) Whether the suit property is the absolute property of Thiripurathammal or joint family property purchased by her husband Sarangapani in the name of Thiripurathammal?

(ii) Whether the respondents 1 to 6 have any share in the suit property?

(iii) Whether suit is bad for non-joinder of necessary



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

parties?

(iv) *Whether settlement deed executed by the 1st*

appellant in favour of the 2nd appellant is valid and legal?

Point (i) -

“Whether the suit property is the absolute property of Thiripurathammal or joint family property purchased by her husband Sarangapani in the name of Thiripurathammal?”

16(i). From the materials on record, it is seen that the land in the suit property was purchased, by the deed of sale dated 19.04.1936, as a hut. The sale deed shows that Thiripurathammal has purchased the property. According to the respondents 1 to 6, Thiripurathammal did not have any independent income and only her husband Sarangapani purchased the property in the name of Thiripurathammal and it is the joint family property. The said contention is denied by the appellants 1 and 2/defendants 1 and 2. When the respondents 1 to 6 claim that the suit property is joint family property and not the individual property of Thiripurathammal, it is for the respondents 1 to 6 to prove the same. There is no presumption that property standing in the name of female member is a joint family property. The persons



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

WEB COPY

who are claiming the property to be joint family property have to prove the same by oral and documentary evidence. Once they discharge this initial burden, it is for the other party to prove that the property is absolute property of a person in whose name the property stands and that it is not the joint family property. In the present case, when the property was purchased by the sale deed dated 19.04.1936, the respondents 1 to 6 were not even born. They did not have any personal knowledge about the financial capacity of Thiripurathammal, their grandmother, to purchase the property. Apart from examining the 2nd respondent as P.W.1, the respondents 1 to 6 have not examined any other witnesses. The 2nd respondent, except deposing that their grandmother is a house wife and did not have any independent income, failed to prove their case that their grandfather Sarangapani only purchased the property in the name of their grandmother and it was for the benefit of joint family. It is an admitted fact that Sarangapani and Thiripurathammal begot 5 sons and 2 daughters. The respondents 1 to 6 have not examined any of the children of their grand parents viz., Thiripurathammal and Sarangapani. On the other hand, the 1st appellant, who is one of the sons of Thiripurathammal and Sarangapani examined himself as D.W.1 and deposed that suit property



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

belonged absolutely to his mother Thiripurathammal. He withstood the cross-examination and nothing has been elicited in the cross-examination to prove that Sarangapani only contributed the sale consideration to purchase the suit property in the name of his wife Thiripurathammal. The appellants 1 and 2 also examined one Arumugam, one of the sons of Thiripurathammal and Sarangapani, as D.W.2. He supported the claim of the appellants 1 and 2. The respondents 1 to 6 failed to elicit any answer from D.W.2 to show that only Sarangapani contributed sale consideration and purchased the suit property in the name of Thiripurathammal.

16(ii).From the materials on record, it is seen that Thiripurathammal borrowed money from his brother Konjithapatham Pillai and has constructed Madras Terraced Building in the suit property and mortgaged the property for a sum of Rs.400/- by registered mortgage deed dated 08.09.1947. The said Konjithapatham Pillai, brother of Thiripurathammal had to pay certain amounts to Bakkiyalakshmi Ammal, W/o.Krishnamurthy Ayyair. In order to discharge the said amount, the brother of Thiripurathammal, Konjithapatham Pillai made over mortgage to Bakkiyalakshmi Ammal by mortgage made over



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

WEB COPY

document dated 15.03.1955. Thiripurathammal, Sarangapani and none of her children other than 1st appellant had evinced interest in redeeming said mortgage. According to the 1st appellant, his mother requested him to redeem the mortgage and enjoy the property as owner. Based on the said request, the 1st appellant paid Rs.850/- to the said Bakkiyalakshmi Ammal, W/o. Krishnamurthy Ayyair and the said Bakkiyalakshmi Ammal made over the mortgage in favour of 1st appellant by two mortgage made over documents both dated 18.12.1961.

16(iii).According to the 1st appellant, based on the said two mortgage made over documents, he was in possession and enjoyment of the property till he executed the settlement deed in favour of his son, the 2nd appellant. Even though the 1st appellant has not initiated any proceedings to enforce the mortgage, he was treated as absolute owner of the suit property by Sarangapani, his 4 sons and 2 daughters and they did not claim any share in the suit property after death of Thiripurathammal or Sarangapani. Arumugam, one of the brothers of 1st appellant as D.W.2 deposed that after the 1st appellant got the mortgage made over to him, he became owner of the suit



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

property and 1st appellant is in possession and enjoyment of the suit property as owner. The above materials show that Thiripurathammal was dealing with the property as a owner and there is nothing on record to show that Sarangapani purchased the property in the name of his wife, Thiripurathammal and paid sale consideration. There is no records to show that said property was enjoyed by Thiripurathammal, Sarangapani and their children as joint family property.

16(iv).The principle that a person who claims that the property is purchased from joint family nucleus or the property is joint family property must prove the same, is no longer *res-integra*. This Court, various High Courts and Hon'ble Apex Court have held so in various judgments. It is sufficient to refer to the judgment of the Division Bench of this Court reported in **2004 (4) CTC 208 [R.Deivanai Ammal (died) and another Vs. G.Meenakshi Ammal and others]**, wherein the Division Bench, in para 13 has held as follows:

“13.First let us consider the nature of the suit properties, namely, self acquired properties of late



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

Ganapathy Moopanar or ancestral properties and whether any nucleus was available to purchase the properties. Under the Hindu Law it is only when a person alleging that the property is ancestral property proves that there was a nucleus by means of which other property may have been acquired, that the burden is shifted on the party alleging self-acquisitions to prove that the property was acquired without any aid from the family estate. In other words the mere existence of a nucleus however small or insignificant is not enough. It should be shown to be of such a character as could reasonably be expected to lead to the acquisition of the property alleged to be part of the joint family property. Where the doctrine of blending is invoked against a person having income at his disposal and acquiring property, the reasonable presumption to make is that he had the income at his absolute disposal unless there is evidence to the contrary. If a coparcener 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 coparcener should not only barely plead the same, but also establish the existence of such a joint family fund or



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

nucleus. Even if the joint family nucleus is so established, the prescription 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 coparcener is to be treated as joint family property. There should be proof of the availability of such surplus income or joint family nucleus on the date of such acquisitions or purchases. The same is the principle even in the cases where moneys were advanced on mortgages over immoveable properties. 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 a manager of a 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.”

There is no presumption that property of a female Hindu is joint family property. As per Section 14 of the Hindu Succession Act, 1956, any property



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

possessed by a female Hindu is her absolute property.

WEB COPY

16(v).Considering the above materials, this Court has no hesitation to hold that Sarangapani did not pay the sale consideration and purchase the property in the name of his wife, Thiripurathammal and the property is absolute property of Thiripurathammal and not a joint family property.

Point (ii) -

“Whether the respondents 1 to 6 have any share in the suit property?”

17.The respondents 1 to 6 are claiming share in the suit property on the ground that suit property is joint family property and as per the amended Section 29 of the Hindu Succession Act, 1956, they have equal share along with the appellants 1 and 2. This claim of the respondents 1 to 6 is not acceptable. We have held while answering Point (i) that suit property is not joint family property, but it is the property of Thiripurathammal, grandmother of the respondents 1 to 6. The succession to female Hindu is as per Sections 15 and 16 of the Hindu Succession Act, 1956. The said Sections are extracted hereunder for easy reference:



WEB COPY



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

“Section 15 - General rules of succession in the case of female Hindus -

(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16 :

(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;

(b) secondly, upon the heirs of the husband;

(c) thirdly, upon the mother and father;

(d) fourthly, upon the heirs of the father;

and

(e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1)-

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

Section 16. Order of succession and manner of distribution among heirs of a female Hindu -

Order of succession and manner of distribution among heirs of a female Hindu. The order of succession among the heirs referred to in section 15 shall be, and the distribution of the intestate's property among those heirs shall take place according to the following rules, namely:-

Rule 1.-Among the heirs specified in sub-section (1) of section 15, those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

Rule 2.-If any son or daughter of the intestate had pre-deceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share



WEB COPY



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

which such son or daughter would have taken if living at the intestate's death.

Rule 3.-The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and (e) of sub-section. (1) and in sub-section (2) of section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death."

As per Section 15 of the Hindu Succession Act, 1956, on the death of a female Hindu, her property devolves first upon her sons and daughters, including children of any pre-deceased son or daughter and the husband. Section 15 enumerates five categories of persons on whom the property devolves in the order viz., (a) to (e). Only when the first category of person is not available, it will devolve on the second category and upto category (e). When persons are available in the first category, only those persons inherit the property equally in exclusions to other categories. In the present case, on the death of Thiripurathammal, her sons, the 1st appellant and another son



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

viz., D.W.2 were alive apart from other children. As per Section 15 of the Hindu Succession Act, 1956, when sons, daughters and husband were alive at the time of death of a female Hindu, the respondents 1 to 6 who are the grand daughters of Thiripurathammal have no right or share in the suit property.

Point (iii) -

“Whether suit is bad for non-joinder of necessary parties?”

18(i).The plaintiff must implead all proper and necessary parties in the suit. The necessary and proper parties must be made as parties to the suit in order to decide the controversy completely and finally, in order to avoid multiplicity of proceedings. Order I Rule 9 of C.P.C. deals with mis-joinder and non-joinder of parties, which reads as follows:

“Order I, Rule 9 of C.P.C. -

9.Mis-joinder and non-joinder – No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

[Provided that nothing in this rule shall apply to



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

WEB COPY

non-joinder of a necessary party.]”

As per Rule 9 of C.P.C., no suit shall be defeated for non-joinder or mis-joinder of parties, but the Court may decide the controversy so far as the parties before it. But as per proviso, Rule 9 of C.P.C. will not apply to non-joinder of necessary parties. A person is a necessary party to proceedings:

(a) When there is a right to some relief against the such party in respect of the matter involved in the proceedings in question.

(b) It should not be possible to pass an effective decree in the absence of such party.

18(ii).In a suit for partition, all the persons having an interest must be made as parties. Without their presence, the issue whether plaintiff is entitled to partition and if so, quantum of share each party is entitled to cannot be decided. In the present case, the respondents 1 to 6 claim partition on the ground that the suit property is joint family property. This Court has held that suit property is the property of Thiripurathammal and not joint family property. Whether the property is joint family property or separate property of Thiripurathammal, all her children are necessary parties to the present suit for



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

WEB COPY

partition filed by the respondents 1 to 6. The contention of the learned counsel for the respondents 1 to 6 that matter may be remitted to Trial Court for *de nova* trial after impleading necessary parties is not acceptable in view of two judgments reported in ***AIR 1965 SC 271*** and ***1983 100 LW 486***, referred to above, relied on by the learned counsel appearing for the appellants. The relevant portions of the above judgments were extracted supra. In both the judgments, it has been held that when the defendants take the plea of non-joinder of party and if the plaintiffs fail to implead the necessary party to the suit, the suit is liable to be dismissed. The ratios held in the above two judgments are squarely applicable to the present suit. The appellants 1 and 2 took a plea that suit is liable to be dismissed for non-joinder of necessary parties. In spite of such a plea, the respondents 1 to 6 did not implead the necessary parties. The reason given by the learned Judge for holding that the suit is not bad for non-joinder of parties is erroneous. Considering the materials on record and the judgments referred to above, this Court holds that the suit is bad for non-joinder of necessary parties and is liable to be dismissed.



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

Point (iv) -

“Whether settlement deed executed by the 1st appellant in favour of the 2nd appellant is valid and legal?”

19.In view of the findings of Points (i) to (iii), the respondents 1 to 6 are not entitled to the declaration that settlement deed executed by the 1st appellant in favour of the 2nd appellant is invalid.

20.All the four Points are answered in favour of the appellants.

21.For the above reasons, the impugned judgment and decree passed by the learned Judge is set aside.

In the result, the Appeal Suit is allowed and Cross-Objection is dismissed. Consequently, connected Miscellaneous Petition is closed. No costs.

(V.M.V., J) (S.S., J)
12.10.2022

Index : Yes / No
(gsa)



WEB COPY



A.S.No.636 of 2016
and Cross Obj.No.7 of 2017

V.M.VELUMANI,J.
and
S.SOUNTHAR,J.

(gsa)

To

- 1.The II Additional District and Sessions Judge,
Chidambaram.
- 2.The Section Officer,
VR Section,
High Court,
Madras.

Pre-Delivery judgment in
A.S.No.636 of 2016
and Cross Obj. No.7 of 2017

12.10.2022