BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 05.07.2022

CORAM :

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

A.S(MD)No.55 of 2010

1)Devaraj
2)Rathinam ... Appellants

vs.

1)Vijayalakshmi
2)Mariammal (Died)
3)Dhanasekaran
4)Narayanasamy
5)N.Arun
6)M.Brindha
7)G.Lognayaki Ammal
8)Ahimsarani(Died)
9)G.Dayalan
10)J.Rajammal
11)Indirani
12)R.Ilangovan
13)R.Kannan
14)R.Ravichandran(Died)
15)Tamilselvan(Died)
16)R.Ramesh
17)R.Latha
18)P.Geetha
19)K.Kalaivani
20)K.Harikrishnan
21)K.Koushikan
22)S.Santhana Krishnan
23)S.Ramakrishnan
24)S.Sethu Narayanan

25)T.Shanthi
26)T.Jaswarthini(Minor)
(R26 is represented by her mother R25) ... Respondents
(R12, R13 & R16 to R18 are LRs of the deceased R4, R1, R3 to R6 are LRs of the deceased R2 were imp leaded vide order dated 23.06.2017)
(R21 was declared as major vide order dated 30.11.2016 in M.P. 1/15)
(R22 to R24 are brought on record as LRs of the deceased R8 and R25 and R26 are brought on record as LRs of the deceased R15 vide order dated 23.06.2017 in M.P.1 & 2/2012)

Appeal Suit filed under Section 96 of the Code of Civil Procedure, against the judgment and decree dated 11.06.2009 made in O.S.No.111 of 2007 on the file of the Additional District and Sessions Judge, Fast Track Court No.III, Madurai.

For Appellants : Mr.S.Natarajan
For R4 to R6 : Mr.C.M.Arumugam
For R17, R18 & R22 to R24: Mr.S.Venkatesh for Mr.A.Sivaji

JUDGMENT

The appellants are the plaintiffs in O.S.No.111 of 2007 on the file of the Additional District and Sessions Judge, Fast Track Court No.III, Madurai, filed against the respondents for partition and separate possession of $1/5^{th}$ share. After trial, the suit was dismissed. Challenging the same, the plaintiffs in the suit as appellants have filed the present appeal.

2. Brief facts in the plaint are as follows:-

The suit property had been purchased by the brothers K.K.S.K.Seenivasaga Reddiar, K.K.S.K.Subbaranj Reddiar, K.K.S.K.Gopalakrishnan, K.K.S.K.Jegalthratchakan and K.K.S.K.Rajasekaran jointly on 21-11-1971 under the registered sale deeds from one N.Natesan and one Ramesh and they were enjoying the property jointly. All the said brothers died. The plaintiffs are the legal heirs of K.K.S.K.Seenivasaga Reddiar. The defendants 1 to 6 are the legal heirs of K.K.S.K.Subbaraj Reddiar. The defendants 7 to 10 are the legal heirs of K.K.S.K.Gopalakrishna Reddiar. The 11th defendant is the legal heir of the K.K.S.K.Jegathratchakan. The defendants 12 to 19 are the legal heirs of K.K.S.K.Rajasekaran. In the suit property, each one of the said 5 brothers has got 1/5 share. The plaintiffs demanded partition of their 1/5th share from the defendants. But the defendants who are wantonly delaying the matter are also making efforts to encumber the property in favour of third party. During the pendency of the suit the 8th defendant died and the defendants 20 to 22 are the legal heirs of the said 8th defendant. The plaintiffs therefore sought for preliminary decree for partition of their 1/5th share with costs.

3. Brief facts in the written statements are as follows:-

(i) The gist of the written statement filed by D.3, 8, 10, 11, 13, 14, 15, 16, 17 is that the allegation that the suit properties had been purchased by 5 brothers jointly is not correct. Kandasamy Reddiar the father of the said 5 brothers had owned number of properties and on his death, the 5 brothers got the properties by way of succession. The deceased Kandasamy Reddiar was also doing money lending business and all the 5 brothers also continued the said business in the name of Kandasamy & sons jointly. The said money lending business is the family business and from out of the income derived from the said money lending business, 5 brothers purchased many properties including the suit property. The 5 brothers have not yet partitioned the properties belonging to the family. Therefore, without asking for partition of other all joint family properties, the plaintiffs are not entitled to ask for partition of suit property alone and the suit is bad for partial partition. Further, after the death of Seenivasa Reddiar, the father of the plaintiffs in the year 1980, the defendants had been in exclusive enjoyment of the suit property, thereby ousting the plaintiffs for more than the prescribed period and if at all the plaintiffs have got any right, the same had been extinguished by the doctrine of ouster. The plaintiffs are not in enjoyment of the suit property. The suit is not properly valued. The proper court fee is not paid. Therefore the suit is liable to be dismissed.

(ii) The gist of the written statement of 4th, 5th and 6th defendants is that the 4th defendant is the son in law of Late K.K.S.K.Subbaraj Reddiar and his wife died. The 5th and 6th defendants are the son and daughter of the 4th defendant. So the 4th defendant is not the legal heir of the above said Subbaraj Reddiar. On the other hand, on several occasions, he had extended his kindness physically and financially to the Subbaraj Reddiyar. The 5th and 6th defendants, the grand sons of the deceased Subbaraj Reddiar, who jointly purchased the suit property must be included in the notional partition as they are entitled to the same accordingly as their mother was died. After the demise of the above said Subbaraj Reddiar and their mother the daughter of the deceased Subbaraj Reddiar, the 5th and 6th defendants do not have any close association in the suit property. Further the 4th and 5th defendants were never involved in the business transactions. At the same time, the defendants cannot be excluded in the clan of the deceased Subbaraj Reddiar. It is therefore prayed that the actual shares of these defendants in the suit property may also be fixed.

(iii) The gist of the written statement filed on behalf of the 22nd defendant is that it is true that the minor defendant K.Kousikan is the younger son of the defendant No.8 Late Kannan. The defendant No.20 is the mother of the minor and 21 is the brother of the minor. It is true that the brothers jointly purchased the suit properties under the registered sale deeds dated 27-11-1971 from one N.Natesan and after purchasing the suit properties jointly, all the five brothers were enjoying the same jointly. All the 5 brothers died and the plaintiffs as the legal heirs of K.K.S.K.Seenivasaga Reddiar were enjoying the suit properties jointly and the relationship of the defendants with the deceased brothers as described in the plaint are admitted. The defendant No.8 Late Kannan is one of the sons of Late K.K.S.K.Gopalakrishnan and being the minor son of the defendant No.8 is entitled to claim his share as legal heir of Late K.K.S.K.Gopalakrishnan. The allegations in paragraph 4 of the plaint is strictly liable to be proved by the plaintiffs. Therefore, the Court may pass a decree of equal share with metes and bounds as this defendant is entitled to get a share of the property.

4. Based on the pleadings, the trial Court framed the following issues:-

1)Whether the plaintiffs are entitled to 1/5th share in the suit property?

2)Whether the suit is hit by partial partition?

3)Whether the defendants 3, 8, 10, 13 to 17 have prescribed title by ouster?

4)To what relief the plaintiffs are entitled to?

5. In order to substantiate the case, on the side of the plaintiffs, the 2nd plaintiff examined herself as PW1 and 2 documents were marked as Exs.A1 and A2. On the side of the defendants, two witnesses were examined as DW1 and DW2 and 11 documents were marked as Exs.B1 to B11.

6. The trial Court, considering the pleadings, oral and documentary evidence, dismissed the suit. Challenging the judgment and decree, the plaintiffs have filed this appeal.

7. The learned counsel for the appellants would submit that the appellants' father namely, K.K.S.K.Seenivasaga Reddiar and his four brothers namely, K.K.S.K.Subbaraj Reddiar, K.K.S.K.Gopalakrishnan, K.K.S.K.Jegathratchakan and K.K.S.K.Rajasekaran jointly purchased the suit property under Exs.B1 and B2. The certified copies of Exs.B1 and B2 have been marked as Exs.A1 and A2. It is the separate property of five brothers who are the sons of the grandfather of the appellants namely, one Kandasamy Reddiar. After the death of their father, the appellants demanded the defendants to divide the suit property and give 1/5th share to their father and for separate possession, but they refused to do the same. Therefore, the present suit was filed. Further, it is submitted that though the grandfather of the appellants namely, Kandasamy Reddiar has ancestral property, all his five sons, including the father of the appellants and his brothers jointly enjoyed the property as joint family property. They were running a finance

business as a partnership firm by name, Kandasamy & Sons and they purchased the suit property out of their own income and the income accrued from the joint family property had nothing to do with the purchase of the suit property. In other words, the suit property was not purchased from any joint family nucleus.

8. The learned counsel for the appellants would further submit that though originally the grandfather of the appellants namely, Kandasamy Reddiar was running the finance business along with his sons in the name of Kandasamy & Sons jointly, at one point of time, he left from the firm. The appellants' father and his brothers only were running the said business and as and when they divided their share of profit from the said business, they purchased the suit property separately in their names. However, after the death of the father of the appellants, the appellants did not want to remain in joint possession and they asked to divide the suit property. However, the learned trial Judge failed to appreciate that joint family has nothing to do with the business of the sons of Kandasamy Reddiar and the suit property was purchased in the names of the sons of the said Kandasamy Reddiar as their separate

property and dismissed the suit on the ground that the suit property is a joint family property and further holding that there are other joint family properties available and that properties have not been included in the suit for partition, the trial Court dismissed the suit on the ground of partial partition which is against the proposition of law. Even if there are other joint family properties available that has nothing to do with the joint business of any of the members of the joint family. Unless their income in the joint business is treated as joint family property, the suit property cannot be treated as a joint family property. Therefore, the appeal has to be allowed and the judgment and decree passed by the trial Court is liable to be set aside.

9. The learned counsel for the respondents would submit that admittedly, the grandfather of the appellants namely, Kandasamy Reddiar and his sons are the members of the joint family. Even the appellants admitted that they have got the joint family properties and agricultural lands and income is derived from the agricultural lands and also the buildings by way of rent. The sons of Kandasamy Reddiar were also doing the finance business.

The said finance business is a family business. Except the above income, there is no other income either for the joint family of the Kandasamy Reddiar or the five sons of Kandasamy Reddiar. The sons of the Kandasamy Reddiar including the father of the appellants did not have the independent income and their source of income was only from the joint family agricultural lands and the finance business. Though the finance business stood in the name of Kandasamy & Sons, but however, there is no evidence to show that the appellants' father and his brothers contributed separate fund either to establish the said Kandasamy & Sons or they purchased the suit property out of their own separate income, or by not using the joint family income. Therefore, in the absence of the same, the only income to all the appellants and their father and his brothers was from the joint family finance business and income from the agricultural land and rental income.

10. The learned counsel for the respondents would further submit that the trial Court rightly dismissed the suit holding that the suit property is also a joint family property and other joint family properties available for partition, have not been included and further

held that when the appellants themselves admitted that other properties are available for partition, they should have included all the properties for partition, and therefore, the trial Court dismissed the suit on the ground of partial partition. Though some of the respondents claimed the suit property by way of ouster, even before the trial Court, they did not press the said issue, and therefore, the trial Court also has not given any finding on that issue. Thus, the learned counsel for the respondents would submit that there is no perversity in the judgment and decree passed by the trial Court and therefore, the appeal is liable to be dismissed.

11. Heard both sides and perused the records.

12. Admittedly, the suit property has been purchased in the names of the five sons of Kandasamy Reddiar. The appellants' father is one of the sons of Late Kandasamy Reddiar. Admittedly, the said Kandasamy Reddiar along with his sons are the joint family members and they have got joint family property. According to the appellants, the suit property was purchased in the names of the five sons of the Kandasamy Reddiar, as such they alone are entitled to

the said property equally by 1/5th share each. The suit property has nothing to do with the joint family and the suit property was not purchased out of the income of the ancestral property or ancestral nucleus. After the death of their father, the appellants have filed the suit for partition. The original documents of Exs.A1 and A2 have been marked as Exs.B1 and B2 which show that five sons of Kandasamy Reddiar alone are entitled to equally 1/5th share each and the trial Court failed to appreciate the same.

13. The specific case of the respondents is that the suit property was purchased out of the income from the joint family business, as such, it is a joint family property. Further, Kandasamy Reddiar and his sons consisting of joint family have also got other properties both buildings and also the agricultural landed properties. The appellants purposefully not included them in order to defeat the claim of the daughters of the Kandasamy Reddiar. They only shown the suit property as separate property of five sons of Kandasamy Reddiar. If they included other joint family properties, the daughters and legal heirs of the daughters of Kandasamy Reddiar would also get share. Therefore, in order to defeat the female heirs of the

Kandasamy Reddiar, the appellants shown the suit property only in the suit schedule citing it as their separate property. There are no materials to show that the appellants' father and his brothers were doing a separate business or having separate source of income and utilised that fund for purchasing the suit property as their separate property. Once it is not proved that they have the independent income, it cannot be stated that the suit property is a separate property.

14. Admittedly, Kandasamy Reddiar and his brothers consisting as a joint family, are having joint family properties and joint family income, but apart from that, they do not have any other business or any other income. When the joint family is admitted and the existence of joint family property is also admitted, there is no bar for any one of the coparceners or the members of the joint family to claim equal share and if the members of the joint family are having any separate income, they can have the property of their own, but however, they must establish that they have got the independent income and out of their income, they purchased the property for their own.

15. No doubt, when the properties stand in the name of the individual members of the joint family, it can be treated as their separate properties, unless it is proved that the properties were not purchased from the income of the joint family properties or business. The person who claims the property as a joint family property, has to prove it is the joint family property. No doubt, in this case, the suit property stands in the names of the five sons of Kandasamy Reddiar. It was also established and admitted that they are the joint family members and they have joint family properties and they are generating income from the joint family properties. Even Exs.B4 to B10 clearly show that there is a rental income from the building and there is a rent control proceedings regarding rental income and also the eviction proceedings have been filed by the appellants against the tenants who were in possession of the property and even they filed suits for other properties. Even in all these proceedings, the appellants admitted that they are the joint family members and they are having the joint family nucleas and income from the joint family property. Once it is admitted that there is an existence of joint family income from the joint family properties, all the purchasers of the suit property under Exs.B1 and B2 have to prove that they

purchased the suit property out of their separate income to claim it as their separate property.

16. The appellants also admitted that other joint family properties are available for partition. The father of the appellants had not filed the suit for partition and separate possession of the suit property and after the death of their father, when the appellants filed the suit claiming that the suit property is not a joint family property and it is their separate property, it is their duty to prove that the suit property had not been purchased from the income of the joint family property or joint family neclues and it is purchased from the independent income or separate income of the five sons of Kandasamy Reddiar.

17. Therefore, under these circumstances, the trial Court from the oral and documentary evidence has clearly given a finding that the respondents who claimed the suit property as joint family property established that the suit property purchased from the income of the joint family business and the appellants failed to prove that it is purchased out of their independent income. Therefore, the

appellants have to establish that it is not the joint family property and they cannot take advantage of the loopholes left by the respondents. Though in the partition suit both parties are treated as appellants, however, in this case, there is a peculiar situation where the father of the appellants was admittedly a coparcener along with his four brothers and his father admittedly purchased the suit property during the life time of the grandfather of the appellants and during the life time of the appellants' father, they have not divided the joint family property. Therefore, even at the time of purchasing the suit property also, admittedly there was a joint family and all the purchasers of Exs.A1 and A2 are members of the joint family/coparceners. Under these circumstances, this Court finds that there is no perversity in the finding of the trial Court that the suit property is also the joint family property.

18. As far as partial partition is concerned, it is the evidence of both the appellants and the respondents that there are other joint family properties, agricultural landed properties and they have also launched rent control and eviction proceedings in respect of those properties and even Exs.B4 to B11 also clearly show that joint family

has other properties. Under these circumstances, when the other items of the joint family properties are very much available for partition, if any one of the coparceners wants partition and separate possession, he should include all the properties which belongs to the joint family for partition. Knowing fully well that there are other joint family properties very much available for partition, the appellants have not included them in the suit for partition and therefore, necessarily, the suit fails on the ground of partial partition. Therefore, the trial Court rightly held that the suit is hit by partial partition because of non inclusion of all other joint family properties available as of now.

19. The appellate Court being a fact finding Court, it has to re-appreciate the entire pleadings, oral and documentary evidence. On a careful perusal of the entire pleadings, oral and documentary evidence and also the judgment of the trial Court, this Court does not find any perversity or good reason to interfere with the said judgment.

20. Accordingly, the Appeal Suit deserves to be dismissed and accordingly dismissed. No costs.

bala **05.07.2022**
Index : Yes / No
Internet : Yes

To

The Additional District and Sessions Judge,
Fast Track Court No.III,
Madurai.

P.VELMURUGAN, J.

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JUDGMENT MADE IN
A.S(MD)No.55 of 2010
DATED : 05.07.2022