

(2002) 07 MAD CK 0160

In the Madras High Court

Case No : A.S. No. 551 of 1991 and Transfer A.S. No. 736 of 2001

M. Saminatha Vellalar

APPELLANT

Vs

Govindaraju, Thambi Ayyan, Natarajan, Gowratham,
Ganthimathi, Amirtham, Panneerselvam and Selvamani

Govindaraju, Thambi Ayyan and Natarajan Vs
Swaminathan

RESPONDENT

Date of Decision : 02-07-2002

Acts Referred:

Citation : (2002) 4 LW 92

Hon'ble Judges : P. Shanmugam, J;K. Sampath, J

Bench : Division Bench

Advocate : S.S. Sundar, for T.R. Rajaraman, for the Appellant; V.K. Muthusamy, for V. Narayanasamy, for the Respondent

Judgement

P. Shanmugam, J.—As two appeals are disposed of by this common judgment, for the sake of convenience `the appellant" in this judgment refers to the appellant in A.S.No.551 of 1991 and `the respondents" refer to the respondents in A.S.No.551 of 1991.

2. The first defendant is the appellant. Respondents 1 to 6 filed a suit in O.S.No.110 of 1989 on the file of the Subordinate Judge, Pattukottai, for partition and division of `A" and `B" Schedule of properties by metes and bounds. The suit was decreed against which the present appeal.

3. The brief facts are as follows:-

The appellant and Veerasami Vellalar are brothers. Veerasami Vellalar died intestate on 29.03.1989 leaving behind him plaintiffs 1 to 5 and the third defendant besides his wife, the sixth plaintiff. The brothers constituted a joint Hindu Family owning agricultural lands. The brothers entered into a registered partition deed of the joint family properties dated 17.03.1974. The case of the plaintiffs was that while some of the items of the properties were divided by

metes and bounds, there were properties which were kept undivided without effecting division by metes and bounds, including the joint family business, namely, rice mill business at Survey No.88-A/1.A of 33 Alathur Village. It is alleged that there was an arrangement even after the partition. by which, the appellant/first defendant was permitted to enjoy the rice mill business exclusively and the accounts will be looked after only in the final partition which would be effected in respect of the undivided properties left out in the partition. On 11.04.1989, the plaintiffs have demanded division of undivided properties left out in the division. As the first defendant was evading and was not willing to divide those properties, the above suit came to be filed. Thus, it could be seen that the plaintiffs seek mainly for division of rice mill and some of the constructions put up after the partition and the properties set out in 'A' Schedule, on the main ground that final division did not take place between the two brothers.

4. The appellant/first defendant, in his written statement, stated that partition has taken place finally as per registered partition deed dated 17.03.1974. The further partition among the plaintiffs' branch in the year 1980 would reveal that there was final partition between the brothers in the year 1974. The joint family had no other vocation except agricultural, whereas the appellant was employed in a coffee house at Singapore from 1937 to 1940 and later he got himself associated with his maternal uncle Rengasamy Vellalar, who was owning a rice mill and the appellant was working as Manager of the said rice mill. With that experience and skill acquired in running a rice mill, he himself took up the rice mill business on lease and he was conducting the same for four years. With the consent of the plaintiffs' father, the appellant took possession of the entire extent of 34 cents in Survey No.88-A/1.A on condition that the plaintiff's father should be compensated in lieu of this share in the site at the time of partition to be made between them. Thereafter, he took exclusive possession of the site and constructed a rice mill building and installed the machineries and accessories investing his own earnings from the rice mill business. Subsequently, he put up a drying yard, oven etc., and other structures. The appellant commenced the rice mill business in the year 1952 after obtaining the necessary licence in his name and since then, he had been conducting the same exclusively for his own benefit without reference to the joint family whatsoever. According to the appellant, the rice mill business is his self-acquired business and the structures in S.No.88-A/1.A and the rice mill structures are his separate properties. A tiled constructed house measuring 15' x 15' for the residence of the appellant was put up out of the joint family funds in a portion of the eastern half of the S.No.88-A/1.A. The appellant being a junior member of the co-parcenary, gradually increased his business resources and estate by his own efforts and enterprise without reference to his elder brother or any kind of support from ancestral joint family estate. He was also doing business in paddy and groundnut kernels. He was carrying on Maligai business and owning a lorry for his exclusive possession. With his income, he had acquired an extent of 13-1/2 acres and was enjoying the

same separately without reference to the other joint family lands. The appellant was having no male issues but only two daughters, whereas his brother Veerasamy Vellalar was having four sons and two daughters. At the intervention and advise of the elders including the appellant's maternal uncle Rengasamy Vellalar, a partition was arranged taking into account the fact that the appellant was already given 34 cents in Survey No.88-A/1.A and he was also having his rice mill business, the self acquired landed properties of the appellant were also included and subjected to partition along with the other joint family properties. Out of 35 acres of ancestral properties, 29 acres were allotted to Veerasamy, and only the remaining six acres of ancestral property was given to the appellant allowing him to retain 13 acres of his own self-acquisition. The appellant conceded half share even in the small constructed house measuring 15" x 15" in S.No.88-A/1.A in which he was living, since it was constructed out of the joint family funds. However, the rice mill business, building, machineries and the site thereof were excluded in the partition deed acknowledging thereby that they belong to the appellant exclusively and not liable for partition. The partition deed had been given effect to and the appellant continues to be in exclusive possession and enjoyment of the properties allotted to him separately as absolute owner. Thereafter, the appellant put up row of shops and rooms in S.No.88-A/1.A out of his own funds. The appellant also pleaded that the plaintiffs have, by ouster, lost their right, if any, to the property, machinery, rice mill, which was in his exclusive possession as a senior member remained quiet without asserting any right in the business properties and profits of the mill and the site thereunder. According to him, the suit for partition was not maintainable, since division had already been taken place and the plaintiffs were not enjoying the possession.

5. On these pleadings, the learned Sub Judge framed as many as six issues, and marked Ex.A.1 to Ex.A.34 documents on the side of the plaintiffs and Ex.B.1 to B.209 documents on behalf of the defendants. The first plaintiff examined himself as P.W.1 and the appellant/first defendant as D.W.1.

6. The Trial Court, after considering the oral and documentary evidence, granted a decree, against which A.S.No.551 of 1991 has been filed.

7. The appellant herein as plaintiff filed a suit in O.S.No.130 of 1989 for a permanent injunction restraining the defendants therein from interfering with his peaceful possession of the scheduled mentioned properties. The learned Sub Judge granted a decree. Transfer A.S.No.736 of 2001 is against that judgment and decree at the instance of the defendants in that suit.

8. The main question that arises for consideration in these appeals is whether Ex.B.1 partition deed has become final and whether the rice mill is the exclusive business and property of the appellant.

9. The fact that there was a joint family consisting of the appellant and his elder brother Veerasamy Vellalar, is not in dispute. During the life time of Veerasami

Vellalar, both the brothers had entered into Ex.B.1 a registered partition deed dated 17.03.1974 making a division of the joint family properties, is also not in dispute. The main contention of the respondents/plaintiffs is that the said partition was not final and there were properties and rice mill business which were kept in common to be divided finally at a later point of time, whereas the case of the appellant/first defendant is that Ex.B.1 partition deed has divided the status and the properties permanently and there was nothing to be left out for final partition. The rice mill and the property over which the main claim has been made is his self-acquired exclusive property and is not liable for partition and was consciously left out of partition.

10. Ex.B.1 is a registered partition deed entered into between the two brothers, namely, Veerasami Vellalar - 1 and his brother Saminatha Vellalar -2 sons of Murugappa Vellalar. The preamble to this document says that the properties mentioned in the schedules to the partition deed belong to them ancestrally and were purchased separately till 17.03.1974, and that the suit properties were in their possession and were in separate convenient enjoyment; they have decided to divide the properties amicably by entering into this partition deed. As per this partition deed, all the properties mentioned in `A" Schedule shall be taken and enjoyed absolutely by Veerasamy Vellalar. Similarly, Saminatha Vellalar, the appellant herein, shall take over `B" Schedule property absolutely. The document further says that they had been conveniently enjoying the properties all these years by orally dividing them and that henceforth, there was no common debt or liability or income. Henceforth, whatever the receipts and liabilities, they have to be taken respectively. The document specifically states that hereafter, there shall be no relationship between them excepting friendly connection. The document further says that they have divided all the properties available, but if they find in future any properties that had been left out, they would divide the same equally. `A" Schedule consists of 13 items in Alathur Village, 33 items in Mahadevapuram Village, 12 items in Musiri Village, 5 items in Vadugankuthagai Village, and 8 items in Pulavanji Village. Similarly `B" Schedule consists of 18 items in Alathur Village, 8 items in Mahadevapuram Village and 9 items in Sembalur Village.

11. The Schedules refer to complete extent in certain items and undivided share in certain other items. To be exact, 30 items in `A" Schedule refers to undivided share and 23 items as complete share in `A" Schedule, while in `B" Schedule, 8 items are referred to as undivided share and six items are referred to as full share. However, in so far as the main disputed item in Survey No.88-A/1.A is concerned, the description is as follows:-

"0.17-0.25 - 0.21 undivided share."

In `B" Schedule, it is stated in item No.15 as follows:-

"88A-1A Punjai 0.17-0.29 - 0.58 undivided share"

To substantiate the contention of the respondents that Ex.B.1 partition deed was

not final, the reference as undivided share has been pressed into service. The defence of the appellant is that as most of the properties are referred to while describing as undivided, it only shows that since it comprised of a larger extent, the recital shows that the undivided half is allotted whether it is a 'A' Schedule or 'B' schedule. In other words, their submission is that out of 34 cents of land in Survey No.88-A/1.A, the appellant was allotted 17 cents and the respondents were allotted 17 cents. In the description, it is stated, "17 cents out of undivided 34 cents". The Theernam and kist make a further distinction insofar as 'B' Schedule is concerned, wherein, it is "0.29-0.58", whereas for 17 cents in 'A' Schedule, it is "0.25-0.21". The appellant further says that there is absolutely no mention about the building and the rice mill in the partition deed and admittedly, they have come into existence in the year 1950 onwards and they have been established and managed by the appellant ever since its commencement exclusively. Admittedly, the building and rice mill are situated in the 17 cents of the land in Survey No.88-A/1.A. In addition to what has been stated by the appellant, it is not in dispute that the respondents' branch have a partition of the properties allotted to them, in the year 1980 by Ex.B.2. The partition deed dated 10.06.1980 was entered into between Veerasami Vellalar-1, Govindarasu-2, Thambiaiyan-3, Panneerselvam-4 and Natarajan-5. In the preamble portion of Ex.B.2 the partition deed dated 10.06.1980, it is stated that the properties were the ancestral properties of Veerasami Vellalar, party of the First and the properties obtained by partition and the properties obtained through their family income and which had kept in common among the five members. Veerasami Vellalar was allotted 'A' Schedule property and in that a reference was made as to S.No.88-A/1.A extent of 17 cents which is relevant for the purpose of our appeals. It is stated thus: In this 17 cents half share of the eastern half a construction measuring 15' x 15' of an extent of 225 cents of Mangalore Tiled House" Here also number of items were referred to as undivided share. It is not the case of the respondents that even though five of their family properties were divided in the partition in the year 1980, because there is a reference in the schedule to the various items as undivided share, the partition is not final. From this it is clear that the items which were kept common were allotted a particular share which were undivided till then. In some of the items, they have allotted in full, especially in so far as S.No.88-A/1.A is concerned, in Ex.B.2, there is no mention about the description of this property whether it is undivided or full. From the above discussion, we are of the clear view that mere reference in the recital as undivided share does not mean that no division has taken place. It is nothing, but a reference to the properties kept in common and which were divided equally or to the extent of the land indicated in that schedule.

12. The case of the appellant is that he had started his career as a workman in Coffee house at Singapore and with the income earned, he came down to his native place in or about 1940 and was associated with his uncle Rengasami Vellalar who was doing a rice mill business. He became the Manager of the said mill and took lease of a rice mill for four years. After gaining experience in

running and managing the rice mill, he has set up his own exclusive independent rice mill in the year 1950. It is his specific case that the main vocation of the joint family is agriculture and the joint family was continuing agricultural operation, he started his career as a worker at Singapore and later on as a Manager in a rice mill and has set up his independent rice mill in 1950. In support of his case, he had produced Ex.B.10 the planning permission for putting up the rice mill in his name and Ex.B.34 the licence for running the rice mill. The property tax of the rice mill was assessed in his name and the payment of property tax receipts were furnished as Exs.B.20 to B.32. The rice mill licence were renewed in his name as per Exs.B.34, B.39 and B.44. The sales tax assessment for the groundnut and rice mill business is Ex.B.19. He has produced Exs.B.11 to B.16 receipts to show the accounts for the construction and purchase of machineries for the rice mill. Exs.B.60 to 76 are the licences issued by the Panchayat Unions of Alathur and Madukkur for running the rice mill. Exs.B.77 to B.121 are the renewal licences obtained by the appellant for the above said rice mill. Ex.B.122 is the Small Scale Industries registration in the name of the appellant's rice mill. Ex.B.127 is the professional tax receipt of the appellant. Exs.B.143 and 144 is the income tax assessment in the name of the appellant for the rice mill. Ex.B.136 is the installation permission granted by the District Collector for the rice mill. Exs.B.138 to 142 are evidence for the purchase of machinery like motor, etc. for the rice mill. The appellant was paying property tax even to the 225 sq.ft. occupied by him and had his patta transferred mutative effected for the land allotted to him as evidenced by other exhibits furnished by the appellant. From the above exhibits, it is clear that it is the appellant who had obtained planning and construction permissions from the concerned authorities like the District Local Authorities, District Collector, Panchayat Union office, etc. It is the appellant who had spent amount for construction of the building and purchase of the machineries. It is the appellant who had been running the rice mill in his name by paying professional, sales and income taxes. The appellant had renewed the rice mill licence. He has obtained permissions with the District Collector and the local authorities all these years. These documentary evidence are overwhelming in support of the case of the appellant that it is the appellant who had established, is running and managing the rice mill. It is exclusively in his own name. There is no contra evidence worth the name to show that the respondents have participated in the construction, installation and management of the rice mill and his business.

13. The submission of the learned Senior Counsel on behalf of the respondents that the appellant was accounting for the income of the rice mill as evidenced by Ex.A.34, a mortgage deed executed by Veerasami Vellalar, the elder brother of the appellant and Exs.A.25, A.26 and A.30 promissory notes jointly executed by the appellant along with Veerasami Vellalar, would show that the business was started with the moneys borrowed by the members of the joint family. Admittedly, the appellant was not a party to Ex.A.34 mortgage and the same shall not bind the appellant. In all the promissory notes, it is stated that the said

amount of Rs.4,000/- under Ex.A.4 was borrowed for family business and for purchase of bullock carts. Ex.A.30 says that the amount of Rs.4,000/- was borrowed for family necessities. Ex.A.26 refers to the borrowal for the purchase of current motor. This is the only document where reference was made for the purchase of motor which is admitted by the appellant as one reflected in his account for the purchase of motor for his rice mill. It is explained by the appellant that of these Rs.10,000/-, only Rs.5,000/- was debited to the account of the appellant and the said amount was completely discharged by the appellant himself. Therefore, it is clear that practically, there is no contra evidence to support the case of the respondents that the rice mill was a joint family business.

14. It is seen that the trial Court was persuaded to accept the case of the respondents on surmises that if really the brothers wanted the rice mill to be allotted to the appellant, they could have allotted the whole of 34 cents in favour of the appellant and there is no necessity to refer it as undivided share. We are not impressed by this conclusion. Though the 34 cents of the land were obtained by the family by an exchange earlier, the fact remains that in Ex.B.1 the partition deed both the brothers are given 17 cents of the land each out of 34 cents and that the failure to mention the rice mill and allotment of the eastern portion of 34 cents, that is, 17 cents in favour of the appellant would only strengthen the case of the appellant that the rice mill and the portion of 17 cents in which the rice mill situate were intended to be allotted to him. No other construction is possible and the conclusion of the learned trial Court is clearly erroneous. While the learned Judge has accepted the case of the appellant that he had acquired the expertise in the running of the mill and he had set up, installed, constructed and had been managing the rice mill without the participation on the part of the respondents as evidenced by voluminous documents Exs.B.4 to B.209 erred in concluding differently. It is seen from evidence that the rice mill was the independent business of the appellant, though he was the member of the joint family till the year 1974. The learned Judge having observed in paragraph 19 of his judgment that from the documents it is clear that the appellant obtained licence in his name and had been running the rice mill and that the respondents have not denied this fact, erred in taking a different view regarding the ownership of the rice mill. The learned Judge has erred in concluding without any evidence that the rice mill was treated to be a joint family property. The learned Judge also erred in construing Exs.A.25, A.30 and A.34 promissory notes and the mortgage deeds to support the case of the respondents that they have contributed for the establishment of the rice mill. As already found Ex.A.25 is the promissory note executed by not only the brothers Veerasamy Vellalar and Saminatha Vellalar, but also the sons of Rengasami Vellalar, namely, Veerachamy Vellalar and Marimuthu Vellalar and the son of Arunachala Vellalar, by name, Chandra Kasa Vellalar, whereby they have borrowed a sum of Rs.4,000/- and in that the purpose of borrowal as per the promissory note was the family expenses, for business purposes and for the purpose of buying bullocks and carts. The appellant had been doing the business on his own even from the year

1948 onwards as evidenced by Ex.B.4, and applied for construction of rice mill on 07.05.1950 as per Ex.B.9 and also obtained permission under Ex.B.10 dated 14.11.1950. The conclusion of the learned Judge that this amount should have been utilized for purchase of machinery in the rice mill, is not based on any evidence, but on mere surmises on mere coincidence. It is a fact that the joint family was continuing and that they were doing agricultural operation till 1974 jointly. Therefore, there cannot be any logical conclusion that these borrowals were for the establishment of the rice mill. Similarly, in Ex.A.26 another promissory note executed by Veerasami Vellalar and Saminatha Vellalar for borrowing a sum of Rs.10,000/-, it is stated that the said amount was borrowed for the purpose of buying a motor. This borrowal is referred to in Ex.B.206 accounts maintained by the appellant from 1969 to 1977. In this only Rs.5,000/- has been credited in favour of the appellant and that the amount has been discharged by the appellant as per the account. The conclusion of the learned Judge that the remaining portion of the promissory note should be discharged by Veerasami Vellalar and that from the promissory note, it is clear that both the brothers should have joined only for the purpose of borrowing money to establish the rice mill, is, in our view, without any basis. These two exhibits cannot lead to a conclusion that the rice mill was established with the joint family funds. In our view, the learned Judge has made too much out of these two sporadic instances. Insofar as Ex.A.34 is concerned, it is admitted that the appellant has not joined in the mortgage and it would not bind him.

15. The conclusion of the learned Judge that the rice mill business grew up with the assistance of the joint family properties and the funds on the basis of two borrowals, is far fetched and totally opposed to overwhelming evidence available in this case.

16. The decisions referred to by the parties can now be referred to.

17. In G. Narayana Raju Vs. G. Chamaraju and Others, the Supreme Court has reiterated the principle that it is well settled that there is no presumption under Hindu Law that a business standing in the name of any member of the joint family is a joint family business even if that member is the manager of the joint family, and that unless it could be shown that the business in the hands of the coparcener grew up with the assistance of the joint family property or joint family funds or that the earnings of the business were blended with the joint family estate, the business remains free and separate. Their Lordships in the facts of that case held that though both the appellant and the respondent were described as proprietors of Ambica Stores the description was only for the purpose of borrowing money from the Bank and that it is the intention that the Court must seek, in every case, the acts and conduct being no more than evidence of the intention. In the case on hand, admittedly, the appellant was running a rice mill on his own and thereafter, obtained licence, constructed the buildings, and had been managing the rice mill all in his own name. Every conceivable documents are in the individual name of the appellant. Therefore,

the intention is crystal clear that the business was separate and individual business of the appellant and was treated so by others. Apart from the direct evidence available from the records, i.e., the partition deed of the year 1974 did not include the rice mill, the respondents and their father partitioned the 17 cents allotted to them, in the year 1980. Therefore, the intention of the parties from the facts is clear to the effect that the rice mill and the business were the individual business of the appellant, and there was no contribution from the joint family properties and the business did not grow up because of their contribution.

18. In *Chattanatha v. Ramachandra* AIR S.C. 799 the Supreme court has held that under the Hindu Law, there is no presumption that a business standing in the name of any member is a joint family one even when that member is the manager of the family, and it makes no difference in this respect that the manager is the father of the coparceners. In the case on hand, the appellant is the junior member of the family and that admittedly, the appellant had been doing the rice mill business from the year 1949 as a Manager of his uncle's rice mill and thereafter, he started his own rice mill on his own in the year 1950. Therefore, no presumption could be drawn in this case that the business standing in the name of the appellant is a joint family business.

19. In *Ramayya v. Kolanda* AIR 1939 Mad 911 a Division Bench of this court has held that in this case there is every reason for thinking that the acquisitions by the brothers were as much the result of their own industry and thrift as they were the natural product of the land itself, that the acquisitions claimed represent savings extending over a fairly long period, that years after the allotment and years after the acquisition it is scarcely just or equitable that the acquirer should be forced to share the product of his thrift and industry with, it may be, an indolent or ease-loving coparcener, and that there is no principle of Hindu law which tends to the perpetuation of such gross injustice. The observation of Their Lordships would squarely apply to the facts of the present case. The business of the appellant from the year 1952 to 1989, i.e., till the filing of the suit, was absolute business of the appellant and it was the result of thrift and industry on the part of the appellant right from the year 1949. The respondents, who did not participate or make any attempt to derive any benefit of the alleged joint family business, cannot claim the business as of the joint family. In the light of the evidence that the respondents' father Veerasami Vellalar was undertaking only agricultural operations and that he was not enterprising to accept or acquire a small portion of the property on his own. It would be gross injustice to accede to the proposition that the respondents, who were no where near the business of the appellant who did his hard work in establishing and managing the rice mill, are to get the benefit of the rice mill. The claim of the respondents that they received small portions of payments sometime in the year 1960 for one year, would not be sufficient to show that the appellant treated his business as of the joint family and shared the income with the other members.

20. In *Rathinam v. Thangasami Pillai* 1967 (I) M.L.J. 360 a Division Bench of this Court held that mere proof of the existence of the joint family owning some joint family property does not give rise to any presumptions and that it must be established that the family possessed some joint property which from its very nature and relative value may have formed the nucleus sufficient and adequate in character so as to impress the acquisitions with the character of the joint family property. Their Lordships referred to, with approval, the observation made in *Appalaswami v. Suryanarayanamurthi* I.L.R.(1948) Mad. 440 : (1947) 2 M.L.J. 138 : 60 L.W. 412 : AIR 1947 189 which is as follows:-

"It is dangerous to construe act of generosity or kindness as admissions of legal obligation. Hence the fact that at the instance of mediators assisting in the partition one of the members of the joint family agreed to apply some of his self-acquired property for the benefit of the members of the family cannot be taken as establishing that the member intended to bring into partition his entire self-acquired interest."

Applying the principle in this case, we find that though the appellant had acquired valuable lands with his income, those properties were brought in for the purpose of division. The said conduct of the appellant can only mean that he was prepared to share the joint family properties insofar as the agricultural land is concerned. That would not mean that he has intended to bring in the rice mill also which was his absolute self-acquired property.

21. In *R. Selvaraj v. Radhakrishna Pillai alias R.R. Krishna Pillai* 1989 (3) L.W. 19 a Division Bench of this Court held that it is not every sporadic or unimpressive contribution by a member of the joint family that would make the resultant activity, a joint family activity, that the contribution of labour, service or money by one member of the joint family to the other should be so conspicuous and impressive that on a prima facie examination of such material, a reasonable and a prudent person should gain the impression that the two members were so associated with the common object of exploiting a commercial activity to the advantage of the joint family as a whole and in general. In our view, this observation of the Division Bench would squarely apply to the facts of the case on hand. The Trial Court was in error in taking note of the sporadic instances of two borrowal for family and other necessities at a particular point of time to lead to the conclusion that the whole business was joint family venture, especially in the light of such an overwhelming evidence of individual establishment and management for well over 40 years.

22. In *Ethirajammal v. G. Lakshmi Devi* (1991 (36) L.W. 590 a learned Judge of this Court has held that mere effecting of a joint family property and taking a loan on its security would not make it as a joint family business. A mere mortgage without more cannot be construed as effecting any detriment to the joint family property, that if the property is sold as a result of the mortgage not being discharged, then the position would perhaps be different, and that but, so long as it continues in tact, the mere fact that a member of a joint family

mortgages a property belonging to the family so as to finance a business or acquisition, it cannot be treated as a detriment to the joint family property. In the present case, Ex.A.34 is the mortgage taken by the respondents' father, and the appellant was not a party and assuming that the funds obtained in the mortgage were utilized for enhancing the rice mill business, it would not make the rice mill as a property of the joint family property.

23. In *Biyyala Chinna Narasamma Vs. Biyyala Venkata Narasi Reddi and Others*, a learned Judge of this Court has held that mere utilization of joint family funds on a business venture by itself will not entitle the coparceners in the joint family to a right to a share in the profits on the footing that the business is divisible asset. The learned Judge also held that it is only when circumstances and evidence show clear association of the entire adult coparcenary in a business conducted with others that acting as a legal entity it can sue for dissolution and accounts. The learned Judge further observed that the spirit of initiative and enterprise in those who remain in a village and continue to reside in the ancestral family house would be destroyed if any enterprise they start which requires individual energy skill and ability is liable to be regarded as a joint family venture in which in the event of its making profits the entire coparcenary can claim a share.

24. In *Lakshmi Ammal Vs. Meenakshi Ammal and Others*, a Division Bench of this Court following the dictum of the Supreme Court in *Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others*, has held that mere existence of ancestral property is not enough to conclude that the business carried on by a member was not joint family business. There must be proof that the ancestral property was sufficient and productive enough and the income from the property was utilized for the purpose of the business.

25. In *Ramnagina Sah and Others Vs. Harihar Sah and Others*, a Division Bench of the Patna High Court has held that when a partition is admitted or proved, the presumption is that all the properties were divided and a person alleging that family property in the exclusive possession of one of the members after the partition, is joint and is liable to be partitioned, has to prove his case, and that therefore in a suit for partition plaintiffs have to prove that in spite of two partitions alleged by them, the property continued to be joint. In our view, the respondents/plaintiffs have not proved that though the landed properties were divided and the rice mill was omitted to be included in the partition deed and the landed properties were subsequently divided among themselves, the rice mill continued to be undivided property for a further division.

26. In *Satchidananda Samanta Vs. Ranjan Kumar Basu and others*, a Division Bench of the Calcutta High Court in the facts of that case that one coparcener starting cinema business on joint family property with consent of others, but without any capital contribution, has held that the cinema business cannot be treated as joint family business. In the present case, though initially the rice mill was constructed on a joint family property with the permission from his elder

brother, the installation of machineries, licences, etc. were all obtained in the name of the appellant and he was continuously managing with the renewal of licences etc. With overwhelming evidence available on the case, it would not make the rice mill business as a joint family business.

27. In *Gyarsibai and Others Vs. Jamnalal Moolchand and Others*, : a learned Judge of the Madhya Pradesh High Court considering the facts of the said case has held that there is not an iota of evidence to show that he (defendant No.2 in that case) intended to waiving the separate claims over the newly constructed house or that he permitted the plaintiffs to claim any share in the income derived from the new house or that he intended to treat the new house also as the joint family property and that no issue can claim any share in the newly constructed house on the ground that it is also joint family property. In our case, the appellant has constructed a row of ten shops in the property allotted to him. There is absolutely no evidence to show that the appellant had waived his right over those properties and that the respondents are entitled for the income or share in that property.

28. In *Revathinnal B. Varma vs. H.H. Padmanabha Dasa* 1993 Supp.(1) SCC 233 the Supreme Court referring to the usual clauses incorporated in a Deed of Partition in a routine manner, has held that it has almost become a customary to include such a clause by abundant caution. In the present case, in Ex.B.1 Partition Deed also, it is stated that if any property has been found to be omitted at a later point of time, it will be shared equally by the two brothers. This is a reservation keeping in view of the extent and nature of the properties. It is unbelievable that the parties to the Deed of Partition were not aware of the existence of the rice mill. It is too much to expect that this Court has to infer that the omission had taken place because the rice mill was left for partition in future date.

29. In *Sivaramakrishnan Vs. Kaveri Ammal and Others*, , a Division Bench of this Court dealing with the case of utilization of the sale proceeds of the ancestral property for acquisition of other property either with or without self acquired funds, has held that such property so acquired would partake of the character of ancestral property because such property has been acquired "by detriment to the paternal estate". This judgment which was pressed into service on behalf of the respondents, would not apply to the facts of the present case. There was no such pleading, nor any joint family property was sold for acquisition of joint business.

30. In *Manikkam Chetty vs. Kamalam* AIR 1937 Mad 335 a Division Bench of this Court has held that in a partition of the joint family property, the character of undivided property may be taken away from some part of the estate, while, as regards the rest the members may retain their joint status, and that the question is therefore essentially one of intention of the parties and the construction of the partition deed executed between them. Their Lordships also held that when coparcenary funds are employed, the business would be presumed to belong to entire coparcenary in the absence of evidence to contrary. In our view on facts

and circumstances, this judgment will not apply to the present case. First, the intention of the parties regarding partition is clear and manifested in the subsequent partition deed. It cannot be construed that the rice mill was intended to be partitioned at a later point of time considering the facts and circumstances of the case. Secondly, there is absolutely no evidence to show that coparcenary funds are employed in the business.

31. The principles deduced from the ruling and the evidence and facts applied in this case support the case of the appellant. The judgment and decree of the Court below are to be set aside insofar as the plaint `B" Schedule is concerned. Insofar as the properties covered by plaint `A" Schedule are concerned, though the learned Counsel submits that they are already covered by earlier partition considering smaller extent of agricultural lands and to buy peace the appellant has no objection for the division in two equal half and allot a share to the respondents branch.

32. For all these reasons, Appeal Suit No.551 of 1991 is allowed and the judgment and decree of the lower Court in O.S.No.110 of 1989 are set aside to the extent indicated. No costs. Transfer Appeal Suit No.736 of 1991 is dismissed and the judgment and decree of the Court below in O.S.130 of 1989 are confirmed in the circumstances of the case. No costs.