



S.A.(MD)Nos.229 and 230 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 16.07.2024

PRONOUNCED ON: 20.12.2024

CORAM

**THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR**

**S.A.(MD)Nos.229 and 230 of 2020  
and  
C.M.P.(MD)No.3007 of 2020**

**S.A.(MD)No.229 of 2020:**

1.Mallika  
2.Parvathi @ Parameshwari : Appellants/Respondents 1 & 2/Plaintiffs  
  
Vs.

1.Sengamalaselvi : 1<sup>st</sup> Respondent/Appellant/6<sup>th</sup> Defendant  
  
2.Balasubramaniam  
3.Vijayaraj  
4.Muthulakshmi  
5.Selvi alias Chellammal  
6.Selvaraj  
7.Ramar : Respondents 2 to 7/Respondents 3 to 8/  
Defendants 1 to 5 & 7

PRAYER:- Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree made in A.S.No.49 of 2016, dated 03.10.2019, on the file of the Additional District Court,



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Srivilliputtur, reversing the judgment and decree made in O.S.NO.83 of 2009, dated 26.08.2016, on the file of the Subordinate Court, Srivilliputtur.

**S.A.(MD)No.230 of 2020:**

1.Mallika  
2.Parvathi @ Parameshwari : Appellants/Respondents 1 & 2/Plaintiffs

Vs.

1.Ramar : 1<sup>st</sup> Respondent/Appellant/7<sup>th</sup> Defendant

2.Balasubramaniam

3.Vijayaraj

4.Muthulakshmi

5.Selvi alias Chellammal

6.Selvaraj

7.Sengamalaselvi : Respondents 2 to 7/Respondents 3 to 8/  
Defendants 1 to 6

PRAYER:- Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree made in A.S.No.50 of 2016, dated 03.10.2019, on the file of the Additional District Court, Srivilliputtur, reversing the judgment and decree made in O.S.No.83 of 2009, dated 26.08.2016, on the file of the Subordinate Court, Srivilliputtur.



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For Appellants : Mr.M.Thirunavukkarasu  
(in both appeals)

For Respondents: Mr.M.P.Senthil  
(in both appeals) for R.1 and R.3

: No Appearance  
for R.2 to R.5  
: R.6 – died – memo recorded

### **COMMON JUDGMENT**

These Second Appeals are directed against the common judgment passed in A.S.Nos.49 of 2016 and 50 of 2016, dated 03.10.2019, on the file of the Additional District Court, Srivilliputtur, reversing the judgment made in O.S.No.83 of 2009, dated 26.08.2016, on the file of the Subordinate Court, Srivilliputtur.

2. The suit is for partition.

3. For the sake of convenience and brevity, the parties will hereinafter be referred as per their status/ranking in the original suit.



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4. Admittedly, the plaintiffs and the defendants 3 and 4 are the sisters of the defendants 1 and 2 and are the children of Ramasamy Konar. The case of the plaintiffs is that the suit properties originally belonged to their father Ramasamy Konar as his self-acquisition, that the said Ramasamy Konar died intestate in or about 1993 leaving behind the plaintiffs and the defendants 1 to 4 to succeed his property, that since the plaintiffs and the defendants 1 to 4 being the Class – I heirs of the deceased, they are entitled to get 1/6<sup>th</sup> share in the suit property, that the fourth defendant's earlier suit in O.S.No.88 of 2004 was dismissed for default, that the plaintiffs came to know during the third week of May – 2009 that the fourth defendant along with the defendants 1 and 2 have created some unregistered documents in favour of the defendants 5 to 7 treating the property to be their exclusive property and that therefore, the plaintiffs were constrained to file the above suit for partition, claiming 2/6<sup>th</sup> shares in the suit property.

5. The defendants 1 to 4 – brother and sisters of the plaintiffs had remained exparte.



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6. The defence of the defendants 5 to 7, who are the subsequent purchasers, is that the deceased Ramasamy Konar and his sons – defendants 1 and 2 constituted a joint Hindu family of which the said Ramasamy Konar was the kartha, that the said Ramasamy Konar purchased the suit properties with the help of the ancestral nucleus and as such, the suit property and all other properties belonged to the joint Hindu family and as such, the deceased Ramasamy Konar and his sons were entitled to get 1/3 share in the joint family properties, that the said Ramasamy Konar during his life time conducted the marriage of his daughters by giving jewels and seers etc., as per their family status with the income derived from the joint family properties, that the plaintiffs and the defendants 3 and 4 in the year 1996 demanded share in the undivided 1/3 share of their father in the joint family properties including the suit property and hence, an oral partition was held in the presence of the plaintiffs and the defendants 3 and 4, wherein they had agreed to receive money in lieu of their respective shares, that they have entered into an arrangement that the first defendant has to pay amounts to the defendants 3 and 4 and the second defendant has to pay to the plaintiffs in lieu of their shares, that the first defendant was allotted with an extent



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of 1.23 ½ Acres in the southern half out of the total extent of 2.47 Acres and the second defendant with northern portion of 1.23 ½ Acres with an undivided half share in the well, electric motor, pumpset etc., that in pursuance of oral partition, the second defendant paid amount to the plaintiffs, but since the first defendant could not pay the amount to the defendnats 3 and 4, he executed a registered sale deed dated 21.05.1996 in respect of 22 cents in the eastern side out of 1.23 ½ Acres allotted to him, that the second defendant, on 05.01.2004 sold the entire extent of 1.23 ½ Acres allotted to him in the oral partition to the fifth defendant, who in turn sold the property to the sixth defendant, that the first defendant, on 30.08.2006 sold 1.01 ½ Acres of land to the seventh defendant, who is the husband of the sixth defendant, that the defendants 6 and 7 since their purchase have been in possession and enjoyment of the suit property by mutating revenue records in their favour and that since the plaintiffs are not having any share in the suit property, the suit is liable to be dismissed.

7. The fourth defendant, in the earlier suit filed in O.S.No.88 of 2004, on the file of the District Munsif Court, Srivilliputtur (O.S.No.283 of 1998, on the file of the Subordinate Court, Srivilliputtur) claiming



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partition in respect of five items of the properties, whereas the plaintiffs have filed the present suit in respect of second schedule of property in O.S.No.88 of 2004.

8. The defendants 5 to 7 have taken additional defence that since the other four schedules shown in O.S.NO.88 of 2004 were not added in the present suit, the suit is bad for partial partition. The said defendants have also taken a defence that though the present plaintiffs were parties to the suit in O.S.No.88 of 2004, they have not made any claim with respect to the properties therein and as such, the present claim of the plaintiffs is barred by the doctrine of constructive res judicata.

9. The plaintiffs in their reply statements have taken a stand that their father Ramasamy Konar purchased the present suit property, vide sale deed dated 31.07.1948.

10. The learned trial Judge, upon perusing the pleadings of both parties, has framed the following issues:

(1) Whether the plaintiffs are entitled for preliminary decree of partition as prayed for?



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- (2) Whether the oral partition as alleged by the defendants is true?
- (3) Whether the suit is bad for partial partition?
- (4) To what other reliefs?

11. During trial, the plaintiffs have examined the second plaintiff as P.W.1 and exhibited 5 documents as Exs.A.1 to A.5. Though the fifth defendant has adopted the written filed by the sixth defendant, remained exparte at the trial. The defendants 6 and 7 have examined themselves as D.W.1 and D.W.2 respectively and exhibited 8 documents as Exs.B.1 to B.9. The learned trial Judge, upon considering the pleadings and the evidence both oral and documentary and on hearing the arguments of both sides, vide judgment and decree dated 26.08.2016, has granted the relief of preliminary decree by declaring that the plaintiffs are entitled to get 2/6<sup>th</sup> share in the suit property. Aggrieved by the granting of preliminary decree, the defendants 6 and 7 have preferred separate appeals in A.S.Nos.49 of 2016 and 50 of 2016 and the learned Additional District Judge, Srivilliputtur, upon considering the materials available on record and on hearing the arguments of both sides, has passed a common judgment dated 03.10.2019 by allowing the appeals and thereby setting



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aside the judgment and decree passed by the trial Court and consequently, dismissed the suit. Challenging the impugned common judgment and separate decrees, the plaintiffs have preferred the present Second Appeals.

12. At the time of admission, the following Substantial Question of Law came to formulated:

“ Whether the lower appellate Court is right in allowing the appeal holding that the suit is bad for partial partition?”

13. After hearing the arguments of both sides, the following Substantial Question of Law came to be formulated:

“ Whether the first appellate Court is right in allowing the appeal, when the defendants 6 and 7 failed to prove the alleged oral partition between the plaintiffs and the defendants 1 to 4?”

14. At the outset, it is pertinent to note that the fourth defendant in the present suit has filed a suit against the present plaintiffs and the defendants 1 to 3 and 5 claiming partition in O.S.No.283/1998, on the file of the Subordinate Court, Srivilliputtur and subsequently the said suit



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came to be transferred and was taken on file in O.S.No.88 of 2004, on the file of the District Munsif Court, Srivilliputtur in respect of five schedule of properties alleging that all the properties came to be owned by her father Ramasamy Konar as his separate and self acquired property.

15. The second defendant in the present suit as well as in the earlier suit in O.S.No.88 of 2004 and the fifth defendant in the present suit who was the sixth defendant in the earlier suit have filed written statement, but subsequently, since the fourth defendant herein (the plaintiff in O.S.No.88 of 2004) has not turned up for the trial, the said suit was ordered to be dismissed for default on 17.10.2005. After the dismissal of the said suit in O.S.No.88 of 2004, the plaintiffs herein who were the defendants 3 and 4 in the earlier suit have filed the present suit claiming partition in respect of one schedule of property which was shown as second schedule in O.S.No.88 of 2004 alleging that the present suit property came to be owned by their father separately. Though the plaintiffs have not stated as to how their father had become the separate and absolute owner of the suit property in the plaint as well as in the first reply statement filed in the year 2010, in the second reply statement filed in February – 2016, they have raised a pleading that the suit property



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came to be purchased by their father vide sale deed dated 31.07.1948 and at the trial, the same came to be exhibited as Ex.A.5.

16. The contesting defendants have taken a specific defence that the suit property and other properties were owned by the Hindu joint family consisting of the deceased Ramasamy Konar and his two sons the defendants 1 and 2, which was headed by kartha Ramasamy Konar. To put it in short, the plaintiffs have claimed that the suit property is the separate and self-acquired property of their father, whereas according to the defendants 6 and 7, the suit property was a joint family property of the deceased Ramasamy Konar.

17. It is settled law that there is no presumption of a property being joint family property only on account of existence of joint Hindu family and the one who asserts has to prove that the property is a joint family property and that if the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be the self acquired property to prove that he



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purchased the property with his own funds and not out of joint family nucleus that was available.

18. The second plaintiff as P.W.1 in her cross-examination would admit that the properties shown in the earlier suit were belonging to the joint family ancestrally and the relevant portions are extracted hereunder for better appreciation:

“பழைய வழக்கில் உள்ள 3வது தபசில் சொத்து தற்போது வரை 1இ 2 பிரதிவாதிகள் வசம் உள்ளது என்றால் அது பரம்பரை சொத்து ஆகும். அந்த வழக்கில் உள்ள 5வது தபசில் சொத்தும் 1இ 2 பிரதிவாதிகள் வசம் உள்ளது என்றால் சரிதான். .... என் அப்பா சுகாதாரர்கள் அடக்கிய கூட்டு குடும்பத்தில் தபசில் உள்ள சொத்துக்கள் பூர்வீக சொத்துக்கள் பாத்தியப்பட்டது என்றால் சரிதான். அந்த பொது குடும்ப / பூர்வீக சொத்தில் என் தந்தை சுகாதாரர்கள் மூவருக்கும் தலா பிரிவினையில்லாத 3/1 பங்கு பாத்தியப்பட்டு நேந்தது என்றால் சரிதான்.”

19. No doubt, as rightly pointed out by the learned Counsel for the plaintiffs, the present suit property came to be purchased by Ramasamy



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Konar vide Ex.A.5 sale deed, but as rightly pointed out by the learned Counsel for the contesting defendants, the joint family was owning ancestral properties. Even according to P.W.1, all the properties came to be owned by the joint family properties ancestrally. In view of the above, as per the settled legal position, the burden gets shifted to the plaintiffs to prove that the suit property was purchased by their father with his own funds and not with the help of the income derived from the joint family property. But admittedly there is absolutely no pleadings or evidence in this regard.

20. It is not in dispute that Ramasamy Konar had died in the year 1993. According to the plaintiffs, since their father had died intestate leaving behind his self acquired property, being Class – I heirs, the plaintiffs and the defendants 1 to 4 are entitled to get 1/6<sup>th</sup> share each. But according to the defendants 6 and 7, after the death of Ramasamy Konar, there was an oral partition in the year 1996 in the presence of the plaintiffs and the defendants 3 and 4, wherein the sisters had agreed to receive the amounts in lieu of their shares, that the defendants 1 and 2 were allotted 1/2 share each in the suit property and the first defendant had agreed to pay the amounts to the defendants 3 and 4 whereas the second



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defendant had agreed to pay the amounts to the plaintiffs in lieu of their shares and that in pursuance of the same, the second defendant paid amounts to the plaintiffs, but since the first defendant could not pay the amount, he executed a sale deed in respect of 22 cents out of 1.23 Acres allotted to his share in favour of the defendants 3 and 4, that subsequently the defendants 1 and 2 have alienated the portions of the property to the defendants 5 and 7 and that the above aspects would go to show that oral partition was acted upon.

21. The learned trial Judge, by observing that the contesting defendants have miserably failed to prove the oral partition, has granted the preliminary decree as sought for by the plaintiffs. As rightly contended by the learned Counsel for the contesting defendants, the main issue to be decided is as to whether there was an oral partition in the year 1996. It is pertinent to note that the plaintiffs have themselves produced and exhibited the copies of the written statement filed by the defendants 2 and 5 in the earlier suit in O.S.No.88 of 2004. The plaintiffs' brother – second defendant in the present suit as well as in the earlier suit has filed his written statement under Ex.A.3 wherein he has specifically pleaded about the oral partition and the way in which the same came to be acted



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upon. It is necessary to refer the following passages in the written statement filed by the second defendant:

“தபசில் சொத்துக்களைப் பொறுத்து வாதி மற்றும் தேநிர் பிரதிவாதியின் தகப்பனார் காலமான பின்பு 1996 – ம் ஆண்டுவாக்கில்இ ஊரில் பெரியவர்கள் முன்பு வாய்மொழி பாகம் செய்யப்பட்டன. அதில்இ ரோமசாமிக் கானாரின் பெண் மக்களும் கலந்து கொண்டனர். அதில் பெண் மக்களுக்கு அவர்களுடைய பதிகிற்குரிய தொகையை பணமாக கொடுத்துவிட ுவண்டும். அதன்படி ுமற்ற்கொண்டு அவர்கள் சொத்துகளில் பங்கு ுகட்கக் கூடாது எனவும் ுபசி முடிக்கப்பட்டது. அதன்படிஇ வாதிக்கும் 5ம் பிரதிவாதிக்கும் தேநிர் வழக்கின் 1ம் பிரதிவாதி பணம் செலுத்த ுவண்டும் என்றும்இ 3 மற்றும் 4 பிரதிவாதிகளான மற்ற பிரதிவாதிகளுக்குஇ தேநிர் பிரதிவாதியும் பணம் செலுத்த ுவண்டும் என்றும் ஒப்புக்கொள்ளப்பட்டது. அவ்வாறு ுபசி முடிக்கப்பட்டதை தேநிர் வாதி உட்பட அனைவரும் ஏற்றுக்கொண்டனர்.

7. தேநிர் வழக்கின் 1ம் பிரதிவாதியானவர்இ வாதிக்கும் 5ம் பிரதிவாதி முத்துலட்சுமிக்கும் ஒப்புக்கொண்டபடி பணம் செலுத்தாமல்இ அதற்கு சூடாக 2ம் தபசில் சொத்தில்இ அவருக்கு ஒதுக்கப்பட்ட பாகத்தில் ஒரு பகுதியை கிரயமாக பத்திரம் பதிவு செய்து கொடுத்துள்ளார்கள். ஆதுஇ கிரயப்பத்திரம் என்றிருந்தபாதிலும்இ வாதி 1 முதல் 5 பிரதிவாதிகளுக்கு டேயரில் ஊரில் வைத்து ுபசி பாகம் செய்து கொண்டதின் அடிப்படையில்தான் ஏற்பட்டது. அந்த



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கிரய ஆவணத்தினை பார்வையிட்டால் அதன் உண்மை தன்மைகள் தெரியும்.””

22. The fifth defendant in the present suit, who is the purchaser from the second defendant has also filed written statement reiterating the oral partition pleaded by the second defendant in his written statement.

23. The learned Counsel for the plaintiffs would submit that since the earlier suit was dismissed for default, the averments raised in the written statement filed in the earlier suit cannot be taken as admission for the present suit. As already pointed out, one of the sisters has filed the earlier suit claiming partition in respect of more properties alleging that the properties were the self-acquired properties of their father and in that proceedings, one of the brothers has filed a written statement taking a specific stand that after the death of their father, oral partition was held in the year 1996.

24. At this juncture, it is necessary to refer the decision relied on by the learned Counsel for the contesting defendants in ***S.R.Srinivasa and others Vs. S.Padmavathamma*** reported in ***2010(5) CTC 364***, where



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the Hon'ble Supreme Court has held that a true and clear admission would provide the best proof of the facts admitted and the relevant passages are extracted hereunder:

*"31. It is undoubtedly correct that a true and clear admission would provide the best proof of the facts admitted. It may prove to be decisive unless successfully withdrawn or proved to be erroneous. The legal position with regard to admissions and their evidentiary value has been dilated upon by this Court in many cases. We may notice some of them.*

*32. In the case of [Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi](#) (1960) 1 SCR 773 it was observed as follows:*

*"An admission is the best evidence that an opposing party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous."*

*33. In the case of [Nagindas Ramdas v. Dalpatram Ichharam](#), (1974) 1 SCC 242, it has been observed:*

*"Admissions, if true and clear are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under [Section 58](#) of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the*



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*rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong."*

*34. The aforesaid two judgments along with some other earlier judgments of this Court were considered by this Court in the case of [Gautam Sarup v. Leela Jetly](#), (2008) 7 SCC 85 wherein it was observed as follows:*

*"16. A thing admitted in view of [Section 58](#) of the Evidence Act need not be proved. [Order 8 Rule 5 of the Code of Civil Procedure](#) provides that even a vague or evasive denial may be treated to be an admission in which event the court may pass a decree in favour of the plaintiff. Relying on or on the basis thereof a suit, having regard to the provisions of [Order 12 Rule 6 of the Code of Civil Procedure](#) may also be decreed on admission. It is one thing to say that without resiling from an admission, it would be permissible to explain under what circumstances the same had been made or it was made under a mistaken belief or to clarify one's stand inter alia in regard to the extent or effect of such admission, but it is another thing to say that a person can be permitted to totally resile therefrom."*

*"28. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified.*



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*Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other."*

25. The learned Counsel would also rely on the decision of the Hon'ble Apex Court in ***Ahmedsaheb (dead) by Lrs., Vs. Sayed Ismail*** reported in ***(2012)8 SCC 516***, wherein the Hon'ble Apex Court reiterated the legal position that admission of a party in the proceedings either in the pleadings or oral is the best evidence and the same does not need any further corroboration.

26. Even assuming that the averments raised in the written statement filed in the earlier suit cannot be taken into consideration, as rightly pointed out by the learned Counsel for the contesting defendants, the second plaintiff – P.W.1 would categorically admit the oral partition and the relevant portion is extracted hereunder:

“ ..... 2 – ம் பிரதிவாதி வாசா.ஆ.3ல் சொல்லியுள்ள விவரங்கள் சரிதான் என்றால் சரிதான். வா.சா.ஆ.3ல் பாரா 6ல் தபசில் சொத்துக்களை பொறுத்து வாதி மற்றும் ஷேத் பிரதிவாதியின் தந்தை



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காலமான பின்பு 1996ல் ஊர் பெரியவர்கள் முன்பு வாய்மொழி பாகம்  
செய்யப்பட்டது என்றும் அதில் ரோமசாமி ஸ்கானாரின் பெண் மக்களும்  
கலந்து கொண்டனர் என்றும் அதில் பெண் மக்களுக்கு  
அவர்களுக்குரிய பட்டு தொகையை பணமாக கொடுக்கப்பட ஸ்வண்டியது  
என்றும்இ ஸ்மற்கொண்டு சொத்துக்களில் பட்டு ஸ்கட்க்கடடாது என்று  
ஸ்பசி முடிக்கப்பட்டது என்றும்இ அதன்படி வாதிக்கும்இ 5ம்  
பிரதிவாதிக்கம் நீத வழக்கில் 1 – ம் பிரதிவாதி பணம்  
செலுத்துவண்டும் என்றும்இ 3இ 4 பிரதிவாதிகளான மற்ற  
பிரதிவாதிகளுக்கும் நீத நிர் பிரதிவாதிகள் பணம் செலுத்த ஸ்வண்டும்  
என்று ஒப்புக்கொள்ளப்பட்டது என்றும்இ அவ்வாறு ஸ்பசி  
முடிக்கப்பட்டதை அந்த வாதி உட்பட அனைவரும்  
ஒப்புக்கொண்டனர் என்று சொல்லப்பட்டுள்ளது என்றால் சரிதான்.  
வா.சா.ஆ.3 பாரா 7ல் நீத வழக்கின் 1ம் பிரதிவாதியானவர்  
வாதிக்கும் 5ம் பிரதிவாதி முத்துலட்சுமிக்கம் ஒப்புக்கொண்ட படி  
பணம் செலுத்தாமல் அதற்கு சூடாக 2ம் தபசில் அவருக்கு  
ஒதுக்கப்பட்ட பாகத்தின் ஒரு பகுதியை கிரையமாக  
புத்திரப்பதிவு செய்து கொடுத்துள்ளார் என்றும் அது கிரையப் புத்திரம்  
என்று ரூந்தபாதிலும் வாதி 1 முதல் 5 பிரதிவாதிக்கு டேயில்  
ஊரில் வைத்து ஸ்பசி பாகம் செய்து கொண்டதன் அடிப்படையில்தான்  
ஏற்பட்டது என்றும் கூறப்பட்டுள்ளது என்றால் சரிதான். 1996ல்  
நடைபெற்ற பாகத்தின் பிராது சொத்தை பொறுத்தமட்டில் தென்பாகம்  
பிரிவினையில்லாத ஸ்பர் பாதி 1.23 ½ செண்டும் அதிலிருந்து கிணறுஇ



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பம்புசெட்டு மிரிவினையில்லாத பாதிரி பட்டும் 1ம் மிரதிவாதிக்கு ஒதுக்கப்பட்டது என்றும் அந்த வாய்மொழி பாகத்தில் நேத மிராது தபசில் சொந்தமான வடபக்கம் பாதிரி ஒரு 1.23 ½ செண்டும் அதில் உள்ள கிணறு மற்றும்

பம்பு செட்டும் மிரிவினையில்லாத பாதிரி பட்டும் 2ம் மிரதிவாதிக்கு வாய்மொழியாக ஒதுக்கப்பட்டது என்றால் சரியல்ல. ....  
வா.சா.ஆ.4ல் சொல்லியுள்ள விவரங்கள் சரிதான்.அந்த வழக்கில் 1ம் மிரதிவாதி வாய்மொழி பாகத்தில் அவருக்கு கிடைத்த சொத்தைதான் கிரையம் கொடுத்ததாக சொல்லியுள்ளார் என்றால் சரிதான்.”

27. Considering the above, as rightly contended by the learned Counsel for the contesting defendants, the learned first appellate Judge has given a finding that there was oral partition and in that partition, the defendants 1 and 2 were allotted with ½ share each in the suit property, that the second defendant had paid amounts to the plaintiffs in lieu of their shares and that the first defendant had executed a sale deed in respect of 22 cents in favour of the defendants 3 and 4 instead of the amounts agreed to be paid.



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28. It is settled law that when an oral partition of joint family property is pleaded, its veracity could be decided by the subsequent conduct of the parties to the alleged partition, more particularly how the properties have been dealt with by the parties after the alleged partition. As already pointed out, in the present case, the second defendant has paid amounts to the plaintiffs in lieu of their shares and the first defendant had given 22 cents of land which was allotted to his share to the defendants 3 and 4 in lieu of the amount that was agreed to be paid.

29. It is pertinent to note that the second defendant sold the entire extent of 1.23 ½ Acres allotted to his share to the fifth defendant vide sale deed dated 05.01.2004, who in turn sold the suit property to the sixth defendant vide three sale deeds under Exs.B.1 to B.3. It is not in dispute that the first defendant after giving 22 cents of land out of 1.23 ½ Acres allotted to him in the oral partition to his sisters, sold the remaining extent of 1.01 ½ Acres to the seventh defendant vide sale deed dated 30.08.2006 under Ex.B.8.

30. The seventh defendant has also produced and exhibited the



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copy of the settlement deed executed by the first defendant in favour of his children dated 10.12.2009 under Ex.B.9 wherein also the first defendant has referred that the suit property was owned by his father ancestrally and a portion of the same was allotted to him in the oral partition. As rightly contended by the learned Counsel for the contesting defendants, it is evident from the admission of P.W.1 that their father Ramasamy Konar had got ancestral properties, that her father Ramasamy Konar and the defendants 1 and 2 constituted a joint Hindu family and the said family owned ancestral properties including the suit property and that her father and two brothers were entitled to get 1/3 share each in the undivided properties of the joint family.

31. As rightly contended by the learned Counsel for the contesting defendants, it is clearly evident that the plaintiffs received the amounts from the second defendant in lieu of 1/3 share in the 1/3 share of their father, that they did not question the alienations made by the defendants 1 and 2 as evidenced by Exs.B.6 to B.8 and that the above would go to establish the oral partition, which came to be accepted in Exs.A.3 and A.4 and as admitted by the plaintiffs.



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32. Now turning to the technical objection that the suit is bad for partial partition, according to the contesting defendants, in the earlier suit in O.S.No.88 of 2004, five schedule of properties were included and the present plaintiffs having remained exparte in the said suit and having admitted that the other properties are in the hands of the defendants 1 and 2, they have filed the present suit only with regard to the suit property and as such, the suit is hit by doctrine of partial partition.

33. It is settled law that once a partition is proved or admitted, the presumption is that all joint property was partitioned or divided. The Hon'ble Supreme Court in the case of ***Kesharbai alias Pushpabai Eknathrao Nalawade (dead) by Lrs., and another Vs. Tarabai Prabhakarrao Nalawade and others*** reported in ***(2014)4 SCC 707***, relied on by the learned Counsel for the contesting defendants, has observed as follows:

*“It is a settled principle of law that once a partition in the sense of division of right, title or status is proved or admitted, the presumption is that all joint property was partitioned or divided. Undoubtedly the joint and undivided family being the normal condition of a Hindu family, it is*



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*usually presumed, until the contrary is proved, that every Hindu family is joint and undivided and all its property is joint. This presumption, however, cannot be made once a partition (of status or property), whether general or partial, is shown to have taken place in a family.”*

34. In the case on hand, as already pointed out, the plaintiffs have admitted the oral partition and more importantly in the earlier suit, five schedule of properties were added, but after the dismissal of the said suit, the plaintiffs have filed the present suit claiming partition in respect of one item of property. As rightly contended by the learned Counsel for the contesting defendants, the plaintiffs have not offered any reason or explanation as to why the other properties were not added in the present suit or that the present suit property was excluded earlier. At the same time, the learned trial Judge has rightly applied the decision in the case of ***Karupiah and another Vs. C.Muniyappan and others*** reported in ***2014(2) CTC 706*** to the position that alienee cannot raise the plea of partial partition.

35. In the present case, the contesting defendants 6 and 7 who are the purchaser from the defendants 1 and 2 cannot contend that the suit is



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bad for partial partition. Moreover, the learned first appellate Judge has nowhere given a finding that the suit is bad for partial partition. But the plaintiffs have raised grounds as if the first appellate Court has given a finding that the suit is bad for partial partition and on that basis, the Substantial Question of Law came to be formulated.

36. Now turning to the next technical objection that the suit is barred by the principle of constructive res-judicata, it is the case of the contesting defendants that the plaintiffs and the defendants 1 to 4 in the present suit are parties to the earlier suit and all the joint Hindu family properties including the suit property were included therein, even assuming without admitting the case of the plaintiffs and even according to the case of the plaintiffs, the plaintiffs being the defendants 3 and 4 in the earlier suit did not claim their allotted  $1/6^{\text{th}}$  share each in the said suit properties including the suit property in the present suit by way of counter claim and they remained exparte and that therefore, the present suit filed by the plaintiffs is clearly barred by doctrine of constructive res-judicata and the suit is liable to be dismissed.





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they are entitled to get 1/6<sup>th</sup> share each as claimed in the present suit and that since they have failed to claim, the present claim is barred by constructive res-judicata.

39. As already pointed out, the doctrine of res-judicata as contemplated under Section 11 C.P.C., can be invoked only if the earlier litigation is decided on merits. In the present case, the earlier suit in O.S.No.88 of 2004 came to be dismissed for default and as such, the principle of res-judicata or rule of constructive res-judicata cannot be made applicable. Hence, the Substantial Questions of Law are answered in favour of the contesting defendants and against the plaintiffs. Considering the above, the learned first appellate Judge has rightly come to the decision that the plaintiffs are not entitled to get the relief and rightly set aside the judgment and decree passed by the trial Court. Consequently, this Court concludes that the common judgment and decrees passed by the first appellate Court in A.S.Nos.49 of 2016 and 50 of 2016, dated 03.10.2019, on the file of the Additional District Court, Srivilliputtur, are liable to be confirmed and as such, the Second Appeals are liable to be dismissed.



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40. In the result, both the Second Appeals are dismissed, confirming the common judgment and decrees passed in A.S.Nos.49 of 2016 and 50 of 2016, dated 03.10.2019, on the file of the Additional District Court, Srivilliputtur. Consequently, the connected Miscellaneous Petition is also dismissed. The parties are directed to bear their own costs.

**20.12.2024**

NCC : Yes:No  
Index : Yes : No  
Internet : Yes : No

SSL

To

- 1.The Additional District Court, Srivilliputtur.
- 2.The Subordinate Court, Srivilliputtur.
- 3.The Record Keeper,  
Vernacular Section,  
Madurai Bench of Madras High Court,  
Madurai.



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**K.MURALI SHANKAR,J.**

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PRE-DELIVERY JUDGMENT MADE IN

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20.12.2024