

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON: 13.09.2017
JUDGMENT PRONOUNCED ON: 10.10.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.526 of 1996

1. H.M.Kari Gowder(died) ...1st Appellant/1st Defendant

2. Seetha

3. Kamala

4. Parvathi

5. Saraswathy

6. Ramba

7. Naalavathi

8. K.Gopalakrishnan

9. K.Ramamoorthy

10. K.Mahalingam ... Appellants 2 to 10

(Appellants 2 to 10 brought on record
as Lrs.of the deceased sole appellant
as per order of court dated 15.07.2003
made in CMP No: 9344/2003)

Vs.

1. H.M.Halan

2. H.M.Madha Gowder (Deceased) ...1st Respondent/Plaintiff

3. H.M.Raju

4. Seethaiammal

5. Arasi

6. B.Chandrasekar (Deceased)

7. B.Lingan

8. B.Raju (Deceased)

9. Mitchiammal (Deceased) ...Respondents 2 to 9/Defendants 2 to 9

(RR4,5 & 7 already recorded as Lrs of the deceased R8 vide order
of court dated 12.04.2017 made in Memo sr 7416/2017 in A.S.
526/1996.)

10. Subbiammal

11. Rukkiammal

12. K.N.Madhan

13. K.N.Joghee

14. Kamala Halan
15. S.Bheeman
16. Deviammal (Deceased)
..Respondents 10 to 16/Defendants 10 to 16
17. Mani (Deceased) ..17th Respondent/18th Defendant
18. Prema
19. Patchiammal (Deceased)
..Respondents 18 & 19/Defendants 19 & 20.
20. Sankarlal Gulraj (Deceased)
21. M.Samsudhin
Official Receiver,
Court of Executive Magistrate,
Kothagiri.
22. H.B.Bheeman @ Billan
23. Shanthi
24. Kamala
25. Saratha
26. Suseeela
27. Chinthamani
28. Vimal Raj
29. Rani
30. Rajathi
31. Saroja
32. Chithra
33. Minor Manjula
34. Minor Rukku
35. Minor Anushaya ..Respondents 20 to 35/Defendants 22 to 37.
(Minor 33 to 35 are represented by
Court Guardian S.Subburayan,
Advocate, Kothagiri by order dt.27-07-95, in I.A.No. 565/95
on the file of the District Court, Uthagamandalam.)
36. Ramdoss
37. Rukki ..Respondents 36 & 37.
38. Thubi
39. Lakshmi
40. Hallammal
41. Lakshmi
42. Johan
43. Rani
(RR 36 to 43 Lrs of the deceased 9th respondent)
44. Mrs. Rukki
45. M.Dharnaraj
46. M.Sivakumar
47. M.Balasubramani

48. M.Rajendran
49. M.Rani
50. M.Jayalakshmi
51. M.Indra
52. M.Malathi

(RR 44 to 52 Lrs of the deceased 2nd respondent)

53. Ramba Chandrasekar
54. Chitra
55. Raenuka
56. Visvanathan

(RR 53 to 56 Lrs of the deceased 6th respondent)

57. Rani
58. Mani

(RR 57 & 58 Lrs of the deceased 16th respondent)

59. Udhayakumar
60. Prasanna
61. Sasikala

(RR 59 to 61 Lrs of the deceased 17th respondent)

62. Shanthi
63. Saroja
64. Chitra
65. Manjula
66. Rekha
67. Anushya

(RR 62 to 67 Lrs of the deceased 19th respondent)

... Respondents 38 to 67.

RR 36 to 43, RR 44 to 52, RR 53 to 56, RR 57 & 58, RR 59 to 61, RR 62 to 67 LRS of the deceased 9th, 2nd, 6th, 16th, 17th, 19th Respondents respectively vide order of Court dated 12.04.2017 by NSKJ in CMP Nos.900 & 901, 903 to 905, 906 to 908, 909 to 911/2013 110 to 112/2013 and 113 to 115 of 2013 in AS No.526 of 1996.

This appeal is filed under Section 96 of Civil Procedure Code, against the judgment and decree dated 2.4.1996 made in O.S.No.176 of 1984 on the file of the District Court, Uthagamandalam.

For Appellants : Ms.P.T.Asha
for M/s.Sarvabhauman Associates
Mr. Srinath Sridevan

For 3rd Respondent: for Mr.R.Balachandran

For RR 12 & 13 : Mr.A.Bobblie

J U D G E M E N T

Challenge in this appeal is to the preliminary decree for partition granted in OS No.176 of 1984, on the file of the District Court, Udagamandalam, upholding the claim of the plaintiff to 9/40th share in the suit properties.

2. The 1st defendant in the suit had originally preferred this appeal, upon his death pending appeal, his legal representatives have been brought on record as appellants 2 to 10. The claim of the plaintiff is that the suit properties belonged to the joint family consisting of Mooka Gowder and his sons, namely the plaintiff and defendants 1 to 3. The defendants 4 to 8 are the children of Bookiammal, a pre-deceased daughter of Mooka Gowder and defendants 9, 10 and 11 are the daughters of the Mooka Gowder. The defendants 12 to 21 are the purchasers of certain items of properties from the 1st defendant. The 22nd defendant is an agreement holder. Defendants 31 to 37 are the legal representatives of the 17th defendant, who died pending suit.

3. The plaintiff would contend that the suit A Schedule properties were ancestral properties measuring about 14.13 and 3/8 acres, of which, according to the plaintiff, 12.89 and 1/8 acres remained with the family. B and C Schedule properties were purchased from and out of the joint family nucleus in the names of Mooka Gowder and the 1st defendant respectively. The plaintiff would further claim that the family was engaged in the businesses that were mentioned in Schedule D and accounts were sought for the said businesses, apart from the claim of partition. A notice was issued by the plaintiff on 30.04.1984 demanding partition, for which the 1st defendant sent a reply stating that the B Schedule properties, which were purchased in the name of Mooka Gowder, were purchased out of the funds contributed by the 1st defendant. It was also claimed that the properties mentioned in Schedule C are the absolute properties of the 1st defendant, having been purchased from and out of his own earnings, even during the lifetime of Mooka Gowder and thereafter. In the said reply notice dated 13.06.1984, the 1st defendant would also claim that there had been partition in the family and there was no joint family even during the lifetime of Mooka Gowder. The claim of the plaintiff that the ancestral property about of 12 acres, remained with the family was stoutly denied. It was also pointed out that an extent about 1.19 acres in Nedunkulla Village, was sold by the 2nd defendant without consent of the other family members. Upon receipt of the said reply, the 1st plaintiff came forward with the above suit.

4. Except the 1st defendant, the other sons, namely defendants 2 and 3, supported the case of the plaintiff. The alienees were represented by various counsels and the defendants 2 and 3 paid the Court fee for allotment of their shares. The daughters and the children of the pre-deceased daughter also claimed the shares by paying separate Court fee. The alienees filed written statement contending that the properties belonged to 1st defendant absolutely and that they are bona fide purchasers of value without notice of the claim of the plaintiff.

5. The 1st defendant, who contested the suit, while admitting the relationship, denied the existence of the ancestral property. He would also claim that the majority of the properties in the suit A, B and C schedules were purchased by Mooka Gowder, out of the funds provided by the 1st defendant, who was the eldest son. It was contended that the 1st defendant who started his carrier as a picker boy in Tennis Court in Kothagiri, befriended on CP Raja Bahadur Mudaliar, who was the leading wine merchant in Kothagiri. The said Raja Bahadur Mudaliar, who developed a liking for the 1st defendant as a youngster, helped him in several ways, enabling him to start a business in provisions as well as the Mandi business in Potatoes and other root vegetables.

6. According to the 1st defendant, Mooka Gowder and his brothers together, possessed of only 4 acres of lands and had a large family to support. Therefore, the 1st defendant has developed the businesses by his sustained efforts and had financed the purchases made by Mooka Gowder in the years 1941, 1957 and 1962. It was also contended that each of the brothers, namely the plaintiff and defendants 1 to 3 were engaged in various businesses like fertilizer, Insurance Agency, Typewriting Institute, Wine Merchants etc. The third defendant being a lawyer by profession, advised the 1st defendant regarding the management of the properties and the 1st defendant always went by the advise of the 3rd defendant. It is also the contention of the 1st defendant that the B Schedule properties were purchased by Mooka Gowder, from and out of the contribution made by the 1st defendant and the C schedule properties were absolute properties having been purchased by him out of his own self funds. The claim of the plaintiff that Mooka Gowder was having dairy Business, was also denied by the 1st defendant. Insofar as the businesses in D Schedule were concerned, the 1st defendant would claim them to be his own. He would also add that many of the businesses have been closed down. It was also contended that the properties stood in the name of Mooka Gowder and the 1st defendant belong to the 1st defendant absolutely. On the above contentions, the 1st defendant sought for dismissal of the suit.

7. On the above rival pleadings, various issues were framed on 15.07.1985, 09.10.1987 and 14.08.1989 and finally, after trial, the learned District Judge, Udagamandalam, recast the issues as follows:

1. Whether the plaintiff is entitled to partition and separate possession of 9/40th share in the suit properties?
2. Whether the family of Mooka Gowder had enough resources to have purchased C Schedule in the name of the 1st defendant?
3. Whether the plaintiff and his brothers participated in the businesses mentioned in C Schedule?
4. Whether the 1st defendant had enough separate income when the C Schedule properties were purchased?
5. Whether the C Schedule properties are separate properties of the 1st defendant?
6. Whether there was an oral partition in respect of the suit A and B Schedule properties as contended by the 1st defendant?
7. Whether the plaintiff and the 2nd defendant have separate properties, if so, whether they are barred from claiming partition of the suit properties?
8. Whether the 3rd defendant had created Exs.A63 to A65 by misusing the signatures of the 1st defendant and whether Exs. A63 to A65 are true and acceptable documents?
9. Whether the businesses found in the D Schedule properties are not liable for partition?
10. Whether the judgment in OS No.222 of 1966 and the security bond executed by the plaintiff and defendants 2 and 3 will be binding on them?
11. Whether the plaintiff is entitled to accounts? and
12. To what relief for the parties entitled to?

8. The plaintiff examined himself as P.W.1 and one Vivekananthan was examined as P.W.2. The 1st defendant was examined as D.W.1 and 3rd defendant was examined as D.W.2. While Exhibits A1 to A68 were produced on the side of the plaintiff, Exhibits B1 to B199 were filed on behalf of the 1st defendant.

9. The learned Trial Judge, on a consideration of the oral and documentary evidence, particularly the documents, namely Exhibits A63, A64 and A65, which are certain communications between the 1st defendant and the Agricultural Income Tax Officer, the Wealth Tax Officer and the appeal filed by the 1st defendant against the penalty proceedings initiated by the Income Tax Officer, concluded that the suit properties were all joint family properties. The learned Trial Judge had also found that the evidence on record would establish that the plaintiff, the 1st defendant and the 3rd defendant have been enjoying the C Schedule properties as joint family properties. The learned

Trial Judge also took note of the fact that the plaintiff as well as the defendants 2 and 3 had executed a security bond in the execution proceedings in OS No.222 of 1996 on the file of the Sub-Court, Udagamandalam, which would show that the plaintiff and the defendants were living jointly. On the above findings, the learned Trial Judge concluded that the suit properties are joint family properties, in which the plaintiff as well as the defendants 1 and 2 will have a right as coparceners. On the aforesaid findings, the learned Trial Judge decreed the suit in respect of Suit A, B and C schedule properties. In respect of the D Schedule property, the learned Trial Judge found that the plaintiff has not established his claim for accounting, as all the businesses have been closed. Therefore, in respect of the D Schedule businesses, the suit was dismissed by the Trial Court.

10. Aggrieved, the 1st defendant has come forward with this appeal.

11. I have heard Ms.P.T.Asha, learned counsel appearing for M/s.Sarvabhauman Associates, for the appellants, Mr.Srinath Sridaven, learned counsel appearing for Mr.R.Balanchandran, learned counsel for the 3rd respondent and for respondents 36 to 41 and 44 to 52 and Mr.A.Bobblie, learned counsel appearing for the respondents 12 and 13. Notice to respondents 20, 21, 30 to 32 have been dispensed with. Respondents 2, 6, 8, 9, 16, 17 and 19 having died pending appeal, steps have been taken to bring their legal representatives on record.

12. Ms.P.T.Asha, learned counsel appearing for the appellants would contend that the plaintiff claims that certain properties, which admittedly stand in the name of individual members, particularly junior members in view of the presumption that the properties were purchased out of their own income, it is for the person asserting the contrary to prove that the actual sale consideration flew from the co-parcenary property or from the surplus income therefrom. She would also contend that the learned Trial Judge was not right in concluding that the 1st defendant himself has admitted the nature of the properties under Exhibits A65 to A68, overlooking the specific plea of the plaintiff that the 3rd defendant, who was the lawyer, had been advising him in matters of taxation and other financial dealings and therefore, those documents were signed by him on the advise of the 3rd defendant. Therefore, the trial Court ought not to have relied upon those documents to conclude that the suit properties are the properties of the joint family. She would also further contend that when the existence of the ancestral properties was denied, it is for the plaintiff to prove that the family possessed ancestral properties, to prove the actual extent of the ancestral properties that were in possession of the family and the income therefrom and the fact that there was

sufficient surplus income which would have aided the purchase of the properties in the names of other members of the family.

13. The learned counsel for the appellant would also further contend that the plaintiff as well as defendants 2 and 3 had purchased several properties in their own names and if only the claim of the plaintiff is that the brothers carried on business jointly and all the businesses in the D Schedule belonged to the family, the plaintiff should have included the properties that were purchased by himself and defendants 2 and 3 and seek for partition of the entire estate. The very fact that the plaintiff has not chosen to include the properties that stand in his name and in the names of the 2nd defendant and the 3rd defendant, would show that the suit had been engineered by the plaintiff in collusion with the defendants 2 and 3. She would also point out that the 3rd defendant who is in fact supporting the case of the plaintiff, had chosen to enter the box after the evidence of 1st defendant was recorded and thereby he got an opportunity to fill up the lacuna. The contention of the learned counsel is that the procedural breach has in fact adversely affected him. With reference to Exs.A63 to A65, that are heavily relied upon by the trial Court to conclude that the suit C Schedule properties were also ancestral properties purchased out of the income from the joint family properties, the learned counsel would submit that those documents were authored by the 3rd defendant, who was admittedly advising the 1st defendant in various legal matters and therefore, the same cannot be the basis for such conclusion.

14. Per Contra, Mr.Srinath Sridevan, learned counsel appearing for the 3rd respondent as well as the other respondents would contend that there is enough evidence to show that the family possessed of ancestral properties. He would also contend that there is evidence in the form of Exs.B16 and A66 to show that Mooka Gowder was running a Dairy Farm and Exs. A67 and A68 are pressed into service by the learned counsel would show that Mooka Gowder, was doing Brick-kiln business also. He would also rely upon Exs.A63 to A65, wherein the 1st defendant has admitted that C Schedule properties belonged to him and his brothers. He would also invite my attention to Ex.B48, which is Security Bond executed by all the brothers creating a security over the 2nd item in suit schedule B properties for the decree that was passed against the 1st defendant in OS No.222 of 1996.

15. According to Mr.Srinath Sridevan, learned counsel appearing for the respondents a cumulative effect of all the above documents would show that the properties thus stood in the name of the deceased Mooka Gowder as well as the 1st defendant were treated as joint family properties, in which the plaintiff and defendants 2 and 3 also have a share as a co-parcenary.

16. On the above rival contentions, the following points arise for determination in this appeal:

1. Whether it could be said that the suit in B and C Schedule properties were purchased out of the income from the joint family properties belonging to the family consisting of Mooka Gowder and his sons?
2. Whether the 1st defendant has established his claim that the suit B Schedule properties were purchased by Mooka Gowder, from and out of the monies contributed by the 1st defendant? and
3. Whether the 1st defendant has proved the partition of the suit A Schedule properties as pleaded by him?

Point Nos.1 & 2:

17. Though it is claimed that the suit A Schedule properties are ancestral properties that were inherited by Mooka Gowder, it is seen from the documentary evidence that are produced that the most of the properties in the A Schedule, namely items 1, 4, 5 and 8 to 17 were purchased by Mooka Gowder between 1947 and 1961. The bulk of the A Schedule properties and the 3rd item of the B Schedule, have been purchased by Mooka Gowder, under Ex.A3 on 04.02.1957. Therefore, the claim of the plaintiff that the entire A Schedule properties were ancestral properties in hands of Mooka Gowder cannot be accepted. Even according to the evidence of P.W.1, the ancestral property that was allotted to Mooka Gowder, measures about 5 acres and 4 cents, of which the 2nd item of A Schedule is used as a play ground. P.W.1 would also depose to the effect that the 4th item of the property was purchased by Mooka Gowder in 1952 and he does not know the source of income. He also admitted that the 2nd defendant had sold an extent of 1 acre 19 cents of ancestral property in Nedunkulla Village and he had not included the said property in the suit. He would also admit that he has not challenged the said sale by the 2nd defendant.

18. During the course of cross examination, P.W.1 would depose that he has purchased certain properties in his name and the 2nd defendant Madha Gowder has purchased certain properties in his name and his wife's name. He would also admit that he and 2nd defendant were jointly doing fertilizer business. In his cross examination, the plaintiff would admit that Mooka Gowder purchased properties in the year 1947, 1952, 1957 and 1961, in his name but those properties were not purchased in the name of the 1st defendant and he does not know the reason for the said purchase. The plaintiff would further depose that a joint family account is being maintained after the death of Mooka Gowder and all the income and expenditure relating to the joint family properties have been entered in the said accounts and the copy of the said accounts is available with all the four brothers. He would also depose that he can produce the same.

He would also further depose that any joint family property that is purchased or sold would be shown in the accounts maintained by the joint family. He would also specifically depose that he got separate account for himself and a joint family account. But the plaintiff has not chosen to produce the said accounts. Except the interested testimony of the plaintiff, there is no evidence to show that the joint family had vast extent of properties and it is from and out of income of those properties, certain properties in A Schedule, B Schedule and C Schedule were purchased in the name of Mooka Gowder and the 1st defendant. It is also seen from the evidence that Mooka Gowder had a large family to support consisting of four sons and three daughters. Though a claim is made by the plaintiff that Mooka Gowder, was doing dairy business and he had huge income from the said dairy business, all that is produced to show the said dairy business is Exs.B16 and A66. Ex.B16 is a sale deed of year 1904, wherein in the property conveyed there is reference to a cattle shed and Ex.A66 is a document of the year 1941 under which Hajmin, Mookan, Uchi etc., namely the brothers had purchased the property, which is conveyed under Ex.B16 and in that document, there is a reference to a cattle shed.

19. Though Mr.Srinath Sridevan, learned counsel would vehemently contend that the fact that the family was possessed of a cattle shed, would itself be sufficient to prove that Mooka Gowder was doing flourishing dairy trade through, which he earned surplus income and had contributed to the purchase of the properties mentioned in Schedule B and Schedule C of the plaint. I am unable to accept the said submissions of the learned counsel. All that Ex.B16 and A.66 would show is that there was a cattle shed (Erumai patti) in the lands that were dealt with by the family and that will not, by any stretch of imagination show that the family had a dairy business and the income from the said dairy business would enable the family to purchase the Schedule B and Schedule C properties.

20. The next contention of Mr.Srinath Sridevan, is that the family was having a brick-kiln business and in order to prove that the family had a brick-kiln business, he would rely upon Ex.A66 and A68, which are of the year 1937 and 1938. Ex.A67 is a permission granted to Mooka Gowder on 22.07.1937 to enable him to dig the soil in the land for manufacturing bricks and Ex.A68 is another permission granted to Mooka Gowder to construct the house using the bricks, which he had manufactured by virtue of the permission granted under Ex.A67 on 22.07.1937. It is quite common for villagers to manufacture the bricks by putting up a brick-kiln for construction of their own houses and that solitary instance, by which Mooka Gowder had taken permission from the authorities to put up the brick-kiln in his land manufactured the bricks and use them in construction of his own house in 1938, would not lead to a presumption that Mooka

Gowder was carrying on brick-kiln business.

21. The next circumstance pointed out by the learned counsel is execution of Ex.B48, a security bond by all the three brothers in order to create a security over the second item in B Schedule for repayment of the debt due by Kari Gowder, the 1st defendant, under the decree in OS. No.222 of 1966. The fact that all the three brothers joined to execute the security bond, is projected as an instance to show that all three brothers were living in joint family, when the said security bond came to be executed on 28.11.1969.

22. Ms.P.T.Ahsa, learned counsel appearing for the appellants would contend that the security bond related to a property, namely item 2 of B Schedule, which admittedly stood in the name of Mooka Gowder and naturally, while creating a charge over that property all the sons of Mooka Gowder, would join to execute the said document and that by itself, according to the learned counsel, would not lead to a presumption that the brothers lived in a joint family and all the properties were acquired out of joint family funds. The last but not least are Exs.A63, 64 and 65. Ex.A63 is a copy of the reply of the 1st defendant for penalty notice issued by the Income Tax Officer, City Circle II, Coimbatore for the assessment year 1973 -1974. In the said reply, it is stated as follows:

"Regarding the property income, the property belongs to the common HUF consisting of myself and my three brothers, the annual rental collections come to Rs.7,000/- and I am getting only a sum of Rs.1,750/- due to illness as already stated and due to the fact I am getting small income from potato business, I am humbly request you to kindly drop the penalty proceedings initiated under proceedings No.271(1) (A) for 1973-1974."

23. Ex.A64 is the grounds of appeal filed against the assessment of the Wealth Tax Officer, under Section 16(5) of the Wealth Tax Act. The said Ex.A64 refers to items 3, 4 and 5 of C Schedule, and it is claimed that the properties mentioned above belongs to the four brothers and therefore, only 1/4th properties is taken for computing the total wealth of the petitioner, namely the 1st defendant. Ex.A.65 is the statement made by the 1st defendant in respect of the Agricultural Income Tax Officer, wherein he had stated that the properties were enjoyed by him and his brothers jointly and he has sought for waiver of agricultural Income Tax for the assessment year 1972-1973.

24. Relying upon the above documents Mr.Srinath Sridevan, learned counsel would contend that the 1st defendant had in fact, before statutory authorities, admitted that the properties in question are joint family properties particularly in Ex.A65,

according to the learned counsel, covers items 1, 2, 3, 4 and 7 of the C Schedule properties. Therefore, the 1st defendant is estopped from contending that those properties are his self acquisitions. In support of his submissions, based on Exs.A63 to A65, Mr.Srinath Sridevan, learned counsel appearing for the respondents would rely upon the judgment of the Hon'ble Supreme Court in Union of India v. Moksh Builders and Financiers Ltd and Others, reported in 1977 (1) SCC 60 and the judgment of this Court in Pentapati Venkataramana and others v. Pentapathi Varahalu (Dead) and others, reported in Volume 50 LW 681. He would also invite my attention to the Judgment of the Hon'ble Supreme Court in Vathsala Manickavasagam and Others v. N.Ganesan and another, reported in 2013 (9) SCC 152, wherein the Supreme Court had an occasion to consider the effect of admissions made in documents and the onus of the proof relating to the said admissions.

25. In answer to the submissions of the learned counsel for the respondent on the effect of Exs.A63 to A65, Ms.P.T.Asha, learned counsel appearing for the appellants would submit that even in the reply notice as well as in the written statement, the 1st defendant had specifically pleaded that the 3rd defendant, who was a lawyer by profession has been advising him and conducting cases on his behalf. It is also in evidence of D.W.1 that he used to leave several signed blank papers with the 3rd defendant to enable him to utilize them, according to the exigencies.

26. The fact that the 3rd defendant had been conducting proceedings for the 1st defendant in Courts and Tribunals is not in dispute. It is seen from letter Ex.B64 dated 09.07.1979 that even as late as in 1979, the 3rd defendant has been conducting proceedings for the 1st defendant. Therefore, according to the learned counsel, these documents Exs. A63, A64 and A65 were in fact prepared and filed on the advise of the 3rd defendant, who was a lawyer by profession. Mr.Srinath Sridevan, learned counsel would however, lay considerable emphasis on the fact that Ex.A65 is a statement made by the 1st defendant before an officer, namely the Agricultural Income Tax Officer, Conoor and therefore, the claim that these documents were prepared by the 3rd defendant and the 1st defendant signed in dotted lines, cannot be accepted. Mr.Srinath Sridevan, learned counsel would also draw my attention to the pronouncement of the Hon'ble Supreme Court in Union of India v. Moksh Builders and Financiers Ltd and Others, referred to supra, and contend that the statement made in Income Tax Returns is admissible in evidence to show the character of the property. These three documents which have been produced are not Income Tax Returns. The first one is the reply to a penalty notice. The second one is ground of appeal against an assessment of Wealth Tax. The third one is a petition seeking exemption from payment of Agricultural Income

Tax. No doubt, a party who has made his admission, is liable to explain the admission. In the absence of such explanation, the admission shall stand against him. Therefore, an admission cannot be taken on the face of it to prove the existing state of affairs. The explanation that is offered by a person, who is alleged to have made an admission is also to be considered by the Courts, before concluding that the admission will have the effect of estoppel thereby, preventing the person who is alleged to have made the admission from taking a contradictory stand in the subsequent proceedings. Even in the judgment relied upon by the learned counsel Mr.Srinath Sridevan, the Hon'ble Supreme Court has pointed out that in the absence of a proper explanation an admission would bind the person who has made it. In Vathsala Manickavasagam and Others v. N.Ganesan and another, referred to supra, the Supreme Court has after referring to the Judgment in Union of India v. Moksh Builders and Financiers Ltd, referred to supra has held as follows:

"22. So also, there is no force in the argument that the aforesaid admissions or statements of defendant 3 could not be read against him as they were not adverse to his interest when made. There is no such requirement of the Evidence Act and the argument is untenable as it unreasonably restricts the opportunity to prove the true state of affairs on the party's own showing and to demolish his subsequent claim as self-contradictory. This point has also been dealt with in Wigmore on Evidence, 1048 in this way:

It follows that the subject of an admission is not limited to facts against the party-opponent's interest at the time of making it. No doubt the weight of credit to be given to such statements is increased when the fact stated is against the person's interest at the time; but that circumstances has no bearing upon their admissibility. On principle, it is plain that the probative reason why a party-opponent's utterance is sought to be used against him is ordinarily the reason noted above, in para (1)b viz, that it exhibits an inconsistency with his present claim, thus tending to throw doubt upon it, whether he was at the time speaking apparently in his own favour or against his own interest.

The contrary view has been characterised by Wigmore as "a fallacy, in the fullest sense".

27. In Pentapati Venkataramana and others v. Pentapathi Varahalu (Dead) and others, referred to supra, a Division Bench of this Court had held that the statements made by a person before an Income Tax Officer, would be admissible in evidence and it would amount to an admission in terms of Section 17 of the Indian Evidence Act. There is no doubt about the proposition of law enunciated by the Hon'ble Supreme Court as

well as this Court in those decisions. In the case on hand, we are faced with a situation, where the plaintiff has come to Court with a plea that the suit A Schedule properties are ancestral properties and the suit B and C Schedules were purchased in the name of Mooka Gowder, and the 1st defendant from and out of the income from the ancestral nucleus. The 1st defendant is the eldest son of Mooka Gowder and the 3rd defendant is the lawyer by profession and he has been representing the cause of the 1st defendant till about 1979. Insofar as Ex.A63 is concerned, it is the reply given by Mooka Gowder to the penalty notice under Section 271 (1)(A) of the Income Tax Act, wherein it is stated that

"regarding the property income the property belongs to myself and my three brothers, the annual rental collection comes to Rs.7,000/-"
It does not refer to any specific property.

28. Though Mr.Srinath Sridevan, learned counsel would contend that it would only refer to items 3, 4 and 5, in Schedule C, which are buildings whose rental income was received, there cannot be such a presumption. On this D.W.1, had deposed that these documents were prepared by the 3rd defendant and he only signed on the dotted lines. Though the 3rd defendant would deny that he had prepared these documents the fact that the 3rd defendant had represented the 1st defendant in several litigations till the year 1979, is admitted. Therefore the claim that the 3rd defendant had no role to play in preparation of these documents, cannot be accepted in full.

29. During the cross examination of D.W.1, it has also been suggested to him that he had not paid fees to the 3rd defendant for the professional service rendered by the 3rd defendant and to a specific suggestions in the cross examination, D.W.1 has deposed that he did not know under what circumstances Ex.A63 to 65 came into an existence. He also denied the suggestion because the admissions in the said documents would go against him and he has now chosen to claim that the 3rd defendant had obtained his signatures in blank papers and had used them to make the said representations.

30. Ms.P.T.Asha, learned counsel appearing for the appellants would contend that the three documents, namely Exs.A63, A64 and A65 are only in the form of representation made to the authorities and it is not known as to whether such representation was accepted by the authorities and acted upon. Therefore, according to her, it would be unsafe to rely upon the said documents, namely said Ex.A63 to A65. Ex.A63 and A64 have been produced by P.W.2. P.W.2 in his evidence would depose that he was not aware as to whether any order, was passed on the basis of the representation made under Exs.A63 and A64. Of course, D.W.2, the 3rd defendant had deposed that he had not

appeared for the 1st defendant in Income Tax and Wealth Tax proceedings. Even the 1st defendant would admit that he never gave vakalat for the 3rd defendant to appear on his behalf in the Income Tax and Wealth Tax proceedings. But it is the consistent case of the 1st defendant that it was the 3rd defendant, who was advising him in all the legal matters and the 3rd defendant had, in his possession several signed blank papers in his capacity as a lawyer and those blank papers have been used by the 3rd defendant to make the representations under Exs.A63 and A64. Insofar as Ex.A65 is concerned, it appears that it is a statement made by the 1st defendant before the Agricultural Income Tax Officer and in that document, it is only stated that the properties were enjoyed by him and his three brothers and he does not say that the property is a joint family property of the three brothers. Therefore, I do not think it would be safe to rely upon the above three documents alone, in the absence of any other evidence to conclude that the properties, particularly in C Schedule, are joint family properties belonging to the family of Mooka Gowder. There is another procedural flaw that occurred during the trial of the suit itself. The 3rd defendant, who is admittedly supporting the plaintiff, was examined after the examination of the 1st defendant, who was the common adversary and this enabled the 3rd defendant to introduce certain facts which were detrimental to the 1st defendant and the 1st defendant was denied of an opportunity to let in evidence to controvert those facts that were introduced by the 3rd defendant during his examination as D.W.2. This procedural infirmity, in my considered opinion that had resulted in certain amount of prejudice to the 1st defendant. As already discussed there is total lack of evidence to connect the purchase of the C Schedule properties under Exs. A5 to A12 by the 1st defendant to any source of income of the alleged joint family properties.

31.The law relating to purchase of the property in the names of co-parceners has been dealt with by this Court and the Supreme Court in several cases. In Shrinivas Krishnarao Kango v. Narayan Devji Kango and others, reported in AIR 1954 SC 379, the Hon'ble Supreme Court quoted the following passage from the judgment of the Privy Counsel in Appalaswami v.Suryanarayanamurti,

" The Hindu law upon this aspect of the case is well settled. Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may (1) I.L.R. 1948 Mad. 440 at 447, 448 have been acquired, the burden shifts to the party alleging

self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property:

After quoting the Privy Counsel, the Hon'ble Supreme Court in the said judgment had observed as follows:

"11. Whether the evidence adduced by the plaintiff was sufficient to shift the burden which initially rested on him of establishing that there was adequate nucleus out of which the acquisitions could have been made is one of fact depending on the nature and the extent of the nucleus. The important thing to consider is the income which the nucleus yields. A building in the occupation of the members of a family- and yielding no income could not be a nucleus out of which acquisitions' could be made, even though it might be of considerable value. On the other hand, a running business in which the capital invested is comparatively small might conceivably product substantial income, which may well form the foundation of the subsequent acquisitions. These are not abstract questions of law, but questions of fact to be determined on the evidence in the case....."

32. In Muniappa Naicker v. Balakrishna Naicker, reported in 1998 (2) LW 259, this Court, while considering the similar question, after referring to almost all the decisions of the Supreme Court on the issue relating to acquisition of property in the names of the members of a joint family, had extracted the following passage from the judgment of the Supreme Court in M/s.Ratanchand Darbarilal v. Commissioner of Income-Tax, Madhya Pradesh, reported in AIR 1985 SC 1572:

"On the basis of the law declared in the various Texts as well as case-laws, the following propositions emerge : (1) A Hindu Family is presumed to be joint. But at the same time, there is no presumption that the joint family is possessed of family properties. (2) The manager, if he is in possession of family properties and is in management thereof and acquires any other property, the law presumes that it is joint family property. (3) Even in such cases, presumption will arise only if it is shown that the family property had left surplus income out of which other properties could be acquired. If the nature and relative value of the property are such that there is no income, any fresh acquisition cannot be treated as a family property. It is well within the powers of the members of the family that they can acquire separate properties and can have

their own avocations in life. There is no law which says that only if a member gets married or comes of a particular age, he can do business or earn income. There is also no presumption that any property acquired by a member is a family property. "

33. After considering the evidence on record in the said case and applying the principles of law enunciated by the Hon'ble Supreme Court, this Court had held that unless it is proved that the properties were acquired with the aid of the income from the joint family nucleus or that by way of a detriment to the joint family properties, the property that were standing in the name of individual co-parcener cannot be presumed to be the joint family properties. While considering the question of income, it was held that it should be established that the family had sufficient income and there was a surplus in the hands of the managing member after defraying the expenses and it is out of the said surplus, the properties were acquired in the name of the other members of the joint family. Therefore, the essential requirements are as follows:-

1. There must be proof of existence of ancestral property;
 2. There must be proof of Income from the ancestral property;
 3. There must be proof of surplus being available with the managing member, after having taken into account the expenses that are to be incurred in maintaining the family.
- (or)
4. There should have been detriment caused to the joint family property, where it is claimed that the property was purchased out of the sale proceeds of the joint family property.

34. Unless above ingredients are established the burden that is on the member, who alleges the properties that stand in the name of a individual member of a co-parcenery, particularly a junior member does not shift to the person in whose name the property stands to show that he had his own separate income. On a consideration of oral evidence in the case on hand, admittedly Mooka Gowder had ancestral property of an extent of only about 5.04 acres and he had large family consisting of four sons and three daughters to support. Therefore, the fact that there was surplus income cannot be presumed. Insofar as the actual income and availability of surplus is concerned the evidence on record is not sufficient to establish the actual income that was derived by Mooka Gowder from the ancestral properties and the surplus that is available thereafter. Of course, the position would be different in the case of the properties purchased in the name of Mooka Gowder. Since, he is the Kartha of the family,

may be the presumption that properties are joint family properties could be attached to the purchase of properties, namely the B Schedule properties by Mooka Gowder. Therefore, insofar as the purchase of C Schedule properties by the 1st defendant is concerned, I am constrained to hold that the plaintiff despite the Co-operation from defendants 2 and 3 has miserably failed to establish that the properties in C Schedule that were purchased by means of Exs.A5 to A12 were in fact purchased out of the income from the joint family property or by way of detriment to the joint member properties that were available. In fact, the purchases span over a period of 40 years from 1941 to 1982.

35. Insofar as the B Schedule properties that stand in the name of Mooka Gowder, who was the managing member of the joint family, the presumption that those properties were also joint family property is always attached to them. The plea of the 1st defendant in respect of acquisition of B Schedule properties is that he had provided funds to Mooka Gowder to purchase the said properties in his name. The very plea of the 1st defendant with reference to the purchase of B Schedule properties by Mooka Gowder in his name from and out of the money provided by the 1st defendant appears to be unbelievable. It is in evidence that Mooka Gowder had purchased items 8 to 17 of A Schedule and 3rd item of B Schedule on 14.02.1957 and the other properties shown in B Schedule also have been purchased by Mooka Gowder between 1947 and 1966. It is not in dispute that all the sons of Mooka Gowder have started earning in and around the same time by way of various business ventures and therefore, it is possible that Mooka Gowder had some money with him out of the income from the ancestral properties that were in his possession as well as the properties that were purchased by him periodically to have contributed for purchase of those properties in his name. The burden of proof with reference to those properties that stand in the name of Mooka Gowder is lighter on the plaintiff in the sense that Mooka Gowder, being the manager of the family having acquired properties in his name and the presumption is that the properties are joint family properties and it is for the 1st defendant to contend that it was he who provided for the consideration for purchase of those properties to establish his pleadings. From the evidence, I am unable to accept the contention of the 1st defendant at that he contributed to the B Schedule properties in the name of Mooka Gowder. Therefore, the points 1 and 2 raised are answered as follows:

The A and B Schedule properties are admittedly ancestral properties and part of the properties that stand in the name of Mooka Gowder, is held to be ancestral properties of the joint family consisting of Mooka Gowder and his four sons, namely the plaintiffs and defendants 1 to 3. Insofar as the C Schedule properties are concerned, the conclusion of the trial Court that they are also

ancestral property having been purchased out of the nucleus of the joint family property does not appear to be correct and the C Schedule properties are held to be the self-acquired properties of the 1st defendant and therefore, neither the plaintiff nor defendants 2, 3 and the daughters of Mooka Gowder would be entitled to claim any share in the 'C' Schedule properties.

Point No.3:

36. Though the 1st defendant would claim that there was a partition of A and B Schedule properties, immediately after the death of Mooka Gowder, the said partition has not been established. Though, it is seen that in some of the sale deeds, the boundary recitals show that the other brothers were in possession of certain item of other properties, I do not think that by itself is sufficient evidence to show that partition by meats and bounds, has been effected between the sons of Mooka Gowder after the death of Mooka Gowder. There is no evidence to show mutation of Revenue Records and some of the properties stand in the name of Mooka Gowder and transfer of Revenue Records have been effected in the name of the 1st defendant, on the basis of "No objection" signed by the other heirs of Mooka Gowder. Therefore, the claim that there was a partition after the death of Mooka Gowder in 1966, has not been established by the 1st defendant. It should be pointed out at this juncture, that the 1st defendant, who pleaded there was a partition after the death of Mooka Gowder has not deposed as to what are the items that were allotted to him and what are the items that were allotted to the plaintiff and defendants 2 and 3, who are the other sons of the Mooka Gowder. In the absence of concrete evidence of proper allotment of shares the plea of partition cannot be accepted. Therefore, the third point is answered against the appellants.

37. In fine the appeal is partly allowed, the judgment and decree of the trial Court are set aside, insofar as it related to the C Schedule properties. The Judgment and decree of the trial Court will stand confirmed insofar as to relate to the A and B Schedule properties. There will be a preliminary decree declaring 9/40th share of the plaintiff and defendants 2 and 3 in A and B Schedule properties alone. The equities would be worked out between the purchasers as per the judgment of the trial Court. However, in the circumstances of the case, I make no order as to costs.

s/d-

Assistant Registrar (CS-V)

True Copy

Sub-Assistant Registrar

jv

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The District Court,
Uthagamandalam.

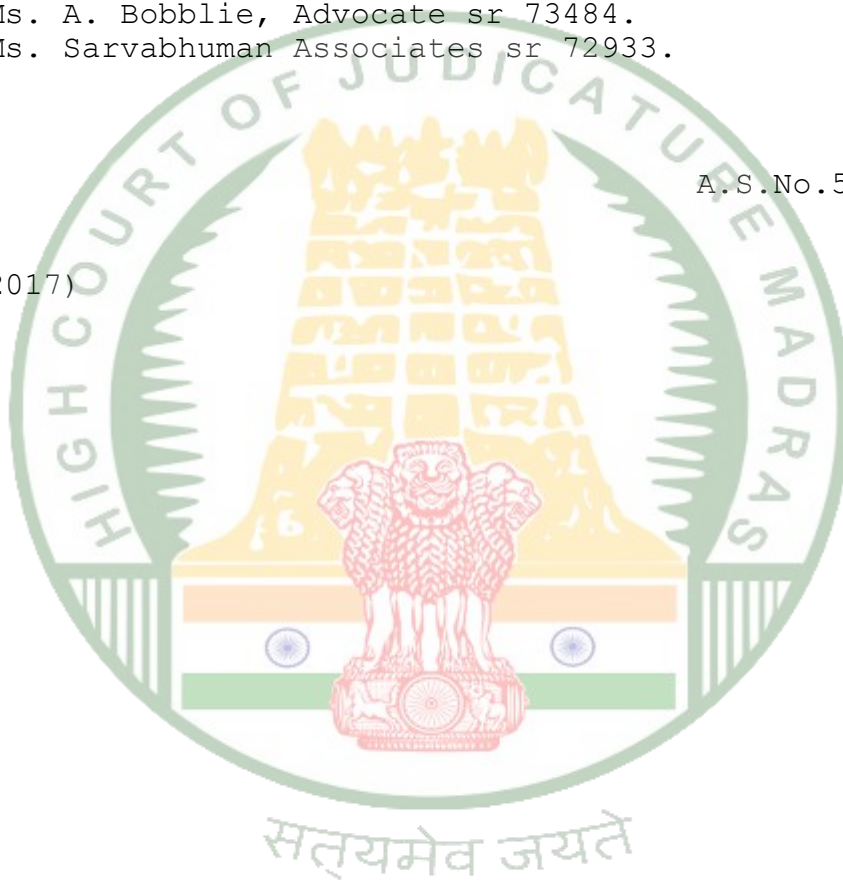
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+1 Cc to Ms. Sarvabhuman Associates sr 72933.

A.S.No.526 of 1996

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