

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON: 27.07.2017
JUDGMENT PRONOUNCED ON: 22.08.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.Nos.534 of 2015 & MP No.1 of 2015,
A.S.No.960 of 2015
and A.S.No.1005 of 2015 & MP No.1 of 2015

A.Sennimalai Gounder ... Appellant in AS No.534/15 &
1st Respondent in AS 960/15 & 1005/15/Plaintiff

Vs

1. E.S.Selambanan ... 1st Respondent in AS No.534/15,
2nd Respondent in AS 960/15 &
Appellant in AS No.1005/15/1st Respondent
2. E.S.Appuswamy ... 2nd Respondent in AS No.534/15,
Appellant in AS No.960/15 &
2nd Respondent in AS 1005/15/Defendants 2 to 5
3. Muthayammal
4. K.Sellammal
5. Kuppayammal ... Respondents 3 to 5 in all the Appeals

Prayer in AS Nos.534/2015 and 960/2015: These appeals are filed under Section 96 C.P.C., against the judgements and decree dated 15.07.2015 made in O.S.No.210 of 2011 on the file of First Additional District Judge, Erode and prays to set aside the same in so far as it went against the appellant/plaintiff (in AS No.534/15) appellant/2nd defendant (in AS No.960/15) respectively by rejecting the prayer for partition in 'C' schedule properties and injunction relief.

Prayer in AS No.1005/15 This appeal is filed under Section 96 C.P.C, r/w order 41 Rule 1 of C.P.C., to set aside the judgment and decree passed in O.S.No.210 of 2011 dated 15.07.2015 on the file of the I Additional District Judge, Erode in respect of Plaint A & B Schedule properties.

Appellant in AS No.534/15 & : Mr.D.Selvaraju
1st Respondent in AS 960/15 & 1005/15

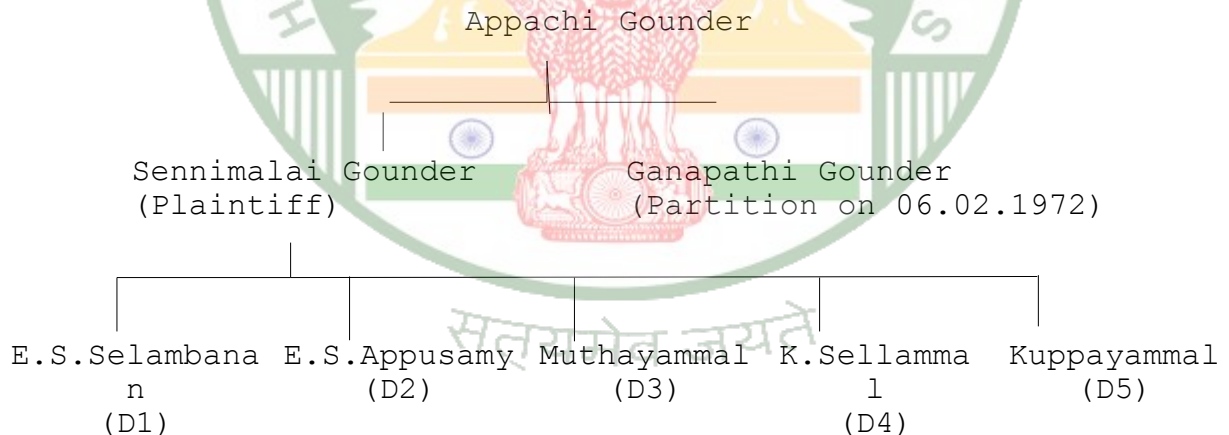
1st Respondent in AS No.534/15, : Mr.R.Rajarajan
2nd Respondent in AS 960/15 & for Mr.E.P. Senniyagiri
Appellant in AS No.1005/15

2nd Respondent in AS No.534/15, : Mr.P.Saravana Sowmiyan
Appellant in AS No.960/15 & for M/s.C.S.Saravanan
2nd Respondent in AS 1005/15

J U D G E M E N T

All these appeals arise out of one suit namely OS.No.210 of 2011 on the file of the First Additional District Court, Erode. The said suit was filed by the appellant in AS. No.534 of 2015 seeking partition and separate possession of his 1/5th share in the suit properties.

2. The Trial Court had decreed the suit in respect of suit 'A' and 'B' schedule properties, while dismissing the suit in respect of the 'C' Schedule property. Aggrieved by the said judgment and decree the 1st defendant in OS No.210 of 2011 has come forward with the appeal in As No.1005 of 2015 and the 2nd defendant in the said suit has come forward with AS.No.960 of 2015. The plaintiff has filed AS No.534 of 2015. The genealogy of the family is as follows:



The gist of the plaint allegations in OS. No.210 of 2011 is as follows:

3. According to the plaintiff, in a partition that took place between him and his brother Ganapathi Gounder on 06.02.1972, the suit A schedule property measuring about an extent of 13.5 acre was allotted to him. From and out of the income and out of the sale proceeds of the portion of the property allotted to him in the partition, the plaintiff had

purchased the suit B Schedule property on 13.07.1979. On 02.06.1974 the plaintiff purchased item No.1 of the suit 'C' Schedule property again from and out of the income from the property allotted to him in the partition dated 06.02.1972, in the name of his two sons namely D1 and D2. The second item of the suit 'C' Schedule property was purchased by the plaintiff in the name of defendants 1 and 2 on 22.06.1974. The third item of the 'C' Schedule property was purchased by the plaintiff in the name of defendants 1 and 2 on 11.12.1981. The defendants 1 and 2 did not contribute any amount for the said acquisition. It is also claimed that they have no source of income.

4. According to the plaintiff the purchases were made in the name of the defendants out of love and affection he had for them. Therefore, the plaintiff would claim that the suit properties are all joint family properties in which the plaintiff and defendants 1 and 4 are each entitled to 1/5th share. The 5th defendant Kuppayammal is added as a party subsequent to the institution of the suit. The plaintiff would further plead that the 1st defendant got married in the year 1985, and since he wanted to establish a separate Mess, at the instance of elders and prominent persons in the locality, a family arrangement was affected in the year 1992 and the plaintiff and defendants 1 and 2 were exclusively in possession of certain items of suit properties. But there was no division by meats and bounds. The arrangement that was made in the year 1992, according to the plaintiff, is only a oral arrangement for convenient enjoyment by the parties.

5. The 1st defendant, according to the plaintiff, had been demanding possession of the first item of A Schedule property. He had also claimed that no land should be allotted to the plaintiff in the event of a partition. The 1st defendant, even attempted to trespass in the 1st item of A Schedule property which was in his possession. Therefore, the plaintiff had demanded for a partition on 18.09.2009. Though the defendants 2 to 4 had agreed for such a partition the 1st defendant did not come forward for a amicable partition. Therefore, according to the plaintiff, the suit for partition became necessary.

6. The defendants 2,3 and 4 practically supported the case of the plaintiff. The 1st defendant alone contested the suit. According to him the nature and character of the suit A Schedule property as joint family property was admitted. He would however, claim that there was a partition in the family even in the year 1973 in the presence of certain named Panchayatdors and the 'A' and 'B' Schedule properties were divided even in the year 1973. Therefore, according to the the 1st defendant the 'C' schedule properties were purchased by the brothers from and out of their own independent income from the properties which were allotted to them in the partition took

place in the year 1973. The 1st defendant would also claim that certain properties were allotted to him exclusively and certain properties were allotted to the 2nd defendant exclusively. He would also claim that since he was unmarried at the time of the partition he continued to live with the plaintiff in item 2 of the A Schedule. The 1st defendant would also plea that he was in separate possession of certain items of property and he is having a separate mess as well as a separate Telephone connection and Cooking Gas connection as well as a separate Electricity Connection. These facts, according to him, would show that there was in fact a partition of the family properties even in the year 1973. Therefore, he sought for dismissal of the suit. The 1st defendant would also contend that the suit is bad for partial partition in as much as 2½ cents of land that stood in the name of the 2nd defendant has not be included in the suit.

7. The 2nd defendant filed a separate written statement substantially supporting the case of the plaintiff. According to him, the partition said to have been taken place in the year 1973 was denied. The 2nd defendant paid Court fee for his 1/5th share and claimed that he may be allotted the 1/5th share.

8. Defendants 3 and 4 also filed separate written statement. They however, accepted the case of the plaintiff and they have also paid Court fee and sought for allotment of their respective shares.

9. The 1st defendant has filed an additional statement contending that the suit is bad for partial partition and also that the suit is hit by provisions of Benami Transactions (Prohibition) Act, 1988.

10. The learned 1st Additional District Judge, Erode who tried the suit, framed the following issues for determination.

1. Whether the suit property already been divided between the plaintiff and the defendants?
2. Whether the oral partition that took place in the year of 1973 has been put into effect and is true or not?
3. Whether the suit properties have been divided as narrated by the plaintiff in para 9 of the plaint?
4. Whether the plaintiff is entitled for partition?
5. Whether the suit is maintainable or not?
6. To what other reliefs?

On 11.03.2014 the issues were recast as follows:

1. Whether the family arrangement pleaded by the plaintiff is said to have taken place?
2. Whether the oral partition in Tamil month Thai 1973 pleaded by the 1st defendant is true?
3. Whether the 'C' schedule properties are the ancestral

properties as contended by the plaintiff or the self acquired properties of the defendants 1 and 2 as contended by the 1st defendant?

4. Whether the defendants 2 to 4 are each entitled to 1/5 share in the suit properties?
5. Whether the plaintiff is entitled for partition as prayed for?
6. Whether the plaintiff is entitled for permanent injunction as prayed for?
7. Whether there is any cause of action for the suit?
8. To what other relief the plaintiff and defendants are entitled?

The following Additional issues were framed on 02.07.2014:

1. Whether the suit is bad for non joinder of necessary parties?
2. Whether the suit is bad for misjoinder of properties?
3. Whether the suit is bad for partial partition?
4. Whether the valuation of the suit is correct?
5. Whether the plaintiff is entitled to claim relief of partition as regards Item 1,2 and 3 of 'C' Schedule without praying for relief of declaration of joint title?
6. Whether the suit is hit by provisions of Benami Transactions (Prohibition) Act?

11. On the side of the plaintiff P.W.1 to P.W.4 were examined and Exhibits A1 to A62 were marked. On the side of the defendants the 2nd defendant was examined as D.W.1, the 4th defendant was examined as D.W.2 and Exhibits B1 to B10 were marked.

12. The 1st defendant who is contesting the suit did not choose to let in evidence.

13. Upon consideration of the evidence on record the learned Trial Judge disbelieved the partition alleged to have taken place in the year 1973 as pleaded by the 1st defendant. Consequently, the claim that certain specific properties were allotted to him in the partition took place in the year 1973 was also disbelieved. The trial Court therefore, found that the suit properties remained undivided. The claim of the plaintiff that the suit is bad for partial partition due to the non inclusion of a property measuring about 2½ said to have been purchased by the 2nd defendant was rejected by the trial Court on the ground that the amendment sought for by the 1st defendant to include the said property was rejected and the said order was affirmed by this Court in CRP Nos.1427 and 2116 of 2015. The learned Trial Judge however, found that the suit 'C' Schedule properties which stand in the name of the defendants 1 and 2 cannot said to be a ancestral properties.

14. The learned Trial Judge pointed out that since the sale deeds Exs.A2, A3, and A5 and under which 'C' Schedule properties have been purchased and Exs.A8, A9 and A10 namely the patta extract that stood in the name of defendants 1 and 2, the 'C' Schedule properties are the individual properties of defendants 1 and 2. Therefore, the plaintiff cannot seek a partition of the said properties. On the above conclusions the learned Trial Judge granted preliminary decree for partition in favour of the plaintiff and the defendants 2 to 4 declaring their respective 1/5th share in the suit 'A' and 'B' Schedule properties. The suit in respect of the 'C' Schedule properties was dismissed.

15. Aggrieved the plaintiff as well as the defendants 1 and 2 have come forward with the above appeals.

16. I have heard Mr.D.Selvaraju, learned counsel appearing for the appellant/plaintiff in AS No.534 of 2015, Mr.A.Rajaraman, learned counsel appearing for the appellant(1st defendant) in AS No.1005 of 2015 and Mr.P.Saravanan Sowmiyan for Mr.Saravanan, learned counsel appearing for the appellant in AS. No.960 of 2015.

17. Mr.A.Rajaraman, learned counsel appearing for the 1st defendant who is the appellant in AS No.1005 of 2015 would vehemently contend that the trial Court erred in disbelieving the partition pleaded by him in the year 1973. He would also contend that at least the oral arrangement pleaded by the plaintiff said to have taken place in the year 1992 had resulted in the disruption of the Joint Family status. Therefore, the present suit seeking partition is not maintainable. The suit was bad for partial partition in as much as the property which admittedly stands in the name of the 2nd defendant had not been included in the suit.

18. Per contra, Mr.D.Selvaraju, learned counsel appearing for the plaintiff and Mr.P.Saravanan Sowmiyan, learned counsel appearing for the 2nd defendant would contend that the plea of partition in the year 1973 is belied by the very allotment pleaded by the 1st defendant. The 1st defendant had in his written statement contend that the partition took place in the year 1973 in which certain properties were allotted to the parties absolutely. Wherein, he had pleaded that the suit B Schedule properties were allotted to the 2nd defendant. Pointing out that in paragraph 6 of the written statement filed by the 1st defendant it is stated that the suit 'A' and 'B' Schedule properties were divided in the year 1973 in the presence of certain Panchayatots, the learned counsel would contend that the very plea of partition in the year 1973 is false to the knowledge of the 1st defendant inasmuch as the B Schedule properties were acquired by the family only in the year 1979.

Therefore, the same could not have been a part of the partition that took place in the year 1973. They would also further contend that the arrangements of the year 1992 cannot be treated as resulting in severance of status because it has been specifically pleaded that it was only oral arrangement for convenient enjoyment and there was no disruption of the joint family status. As regards 'C' Schedule properties, the learned counsel appearing for the plaintiff as well as the 2nd defendant would contend neither the plaintiff nor the 2nd defendant had any other avocation at the time when the 'C' Schedule properties were purchased. The 'C' Schedule properties have been purchased under three sale deeds dated 02.06.1974, 22.06.1974 and 11.12.1981.

19. Pointing out the above the learned counsel appearing for the plaintiff and the 2nd defendant would contend that unless partition in the year 1973 is proved the claim of the 1st defendant to the 'C' Schedule properties cannot also be sustained. The learned Trial Judge, according to him, was wrong in concluding that the claim of the plaintiff in respect of 'C' Schedule properties is hit by the Benami Transactions (Prohibition) Act, 1988. Since it overlooks one of the exemptions enumerated under the said Act.

20. On the above arguments the following points arise for determination in these Appeal:

1. Whether the partition of the year 1973 pleaded by the 1st defendant has been established?
2. Whether the suit 'C' Schedule properties can be said to be joint family properties acquired by the plaintiff in the name of defendants 1 and 2?
3. Whether the suit is bad for partial partition?
4. Whether the defendants 3 and 4 who are daughters of the 1st defendant would be entitled to equal share in the suit properties as co-parcener?

Point No.1:

21. The main thrust of the defence of the 1st defendant is that there was a division of the suit properties in the year 1973 in the family. In paragraphs 6 and 7 of the written statement the 1st defendant would claim as follows:

"6. Under the circumstances this plaintiff himself felt that this defendant was not satisfied in spending lavishly on the second defendant. So, as family manager and father and head of the family he himself wanted to have a final division of the 'A' and 'B' [Amended as per the order in IA 495 of 2014 dated 06.09.2014] schedule properties and requested the first defendant to satisfy himself with his share and called upon respectable persons to divide 'A' and 'B' [Amended as per the order in IA 495 of 2014 dated

06.09.2014] schedule properties during the year 1973. Late E.M.Natarajan, M.L.A., and Advocate (1) E.P.Ramasamy, son of Periya gounder - (2) Sri Ayyavoo Mudaliar close friend of plaintiff and his adviser were called by plaintiff and they divided suit 'A' and 'B' [amended as per the order in IA 495 of 2014 dated 06.09.2014] schedule properties into 2 equal shares.

7. The defendants 3 and 4 also were present. This defendant was allotted item 1 No.1 item S.F.No.180/1 and item 2 the house in S.F.180/1. This item is called Manal thottam. This defendant was also given item 3 in item 1 'A' Schedule S.F.574/2B, 574/5 called Senkadu."

22. The plaintiff had filed an additional written statement denying the claim of the 1st defendant that there was a partition in the year 1973. He would also point out that the suit B Schedule Property was purchased by the 1st defendant only in the year 1979 and therefore, there could not have been partition of the same in the year 1973. It is also contended that the plaintiff and his brother became divided only on 06.02.1972, therefore there could not have been a partition within one year between the plaintiff and his sons. In his oral evidence also the plaintiff has categorically denied the claim that the property was divided in the year 1973. The suggestion that the partition took place in the year 1973 in the presence of member of the legislative Assembly Mr.Natarajan was denied by the plaintiff. Certain other circumstances are also pointed out by the learned counsel for the plaintiff to show that the plaintiff and the 2nd defendant have denied the claim of the 1st defendant that there was a partition in the year 1973

23. Pointing out the fact that the 1st defendant has pleaded that the house constructed in items 1 and 2 and item 5 of A Schedule property was allotted to the 2nd defendant in the partition of the year 1973. The learned counsel for the plaintiff as well as the 2nd defendant would point out that house was constructed only in the year 1976. In support of their contention, they would rely upon the documents under Exs.A.56, A.57, A.58 and A.59 etc. which would go to show that the house was constructed only after the year 1975 and house warming ceremony was conducted in September 1976. Ex.A.56 is a letter addressed to the plaintiff by one K.Chinnasami Gounder, who is the Chairman of the Sennimalai Panchayat Union Council, greeting him on the occasion of house warming ceremony. Ex.A57 is a series of correspondence by which the plaintiff had obtained permission from the Forest Department for the purchase of timber for the construction of the house. Ex.A.58 is the bunch of receipts issued by Ayyappa Mosaic Floorings for the supply of mosaic flooring for the house during July and August 1976. Referring to these documents and several other documents

in the form of bills the learned counsel would submit that the house was constructed only in the year 1976. Therefore, the claim of the 1st defendant that the house was allotted to the 2nd defendant in the partition that took place in the year 1973 is not correct.

24. It must be pointed out that the 1st defendant who had filed the written statement claiming that there was partition in the year 1973, did not let in evidence in support of his case. Though his claim is that he was denied an opportunity to give evidence, I do not think such a plea could be entertained at this stage. The evidence on the side of the plaintiff, the 2nd defendant as well as the documentary evidence that has been produced would improbably the claim of the 1st defendant that there was a partition in the year 1973. It is the specific stand of the 1st defendant that 'A' and 'B' Schedule properties were divided in the year 1973. But the B Schedule properties were purchased by the plaintiff only in the year 1979, therefore they could not have been subject matter of the partition that said to have been taken place in the year 1973. Therefore, I do not find any reason to interfere with the findings of the trial Court that there was no partition in the year 1973 as contended by the 1st defendant.

Point No.2:

25. The suit 'C' Schedule properties have been purchased under three different sale deeds dated 02.06.1974, 22.06.1974 and 11.12.1981. All the sale deeds admittedly stand in the name of the defendants 1 and 2. The case of the 1st defendant insofar as acquisition of the 'C' Schedule properties is concerned is that after the partition in the year 1973, he was enjoying the properties that were allotted to him and from and out of the income from the properties allotted to him in the partition of the year 1973. He had acquired the 'C' Schedule properties along with his brother.

26. The 2nd defendant is a lawyer by profession but he was enrolled as lawyer only in the year 1988. The son of the vendor in Ex.A3 under which item No.1 of 'C' Schedule properties were purchased on 22.06.1974 was examined as P.W.3. He had deposed that the sale consideration was Rs.15,500/- out of the sum of Rs.15,100/- was adjusted towards the pronote amount due to the 1st defendant and balance of 400 rupees was paid by the plaintiff. He also deposed that the father used to borrow money from the plaintiff and promissory note will be executed in the name of 1st defendant or the 2nd defendant whoever was available at the time of execution. He also denied the claim that he is deposing in favour of the plaintiff since he is happened to be a close friend of the 2nd defendant. The vendor under Ex.A5, the sale deed dated 11.02.1981 under which item No.4 of the 'C' Schedule property was purchased in the name of the defendants 1

and 2 jointly have been examined as D.W.4, he would depose that the consideration for the sale was given only by the plaintiff and not by defendants 1 and 2. Relying upon the above said evidence it is submitted that neither the 1st defendant nor the 2nd defendant had any independent income at the time when the suit 'C' Schedule properties were acquired by the family.

27. Pointing out the 1st defendant's only claim that he was in possession of the property that was allotted to him in the year 1973 and it is from and out of the income from the property that was allotted in the year 1973 the suit 'C' Schedule properties were purchased by him as his own properties along with brother, the learned counsel appearing for the plaintiff and the 2nd defendant would contend that once the partition in the year 1973 is disbelieved, the claim of the 1st defendant that he had acquired the properties in 'C' Schedule from and out of the income from the properties allotted to him in the partition that took place in the year 1973 would automatically fail. I see force in the said submission. The claim of the 1st defendant with reference to acquisition of 'C' Schedule properties itself is that he had purchased them out of the income from the properties that were allotted to him in the 1973 partition. His claim that there was partition in the year 1973 has been rejected by me. The very source of funds for acquisition of 'C' Schedule property in the hands of the 1st defendant becomes non existent. Therefore, the contention of the plaintiff that the suit 'C' Schedule properties were acquired by him out of the income from the joint family properties in the name of his sons is bound to be accepted.

28. The Trial Court had rejected the said claim only on the ground that the said claim is hit by the Benami Transactions (Prohibition) Act, 1988. The trial Court has evidently overlooked to the provisions of Sub Section 3 of Section 4 of the Benami Transactions (Prohibition) Act, 1988, which provides an exception to the applicability of Section 4 in respect of the co-parcener of Hindu Undivided Family. The partition pleaded by the 1st defendant in the year 1973 having been rejected the family continued to be joint even at the time when the 'C' Schedule properties were acquired by the family under Exs. A2, A3 and A5.

29. Mr.A.Rajarajan, the learned counsel appearing for the 1st defendant would however contend that even according to the plaintiff there was a division of the properties in the year 1992. Pointing out that even in the plaint the plaintiff had specifically pleaded that certain specific properties were allotted to the plaintiff himself, the 1st defendant and the 2nd defendant. Therefore, according to him there was a severance of status in the joint family even in the year 1992 and therefore the suit for partition cannot be maintained. He would

rely upon the judgments of the Hon'ble Supreme Court in Puttrangamma and others v. M.S.Ranganna and others reported in [AIR 1968 SC 1018]; and Smt.Krishnabai Ganpatrao Deshmukh v.Appasaheb Tuljaramrao Nimbalkar and others reported in [AIR 1979 SC 1880].

30. No doubt it is true that severance of status would come in once it is found that there is a declaration by a co-parcener to terminate the co-parcenary. That is not the case here. The plaintiff has very categorically stated that the division took place in the year 1992 was only for the purpose of convenient enjoyment and not final division of meats and bounds which resulted in the severance of status between the co-parceners. It is one thing to say that there was a severance of status, but there was no partition. There can be a severance of status in the family without there being a partition but a partition would necessarily result in severance of status. However, the arrangement which took place in the year 1992, according to the plaintiff, is only arrangement for convenient enjoyment and on facts also it is found the revenue records stood unaltered till the filing of the suit. I do not think there is any substance in the submission of the learned counsel that there was a severance of status in 1992.

31. Mr.D.Selvaraju, learned counsel appearing for the plaintiff/appellant in AS No.534 of 2015 would submit that once the existence of the joint family is established and the fact that there was sufficient properties in the hands of joint family is established any acquisition made in the name of a member would be presumed to be for the benefit of the family and it is for that member to show that he had separate income which had funded the purchase of the property in his name. The learned counsel would rely upon the judgment of the Hon'ble Supreme Court in D.S.Lakshmaiah and another v. L.Balasubramanyam and another reported in [2003 (10) SC 310]. The Hon'ble Supreme Court had stated the law in paragraph 18 as follows:

"18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, 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 self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available."

32. In view of the law declared by the Hon'ble Supreme Court the onus is on the 1st defendant to show that he had independent income through which he was able to acquire 'C' Schedule property under Exs.A2, A3 and A5. As already pointed out the 1st defendant has not entered the witness box. His own plea is that source for purchase of 'C' Schedule properties is the income from the property allotted to him in the partition that took place in the year 1973. The partition of the year 1973 has been disbelieved. Therefore, I have no hesitation in holding that the 'C' Schedule property is also joint family property belonging to the family and as such the plaintiff and the defendant 1 to 4 have a equal right over the said properties also.

33. Yet another factor that would belie the case of the 1st defendant in respect of acquisition of 'C' Schedule Properties is the age of the 2nd defendant at the time of said acquisition under Exhibits A2 and A3 in the year 1974. The 2nd defendant is shown to have been born on 06.02.1956 under Ex.B1 which is a Transfer Certificate. Therefore, in the year 1974 he was only 18 years old. He was about 24 years old and at the time when the 4th item of 'C' Schedule property was acquired on 11.02.1981. It is highly improbable that the 2nd defendant could have had own income at the age of 18 years so as to contribute for the purchase of the 'C' Schedule property.

Point No.3:

34. Mr.Rajarajan, learned counsel appearing for the 1st defendant would vehemently contend that the suit is bad for partial partition in as much as the land measuring 2 1/2 cents which admittedly stands in the name of the 2nd defendant has not been included in the suit. Relying upon Ex.B10 dated 19.10.1985 which is a copy of the Revenue Sale Certificate issued to the 2nd defendant, the learned counsel would contend that the non inclusion of this property in the suit is bad for partial partition. The said document has been marked in the cross examination of the 2nd defendant as D.W.1. In his cross examination D.W.1 had denied that the property belongs to him. D.W.1 has deposed that the said property was purchased by one Muthusamy in his name in the Revenue auction but the possession of the said property was not taken by him. Therefore, it is not shown that the property is in the hands of the 2nd defendant or the family. It is also be pointed out that the 1st defendant had filed an Application in IA.No359 of 2015 seeking to include the property covered by Exs.B10 in the suit. The said application has been rejected by the trial Court and the Civil Revision Petition filed against the same was dismissed by this Court. Therefore, I do not think that the question that the suit is bad for partial partition for non inclusion of the 'C' Schedule properties could be agitated by the 1st defendant.

35. Mr.R.Rajarajan, learned counsel appearing for the 1st defendant would however, conted that the said issue can be re examined under Section 105 of the Code of Civil Procedure. The learned counsel would also rely upon the Judgment of this Court in [1968 (Volume 2) MLJ 266], Saradhambal v. A.M.P.Arunachalam, wherein this court had held that Section 105 enables the Court to look in to the correctness of the interlocutory order whether they are appealable or not irrespective of the fact there had been a Civil Revision Petition filed against the said order and this Court passed certain order in Civil Revision Petition. In the said decision this Court was concerned about the correctness of an order dismissing an application under Order 21 Rule 19 for not furnishing security. The question that arose was whether the order directing the petitioner to furnish security in order to entertain an Application under Order 21 Rule 19 could be gone into in an appeal against the dismissal of the application under Order 21 Rule 19.

36. Honble Mr.Justice M.M.Ismail, as he then was, has in Saradambal's case, held that the appellant is entitled to challenge the validity of the said order invoking the provisions of Section 105 of Code of Civil Procedure Code. I do not think the said decision could be applied to the case on hand. While considering I.A.No.359 of 2015 the trial Court had held that there is no pleading with regard to the said property in the plaint and it is also held that revenue records have not been produced to show that the property stands in the name of the 2nd defendant. In essence it was held that it has not been established that the said property belongs to the family. The said order has been confirmed by this Court in CRP No.2116 of 2015. Therefore, I do not think it would be proper for me to go into the said question once again decide it otherwise. Therefore, the non inclusion of the property covered by Ex.B10 in the suit will not make the suit bad for partial partition.

Point No.4:

37. Finally Mr.A.Rajarajan, the learned counsel appearing for the 1st defendant/appellant in As No.1005 of 2015 would contend that the trial Court ought not have granted an equal share to the defendants 2,3 and 4. He would submit that in view of the severance of status in the Family in the year 1992, the dfendants 3 and 4 who are the daughters will not become co-parceners. The learned counsel would contend that the declaration of intention to separate would itself be sufficient for effecting severance of status in the family and therefore the defendants 3 and 4, who are the daughters who claim to have become co-parceners from 09.09.2005 by virtue of the Hindu Succession Amedment Act 39 of 2005 cannot be treated as co-parceners. The learned counsel would also invite my attention to the judgment of the Hon'ble Supreme Court in Smt. Krishnabai

Ganpatrao Deshmukh v. Appasaheb Tuljaramrao Nimbalkar and others reported in [AIR 1979 SC 1880].

38. No doubt, there is no quarrel with the proposition of law that a notice of intention or declaration to separate by a member of co-parcenary would result in severance of status. But the Act 39 of 2005 does not recognize severance of status in the family as a partition. What is required to disentitle the daughters from becoming co-parceners in a registered partition. As per the amended Section 6 of the Hindu Succession Act, after its amendment by Act 39 of 2005, the daughter of Male Hindu, who dies after 09.09.2005 becomes co-parcener and she should be allotted a same share as is allotted to a son. The effect of the said provision is that the daughters of a Male Hindu who is alive on 09.09.2005 as a co-parcener of a joint family would also become co-parceners along with him and they would be entitled to a equal share in the property. The only exception is that it would not affect a partition that had taken place in the family before 20th December 2004. The explanation to Sub Section 5 qualified it further by providing that the partition should have been by execution of a registered deed of partition as required under the Registration Act or a partition effected by decree of Court. Therefore, in order to disentitle a daughter from claiming equal share as a co-parcener, it should be shown that there was a

partition by a registered instrument or by a decree of Court. No other mode of partition is recognized under the said provision. Therefore, mere severance of status, even assuming it had taken place, will not disentitle the defendants 3 and 4 from claiming an equal share in the suit properties. Therefore, the defendants 3 and 4 who are daughters of the plaintiff would be entitled to a equal share as that of the son in the properties which are held to be joint family properties.

39. In the light of the above conclusion the suit 'C' Schedule properties are also held to be joint family properties. The plaintiff and defendants 1 to 4, each would be entitled to 1/5th share in the suit A, B and 'C' Schedule properties. The decree of the trial Court will stand modified accordingly. The suit in OS No.210 of 2011 will stand decreed in respect of the suit A, B and 'C' Schedule properties declaring the 1/5th share of the plaintiff and the defendants 2 to 4 in the said properties.

40. A preliminary decree to that effect is granted. The appeals in AS.Nos.534 of 2015 and 960 of 2015 are allowed and AS No.1005 of 2015 is dismissed. Considering the relationship between the parties there shall be no order as to costs in these

appeals. Consequently, connected miscellaneous petitions are closed.

-s/d-
Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

jv

To

The First Additional District Judge
Erode.

Copy to
The section officer
VR section, High Court, Madras.

+3 Ccs to Mr.D. Selvaraj, Advocate , sr 60716 to 60718.
+3 Cc to Mr.E.P. Senniyan giri, Advocate sr 61219,61221,61222.

A.S.Nos.534 of 2015 & MP No.1 of 2015,
A.S.No.960 of 2015
and A.S.No.1005 of 2015 & MP No.1 of 2015

SP(10/11/2017)

सत्यमेव जयते

WEB COPY