

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29-06-2017

Pronounced on : 07-08-2017

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and

THE HONOURABLE MR. JUSTICE M.S. RAMESH

Appeal Suit No. 190 of 2013

Y.V. Sekar .. Appellant/Ist Defendant

Versus

1. A. Parimala Kanthi
2. R. Sasikala .. Respondents 1& 2/Plaintiff
3. Y.V. Nappin Ammal ..3rd Respondent /IInd Defendant

Appeal filed under Section 96 of the Code of Civil Procedure, 1908 against the Judgment and Decree dated 22.01.2013 made in O.S. No. 371 of 2008 on the file of the Additional District Judge, Kancheepuram at Chengalpattu

For Appellant : Mr. K.V. Ananthakrishnan

For Respondents : Mr. K. Hariharan for RR1 and 2

Mr. D. Vijayakumar for R3

JUDGMENT

R. SUBBIAH, J

This appeal is filed by the first defendant in O.S. No. 371 of 2009 as against the Judgment and Decree dated 22.01.2013 passed in O.S. No. 371 of 2009 on the file of the learned Additional District Judge, Kancheepuram at Chengalpattu. The said suit was filed by the plaintiffs/respondents 1 and 2 herein for a preliminary decree of partition of the suit property into four equal shares and to allot three such shares to them.

2. The Plaintiffs 1 and 2 in O.S. No. 371 of 2009 are the respondents 1 and 2 herein. The first defendant is the appellant in this appeal. The second defendant in the suit is arrayed as third respondent in this appeal. For easy reference, the parties shall be referred to as plaintiffs and defendants as they were arrayed in the suit before the trial court.

3. The Plaintiffs 1 and 2 and the first defendant are the daughters and son of one Y.N. Vijaya Pillai and Nappin Ammal, second defendant in the suit. According to the plaintiffs, the suit schedule mentioned property bearing Plot No.18, Door No.34, New Colony 8th Street, Adambakkam, Chennai - 600 088 measuring 1 ground 1278 square feet was purchased by Mr. Y.N. Vijaya Pillai from and out of his earnings from one Audilakshmi Ammal and Rajabathar Mudaliar through a registered sale deed dated 14.05.1965 for a sum of Rs.3,500/-. After such purchase, Y.N. Vijaya Pillai constructed a house in the suit property out of his earnings and he was living there along with his wife and children. While so, on 27.01.1981, the father of the plaintiffs and first defendant namely Vijaya Pillai died leaving behind the plaintiffs and the defendants as his legal heirs. As the suit property is the self-acquired property of the deceased Vijaya Pillai, on his death, the plaintiffs and defendants are entitled to 1/4 shares each.

4. It is the contention of the plaintiffs that on 28.12.2005, the second defendant, who is the mother of the plaintiffs and first defendant, had executed a registered release deed on receipt of a sum of Rs.25,000/- whereby the second defendant has released her undivided 1/4th share in the suit property in favour of her two daughters i.e., the plaintiffs in the suit. Thus, the plaintiffs became entitled to 3/4 share in the suit property and the first defendant is entitled for 1/4 share thereof. It is the further case of the plaintiffs that the second defendant has been running a Typewriting institute in the first floor of the house for the past 47 years. After execution of the release deed, the second defendant continued to run the typewriting institute with the permission of the plaintiffs. It is the further case of the plaintiffs that the plaintiffs and the first defendant are in joint possession of the suit property and such possession is deemed to be the joint possession along with the plaintiffs. The second defendant, who is running the typewriting institute, has been in possession of the portion occupied by the typewriting institute with the permission from the plaintiffs after the execution of the release deed. While so, the first defendant exhibited hostile attitude towards the plaintiffs and therefore, finding that the joint ownership of the suit property is no longer possible, the plaintiffs issued a notice dated 09.06.2008 calling upon the first defendant to effect division of the suit property and to handover 3/4 share to them. On receipt of such notice, the first defendant sent a reply notice dated 30.06.2008 containing untrue averments inter alia denied the due share of the plaintiffs in the suit property. In the reply notice dated 30.06.2008, it was falsely contended by the first defendant that he had contributed for the seemanthamm marriage and delivery of the child of the first plaintiff and

also spent amount for conducting betrothal, marriage and delivery of the children for the second plaintiff. It was also falsely claimed in the reply notice that the first defendant has been maintaining the second defendant and spending for her medical expenses. Further it is stated in the reply notice that first defendant has no knowledge about the release deed said to have been executed by second defendant in favour of plaintiffs on 28.12.2005. In such circumstances, the plaintiffs have instituted the suit before the trial court for partition and separate possession.

5. Resisting the allegations made in the plaint, the first defendant has filed a detailed written statement contending inter alia that at the time of the death of the father of the plaintiffs and the first defendant, the plaintiffs were aged 27 and 25 years respectively. It is further contended that the first plaintiff got married during the life of time of their father in August 1980. Thereafter, the first defendant had contributed money for seemantham and delivery of the child of the first plaintiff in the year 1981. It is further contended that the first defendant has availed loan out of his provident fund and from Thrift Society for performing the marriage of the second plaintiff during 1983 and also for the consequential ceremonies relating to seemantham, delivery of child etc., After conducting the marriage of the plaintiffs, the first defendant got married in the year 1986. It is further stated that the first defendant was a qualified Government approved Typist and Instructor in Tamil and English with certificate for running a Typewriting Institute in the suit property and it is he who is conducting the Typewriting Institute in the name of the second defendant out of reverence. Thus, the second defendant is only a name lender and in fact it is the first defendant who is running the institute with the necessary approval. It is also stated that the first defendant is employed in TWAD Board and from and out of the income derived from the institute and his salary, he has performed the marriage, seemandham and delivery of children of the plaintiffs. It is further stated that the first defendant has been maintaining and taking care of the second defendant for the past 27 years and spending for her medical expenses.

6. It is further stated by the first defendant in the written statement that during the year 2002, the second plaintiff developed serious ailment and was admitted in the hospital. At that time, the first plaintiff was in need of money to take care of the hospital expenses of the second plaintiff and therefore she requested the first defendant to provide money and promised to return the money back. Taking note of the proximity of the relationship, the first defendant has handed over the title deeds relating to the suit property to the second plaintiff to raise a loan by mortgaging the suit

property. However, even before the first plaintiff could raise loan, the first defendant paid a sum of Rs.20,000/- to her by pledging the jewels belonging to his wife with the understanding that the plaintiffs will not demand any share in the suit property. As the first defendant has given amount for meeting the hospitalisation expenses of the second plaintiff, the first plaintiff did not mortgage the title deeds to raise money. However, the first plaintiff did not return the title deeds to the first defendant. Furthermore, the first defendant also did not demand for return of the documents from the plaintiffs, taking note of the relationship between them. It is also contended that the first defendant has made two fixed deposits for Rs.10,000/- in the name of the plaintiffs and the amount thereof have been withdrawn by the plaintiffs. Further, the first defendant made deposits in the Post Office Recurring Deposit fund and it was also withdrawn by the first plaintiff and second defendant. Further, the second defendant gave all her jewels, silverware and Rs.50,000/- received by her to the plaintiffs. The plaintiffs, at no point of time, demanded partition of the suit property because of the specific understanding that in lieu of their share, the first defendant had spent money for performance of their marriage, seemandham and delivery of the children etc., and also maintained the entire family. The amount so received by the plaintiffs is equal to the share in the suit property. The first defendant was under the bonafide impression that the plaintiffs would not claim any share in the suit property and release their share at any time. It is further stated that only after receipt of the notice dated 09.06.2008 sent by the plaintiffs did the first defendant come to know about the release deed dated 28.12.2005 said to have been executed by the second defendant. Further, the second defendant did not receive Rs.25,000/- from the plaintiffs at the time of executing the release deed dated 28.12.2005 and therefore, the release deed dated 28.12.2005 will not bind the first defendant in any manner. If one of the co-sharers release his or her share in the property in favour of the other co-sharers, such benefit must be given to all the co-sharers equally but that was not done in this case. The Plaintiffs are having independent house and other property from their in-laws. They have received money from the first defendant on several occasion to improve their property. The first defendant alone paid property tax, water tax and carried out periodic repair to the suit property and maintained it by spending amount. If the amount received by the plaintiffs from the first defendant at periodic interval is taken into account, it would be equal to the claim for share in the suit property made by the plaintiffs. In other words, the various amount spent by the first defendant for the plaintiffs and also given to the plaintiffs is more than or equal to 1/4 share in the suit property. The Plaintiffs are not in joint possession of the suit property and the question of possession by the first defendant cannot be assumed to be a

joint possession for and on behalf of the plaintiffs. According to the first defendant/appellant, the suit ought to have been valued on the market value of the suit property under Section 37 (I) of The Tamil Nadu Court Fee and Suit Valuation Act and the suit has been improperly valued. Therefore, the first defendant prayed for deciding the maintainability of the suit as a preliminary issue under Section 12 of the Tamil Nadu Court Fees and Suit Valuation Act, 1955.

7. The second defendant, who is the mother of the plaintiffs and the first defendant, had filed a separate written statement contending that she has executed the release deed dated 28.12.2005 in favour of the plaintiffs on receipt of Rs.25,000/- from them. Upon such execution of release deed, the second defendant is in permissive occupation of the suit property having been permitted by the plaintiffs to reside in a portion of the suit property where she is running the typewriting institute. It is also stated that both the plaintiffs and the first defendant are in joint possession of the suit property. However, as the first defendant exhibited hostile attitude towards the plaintiffs, they have issued the notice dated 09.06.2008 demanding partition. The second defendant categorically denied the allegation of the first defendant that he is running the typewriting institute in the suit property and the second defendant is only a name lender. It is further stated that the first defendant did not contribute any amount either for the marriage, seemandham or delivery of the children of the plaintiffs, as stated in his written statement. The first defendant did not show any love and affection towards the second defendant and that the second defendant has only given the jewels and other belongings of her to the plaintiffs at the time of execution of the release deed. Thus, the second defendant prayed for decreeing the suit as prayed for with costs.

8. A reply statement was filed by the plaintiffs to the written statement of the first defendant contending inter alia that the first defendant did not contribute any amount for their marriage, seemandham or delivery of the child as alleged. The title deeds pertaining to the suit property were not given to the plaintiffs in the manner as pleaded by the first defendant. On the other hand, the title deeds relating to the suit property were in possession of the second defendant after the death of their father, from whom, they have received the title deed. The plaintiffs have not withdrawn the fixed deposit amount or other savings amount made by the first defendant, as stated in the written statement. The plaintiffs have also denied the allegation that they have received amount from the first defendant for construction of house and the amount so received is equal to 1/4 share in the suit property. The release deed was executed by the second defendant voluntarily after receiving

a sum of Rs.25,000/- from the plaintiffs. The contention that the release deed should also go to the benefit of the first defendant is legally not sustainable. It is the second defendant who is running the typewriting institute in the suit property and not the first defendant, as stated in the written statement of the first defendant. The suit was properly valued and therefore, there is no necessity to decide the correctness of the valuation of the plaint as a preliminary issue.

9. Before the trial Court, the first plaintiff examined herself as PW1 and Exs. A1 to A6 were marked. On the side of defendants, the second defendant/mother was examined as DW1 and the first defendant was examined as DW2, however no document was marked on the side of the defendants. The trial Court, upon consideration of the oral and documentary evidence framed five issues for consideration and ultimately, passed a preliminary decree for partition as prayed for by the plaintiffs. Aggrieved by the preliminary decree passed by the trial court, the first defendant in the suit has filed this appeal.

10. Along with this appeal, the first defendant/appellant has filed M.P. No. 1 of 2014 praying to grant leave and permit him to file the documents morefully set out in the list annexed along with the petition, to receive the same and to mark those documents as exhibits on the side of the first defendant. In the affidavit filed in support of this petition, it has been stated by the first defendant that even though he has handed over those documents to the counsel who appeared before the trial court, he had misplaced and lost the office bundles with all the original documents. When it was questioned, the counsel engaged by the first defendant has stated that the non-filing of the documents would not in any way affect his defence in the suit especially when it is for the plaintiffs/respondents 1 and 2 herein to prove their case and it is enough if he leads oral evidence in the case. However, after the preliminary decree was passed the counsel engaged by the first defendant has handed over the original documents with xerox copies of the case papers. According to the first defendant, for the mistake committed by the counsel engaged by him before the trial court, he should not be penalised. Further, for non-filing of the documents, the trial court has drawn an adverse inference against him. Therefore, the first defendant/appellant has filed the above Miscellaneous Petition for reception of documents at the appellate stage.

11. Opposing the prayer sought for in MP No. 1 of 2014 for reception of documents, the plaintiffs/respondents 1 and 2 herein have filed a counter affidavit contending that the averments that the first defendant had entrusted the documents to the counsel engaged by him before the trial court and that the counsel did not file those documents in the court are

nothing but false. When the first defendant was examined as DW2 before the trial court, he has not whispered anything about the documents in his possession. The only defence raised by the first defendant before the trial court is that he has spent huge amount towards performance of Marriage, Seemandham and delivery of children of the plaintiffs/respondents 1 and 2 herein, which was denied by the plaintiffs/respondents 1 and 2. Furthermore, the trial court did not decide the suit by drawing an adverse inference against the first defendant for non-filing of the documents, but by appreciating the entire evidence available on record. In any event, according to the plaintiffs/respondents 1 and 2, the present documents are irrelevant and not necessary for arriving at a decision in this appeal. The first defendant has not assigned any valid and convincing reasons for non-filing of the documents before the trial Court. Therefore, the plaintiffs/respondents prayed this Court for dismissal of the petition for reception of additional documents.

12. During the course of hearing of this appeal, it was brought to the notice of this Court that the second defendant in the suit, who is the third respondent in this appeal, died on 15.12.2016. To this effect, the counsel for appellant has filed a memo on 02.01.2017. It is also stated that the plaintiffs 1 and 2 and the first defendant alone are the legal heirs of the second defendant/third respondent and they are already on record. The Memo filed by the counsel for the appellant intimating the death of the second defendant/third respondent is hereby recorded.

13. The learned counsel appearing for the appellant/first defendant submitted that the suit property was originally purchased by the father of the plaintiffs and the first defendant on 14.05.1965 out of his self-earned funds. The second defendant is the mother of the plaintiffs and first defendant. The father of the plaintiffs and first defendant died on 27.01.1981. As the only male heir in the family, it is the appellant who had spent money for the Marriage, Seemandham and delivery of children of the plaintiffs, besides medical expenses of the second plaintiff when she was hospitalised and also the medical expenses of the mother/second defendant. In fact, the first defendant has availed loan from his employer for conducting the marriage, seemandham and delivery of the children of the plaintiffs. Further, during the year 1983, the first defendant has availed loan from his provident fund contribution and from Thrift Society for performing the marriage of the second plaintiff and also for the consequential ceremonies relating to seemantham, delivery of child etc of the second plaintiff. In fact, during 2002, the second plaintiff was seriously ill and admitted in the hospital and it was the first defendant who has raised money by pledging the jewels of his wife and paid it towards hospital expenses of the second

plaintiff to the tune of Rs.20,000/- on the understanding that the plaintiffs will not demand any share in the suit property. Apart from the above expenses, the first defendant also spent varying amounts and such amount spent by the first defendant is equivalent to the share in the suit property to the plaintiffs. On account of the amount spent by the first defendant/appellant, his sisters/the plaintiffs and also the mother/second defendant relinquished their right in the suit property in favour of the first defendant, who held the suit property as his own. Thus, it was the first defendant, who maintained the entire family, including his mother the second defendant, till her life time. The first defendant was residing in the suit property on his own right, as an owner thereof. After 24 years of the death of the father, the second defendant, without any right, has executed the deed of relinquishment in favour of the plaintiffs by allegedly receiving a sum of Rs.25,000. After three years of execution of the relinquishment deed by the second defendant in favour of the plaintiffs, the plaintiffs have filed the suit in the year 2008. The suit is therefore barred by limitation. The plaintiffs are estopped from filing the suit and the principle of ouster will operate against them. The second defendant was under permissive occupation of the first defendant, who maintained her till her death in the year 2016. But the trial court failed to infer that the principle of ouster operates against the plaintiffs. In this context, the learned counsel for the first defendant/appellant relied on the decision of the Apex Court in (Babulal Badriprasad Verma vs. Surat Municipal Corporation and others) reported in AIR 2008 Supreme Court 2919 (1) wherein it has been held as follows:-

"34. Significantly, a similar conclusion was reached in the case of Krishna Bahadur vs. Purna Theater (2004) 8 SCC 229, though the principle was stated for more precisely, in the following terms:-

"9. The principle of waiver although is akin to the principle of estoppel, the difference between the two, however, is that whereas estoppel is not a cause of action, it is a rule of evidence, waiver is contractual and may constitute a cause of action, it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.

10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct.

35. In Ramdev Food Products Pvt Ltd., vs. Arvindhbai Rambhai Patel and others (2006) 8 SCALE 631, this Court observed:-

"The matter may be considered from another angle. If the first respondent has expressly waived his right on the trade mark registered in the name of the appellate-company, could he claim the said right indirectly. The answer to the said questions must be rendered in the negative. It is well settled that what cannot be done directly cannot be done indirectly. The term "waiver" has been described in the following words: "Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted and is either express or implied from conduct. A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision does not exist. Waiver of this kind depends upon concern, and the fact that the other party has acted upon it is sufficient consideration. It seems that, in general, where one party has by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the question which he has himself so introduced, even though it is not supported in point of law by any consideration (See.16 Halbury's Laws 4th edn. Para 1471)

In this view of the matter, it may safely be stated that the appellant, through his conduct, has waived his right to an equitable remedy in the instant case. Such conduct precludes and operates as estoppel against him with respect to asserting a right over a portion of the acquired land in a situation where the scheme in question has attained finality following as a result of the appellant's inaction."

14. Reliance was also placed by the counsel for the appellant on the book authored by Mitra titled Co-ownership and Partition -18th Edition relating to the true meaning of Ouster, which reads as follows:-

"21. Ouster - true meaning:- Ouster does not mean driving out of the co-sharer from the property, but it will not be complete unless it is coupled with other ingredients required to constitute adverse possession. Broadly speaking, three ingredients are necessary for establishing the plea of ouster in the case of a co-owner namely (i) declaration of hostile animus (ii) long and uninterrupted possession of the person pleading ouster and (iii) exercise of the right of exclusive ownership openly to the knowledge of the other co-owner.

Recognition of the plea of ouster presupposes that there has been hostile animus express or implied on the part of the co-owner setting up the plea of ouster against the other.

Consequently only because the joint family property is in exclusive possession of a co-parcener, it cannot be treated to be adverse to the other co-parceners unless such possession was exercised by ousting them."

15. By relying upon the above, the learned counsel for the first defendant/ appellant submitted that since the suit property is in exclusive possession of co-parcener, it cannot be treated to be adverse to the other co-parcener. For proving ouster, it is not necessary to show that the other co-parcener are driven out from the suit property. Therefore, the case of the first defendant/appellant that there was an understanding between the plaintiffs and first defendant to the effect that the plaintiffs will not claim any share in the suit property in lieu of the amount spent by him has to be accepted by applying the principles of ouster.

16. Apart from the above submission, the learned counsel for the first defendant/appellant also submits that if this Court comes to a conclusion that the release deed dated 28.12.2005 executed by the deceased second defendant in favour of the plaintiffs is valid, it will equally enure to the benefit of the first defendant and the first defendant is also entitled to one share which the mother/second defendant was entitled to. In support of his contention, the learned counsel for the first defendant relied on the decision in the case of (P.R. Munusamy Naidu vs. V. Venkatesan and others) reported in 1997 II MLJ 18 wherein it was held that wherein in Para Nos. 14 and 15, it has been held as follows:-

"14. In a Full Bench decision of this Court in Chella Subbanna vs. Chella Balasubbareddi (1945) 1

M.L.J. 140; AIR 1945 Mad 42; 1945 M.W.N. 95 (at page 143), it was held as follows:-

"The relinquishment by one co-parcener of his interest in the family estate in favour of the members of the coparcenary does not amount to an alienation; it merely amounts to an extinction of his interest in favour of the others. The gift of his interest to one or several other coparceners would not mean the extinction of that interest. It would mean an alienation of it. It is well settled law that there cannot be such a gift to a stranger and it is now clear that there cannot be a gift to a fellow coparcener if the family is to remain undivided.

There is another Privy Council Judgment which supports the proposition that there cannot be a renunciation by one member of a joint family in favour of one of several other members of the family while the family remains joint. In Vasant Rao vs. Anandrao, 6 Bom.L.R. 925, one Madheswaro executed a release of his interest in the family property in favour of his father. The Bombay High Court held that the release must be treated, as being, not for the benefit of the father alone, but of the coparcenary and the shares were to be determined as though Madhaw Rao had died. This case went to the Privy Council as Anandrao vs. Vasant Rao, 9 Bom.L.R. 595, their Lordships held that the governing principles had been rightly applied by the High Court and dismissed the appeal. At p.497, 10th Edn. Of Mayne, the learned Editor expresses the opinion that dicta in Peddiayya vs. Ramalingam, I.L.R. 11 Mad 406 and Thangavelu Pillai vs. Doraiswami Pillai, 27 M.L.J. 272 cannot be considered good law especially after the decision of the Privy Council in Venkatapathi Raju vs. Venkatanarasimha Raja (1936) 1 MLJ 558; LR 69 I.A. 307; I.L.R. 1937 Mad 1. It follows from what we have said that we are in full agreement with this opinion and that additional support for it is to be found in the Judgment of their Lordships in Anandrao vs. Vasant Rao, 9 Bom.L.R. 595. The answer which we give to the question referred is this: A Member of joint Hindu Family governed by the Mitakshara law cannot give his interest in the family estate to one of several coparceners if they remain joint in estate. In such circumstances, he can relinquish his interest but the relinquishment operates for the benefit of all the other members. The costs of this reference will be costs in the appeal."

17. The learned counsel for the first defendant/appellant also placed reliance on the decision of this Court in (Kannammal and others vs. Vembana Gounder and others) reported in 2009 (6) CTC 197 wherein it has been held in Para No.25 as follows:-

"25. In view of the above excerpts including the entire precedents cited supra, there could be no doubt that a coparcener cannot settle or gift his undivided share in the coparcenary property. However, it is crystal clear that in this case, the said Nachimuthy Gounder, by virtue of Ex.B-41, the sale deed, which I held supra as disguised donation and Ex.B-14, the settlement deed, alienated the items 1 (a), 1 (b), items 3 and 4 of the "C" Scheduled Properties, and as such, those alienations are ineffective and would not bind the other co-parceners and the legal heirs."

18. With regard to the factual aspects, the learned counsel for the first defendant/appellant submitted that after the death of the second defendant, the first defendant is running the typewriting institute. Even during the life time of the second defendant, the first defendant alone was running the typewriting institute for more than three decades inasmuch as he possess the requisite qualification to run such an institute. The second defendant was only a name lender. Further, the counsel for the first defendant/appellant submitted that during the course of trial, only the first plaintiff stepped into the witness box and adduced evidence, but the second plaintiff did not enter the witness box to deny the defence raised by the first defendant and it would amount to admitting the defence projected by the first defendant. The trial court, without considering the above aspects has erroneously passed the preliminary decree for partition.

19. As regards the non-filing of the documents before the trial court, the learned counsel for the first defendant/appellant submitted that the petition filed under Order 41 Rule 27 of CPC seeking leave for reception of additional document has to be considered by this Court for the reasons assigned in the affidavit filed in support of the petition. The first defendant has clearly narrated the events that prevented him from filing the documents in his possession before the court below. Further, the additional documents are absolutely necessary to appreciate the defence projected by the first defendant. Even during the course of trial, the plaintiffs did not cross examine the first defendant with regard to his defence that he had spent money for the marriage, seemandham and delivery of the children and the failure to cross-examine the first defendant on the above aspects amounts to an admission. In this regard, the learned counsel for the first defendant/appellant relied on the decision reported in the case of (Sarwan Singh vs. State of Punjab) reported in 2003 (1)

SCC 240 wherein it has been held that it is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted. The learned counsel for the first defendant/appellant therefore prayed this Court to allow the petition for reception of documents and to permit the first defendant/appellant to mark those documents so as to enable him to substantiate his defence as regards the expenses incurred by him for and on behalf of the plaintiffs and the second defendant.

20. The learned counsel for the first defendant/appellant also placed reliance on Sections 21, 22 and 23 of The Hindu Adoption and Maintenance Act to drive home the point that sisters are not dependants. The legal principle of law is that any expenses incurred towards the marriage of unmarried daughter for her maintenance has to be adjusted in the share to be allotted to the sisters. When the share is claimed in the property, they have to bear the liability to be incurred by one of the sharers alone. In this case, it is the first defendant who has incurred the liability in lieu of the plaintiffs share as well as the second defendant/mother. As per the settled principles of law, since the first defendant has taken shares in lieu of the expenses incurred for maintaining the plaintiffs and the second defendant, the plaintiffs have lost their right to claim any share in the suit property. Consequently, the second defendant/mother has no right to execute the release deed releasing her share in favour of the plaintiffs since the second defendant has lost her right to the share and has been extinguished by the principle of ouster for the period of over 12 years. In this context, the learned counsel for the first defendant/appellant relied on the decision in the case of (K.V. Narayanan vs. K.V. Ranganandhan and others) reported in AIR 1976 SC 1715 = 1997 (1) SCC 244 wherein it has been held that while deciding the family estate, it is necessary for the joint family to take account of both the asset and the debts for which the undivided estate is liable and to make provision for discharge of the debts. Also, if family arrangements which are governed by a special equity peculiar to themselves or entered into bonafide to maintain peace or bring about harmony in the family and the terms thereof are fair taking into consideration the circumstance of the case, every effort must be made by the Court to recognise and sustain it. The trial court failed to consider the above legal aspects and therefore he prayed for setting aside the preliminary decree passed by the trial court by allowing this appeal.

21. The learned counsel for the first defendant/appellant also submitted that alternatively, if this Court concludes that the plaintiffs are entitled to the share of the second defendant/mother, on the date of release deed namely 28.12.2005,

the plaintiffs did not have any right and their right has to be curtailed to the extent of one fourth share of the property released by the second defendant/mother. In such event, the first defendant/appellant is also entitled one third share on the 1/4 share on release of the suit property. Depending upon the shares to be declared, the first defendant is entitled to be reimbursed the amount incurred for the marriage of the second plaintiff and other amount incurred by him. The plaintiffs cannot claim the value of the shares as on this date and enjoy the benefits accrued to the suit property leaving the first defendant to bear the liabilities and burden incurred towards the plaintiffs.

22. Countering the submissions of the learned counsel for the first defendant/ appellant, the learned counsel appearing for the plaintiffs/respondents 1 and 2 submitted that admittedly, the suit property was purchased by the father of the plaintiffs and the first defendant. After the death of the father, the plaintiffs, first defendant as well as the mother/second defendant are equally entitled to a share in the suit property by succession. The second defendant/mother has released her share in favour of the plaintiffs by executing a registered release deed dated 28.12.2005. The execution of the release deed dated 28.12.2005 by the second defendant/mother was not denied by the first defendant. Further, during the course of cross-examination of DW1/mother, the first defendant/DW2 has not put any question regarding the right of the second defendant/mother to execute the release deed dated 28.12.2005. Even though it was claimed by the first defendant that the second defendant was only a name lender and it is he who is running the typewriting institute, he has not filed any document to substantiate the same. Further, the first defendant claimed that he had spent for the marriage, seemandham and delivery of the children of the plaintiffs by availing loan from his employer and by pledging the jewels of his wife, but such averments were not substantiated by producing any documentary evidence. The trial court has also specifically rendered a finding that the first defendant has not produced any document to substantiate the defence that he has spent varying amounts for and on behalf of the plaintiffs. It is further stated that at no point of time, there was an understanding between the plaintiffs and the first defendant to the effect that the plaintiffs will not claim any share in the suit property in lieu of the amount allegedly spent by the first defendant for and on behalf of the plaintiffs. Further, the learned counsel for the plaintiffs/respondents 1 and 2 placed reliance on the Full Bench decision of this Court in Babburu Basavayya and others vs. Babburu Guravayya and another) reported in AIR 1951 Madras 938 held as follows:-

"13. We may now summarise our conclusions. A partition suit in which a preliminary decree has been passed is still a pending suit and the rights of the parties have to be adjusted as on the date of the final decree; *Jadunath vs. Parameswar*, I.L.R. (1940) I Cal.255. In such a suit the Court has not only to divide the common properties but has also to adjust the equities arising between the parties out of their relation to the common property, the property to be divided. The preliminary decree determines the moieties of the respective parties and thereby intrudes the basis upon which the division of the property has to be made. There are other matters in addition to the moieties of the parties that have to be considered and decided before an equitable final partition can be effected. Among them are the realisation of common outstandings, the discharge of common liabilities, the distribution of the profits of the properties realised pending the suit, either in cash or by allotment of property of the requisite value, the grant of overty, the provision of maintenance to parties entitled thereto, the allotment of lands on which improvements have been effected to the sharer who has improved them, the allotment of alienated lands to the share of the alienor and other similar matters. Even after the passing of preliminary decree, it is open to the Court to give appropriate directions regarding all or any of these matters either suo motu or on the application of the parties. O.20, R.18 Civ.P.C. does not prohibit the Court from issuing such directions after the stage of a preliminary decree. It is open to the Court in order to prevent multiplicity of litigation and to do complete justice and effect an equal division of all the common assets and properties among the parties, to direct an enquiry into the profits received or realised by one or some of them during the pendency of the suit and to award the others their proper share of such profits under its final decree. This enquiry can be ordered either as part of the preliminary decree itself or subsequently as a step towards the passing of the final decree, and in either case, the result of the enquiry has to be incorporated in the final decree.

23. Thus, the learned counsel for the plaintiffs/respondents 1 and 2 submitted the scope of passing preliminary decree does not entertain any enquiry regarding overalties adjustment of shares and money spent.

24. As far as the allegation of the first defendant that the release deed dated 28.12.2005 executed by the mother/second defendant will also enure to the benefit of the first defendant, it is submitted that as per the decision in (Kuppuswami Chettiar vs. A.S.P.A. Arumugam Chettiar and another) reported in AIR 1967 Supreme Court 1395 Section 5 of the Transfer of Property Act stipulates that the word 'transfer' includes conveyance by registered instrument including release deed for consideration and the release deed need not be for all to the benefit of the other sharers and the release of a particular share for consideration is a valid transfer. Therefore, the plea of the first defendant that the release deed executed by the mother on 28.12.2005 in favour of the plaintiffs will also enure to his benefit cannot be countenanced especially when the release deed was executed for a consideration of Rs.25,000/- by the second defendant/mother. When the release deed dated 28.12.2005 was executed by the mother/second defendant after receipt of Rs.25,000/-, it will not enure to the benefit of the second defendant.

25. As regards the plea of ouster, the learned counsel for the plaintiffs/ respondents 1 and 2 would contend that there cannot be any ouster or limitation for making a claim in this case. According to the counsel for the plaintiffs/respondents 1 and 2, ouster is an independent concept where the person claiming ouster has got to produce evidence and prove that he had been in independent possession and enjoyment of the suit property by breaking the concept of joint possession or showing the independent possession to start the point of limitation. In this case, the second defendant mother has admitted the joint enjoyment of the property after the death of the father. Further, in a suit for partition, the question of limitation cannot be pressed into service as possession of one of the co-parceners will be construed as possession of the property for and on behalf of the other co-parceners as well. Therefore, according to the learned counsel for the plaintiffs/respondents 1 and 2, the theory of ouster or limitation in filing the suit for partition does not arise in this case. Above all, the plea of ouster has not been pleaded in the written statement by the first defendant and therefore, it cannot be agitated by him in this appeal.

26. As regards the non-filing of the documents before the trial court, the learned counsel for the plaintiffs/respondents 1 and 2 submitted that the first defendant has not assigned any valid reason for not marking the documents before the trial Court. Further, the documents sought to be filed are irrelevant and not necessary for adjudicating the dispute involved in this appeal. The documents are sought to be marked by the first defendant to fill up the lacunae in his defence. In this context, the learned counsel for the plaintiffs/respondents 1

and 2 relied on the decision of the Honourable Supreme Court in the case of (Malayalam Plantations Limited vs. State of Kerala and another) reported in AIR 2011 Supreme Court 559 wherein it has been held that if any petition is filed under Order 41 Rule 27 in an appeal, it is incumbent on the part of the appellate Court to consider on merits at the time of hearing of the appeal so as to find out whether the documents or evidence sought to be adduced have any relevance/bearing in the issues involved. Further, additional evidence could be adduced in one of the three situations namely (a) whether the trial court has illegally refused the evidence although it ought to have permitted (b) whether the evidence sought to be adduced by the party was not available despite the exercise of due diligence and (c) whether additional evidence was necessary in order to enable the Appellate Court to pronounce the judgment or any other substantial cause of similar nature. It is equally well settled that additional evidence cannot be permitted to be adduced so as to fill in the lacuna or to patch up the weak points in the case. By placing reliance on the above decision, the learned counsel for the plaintiffs/respondents would vehemently contend that the additional documents sought to be filed by the first defendant/appellant is nothing but an attempt to fill up the lacuna in the defence projected by the first defendant. Further, none of the situations laid down by the Apex Court in the above decision warranting interference by the Court has arisen in this case. The trial court has extensively dealt with the above aspects and passed a preliminary decree. The learned counsel appearing for the plaintiffs/respondents 1 and 2 therefore prayed this Court for dismissal of the appeal.

27. Keeping the above submissions of the counsel for both sides, the following questions arise for our consideration in this case namely

1. Whether the plaintiffs are entitled for the relief of partition in the suit property as claimed by them in the plaint on the principle of ouster inasmuch as the first defendant had spent amount for performance of their marriage, seemandham, delivery of their children, medical expenses for the second defendant/mother by availing loan from his employer, which is equivalent to the share of the plaintiffs in the suit property
2. Whether the release deed dated 28.12.2005 executed by the second defendant/mother in favour of the plaintiffs is valid?
3. Whether the Release deed dated 28.12.2005 executed by the second defendant in favour of the plaintiffs would enure to the benefit of the first defendant/appellant to get one third share in the 1/4th share of the second defendant which

she relinquished in favour of the plaintiffs.

4. Whether the plaintiff has made out a case under Order 41 Rule 1 of CPC for reception of additional documents.

28. On perusal of the pleadings and submissions made by the counsel for both sides, we have noticed that the suit property was purchased on 14.05.1965 by the father of the plaintiffs and the first defendant. The father of the plaintiffs and first defendant died on 27.01.1981 leaving the plaintiffs and the defendants as his legal heirs to succeed to his estate. According to the first defendant, as a male member in the family, he has spent various amount towards the marriage, seemandham and delivery of the children of the plaintiffs apart from payment of Rs.20,000/- to the second plaintiff when she was seriously ill and hospitalised. It is further contended that he has also taken care of the expenses, including medical expenses for the mother/second defendant till her death. It is further submitted that he is running the typewriting institute in the suit property which is being run in the name of the second defendant and the second defendant was only a name lender.

29. Admittedly, during the life time of the second defendant, she has executed a release deed dated 28.12.2005 releasing her share in the suit property in favour of the plaintiffs for a consideration of Rs.25,000/-. Before the trial court, the second defendant also filed a written statement supporting the case of the plaintiffs. Further, the second defendant/mother has also adduced evidence before the trial Court as DW1 and repudiated the defence made by the first defendant that he had spent varying amounts and incurred expenses for the marriage, seemandham and delivery of the children of the plaintiffs besides the expenses of the second defendant/mother. The Plaintiffs have also filed reply statement to the written statement filed by first defendant repudiating each and every one of the allegations made by him and contended that he did not spend any amount for performance of their marriage, seemandham and delivery of the children, as alleged by him.

30. In the above circumstances, when the plaintiffs have discharged their initial burden, it is for the first defendant to show that he has, in fact, spent amount for the performance of marriage, Seemandham and delivery of children, as has been stated in his written statement. However, the first defendant did not substantiate such averments by filing any documentary evidence. Therefore, the submissions made by the counsel for the first defendant/appellant that there was an understanding between the plaintiffs and first defendant that the plaintiffs will not claim any share in the suit property in view of the amount spent by the first defendant for marriage, seemandham and

delivery of the children and therefore, the plaintiffs are not entitled for the suit relief, cannot be accepted.

31. As regards the plea of ouster, we have noticed that such a plea was neither pleaded in the written statement nor substantiated by the first defendant before the trial court. In this context, reference can be made to the book titled Co-ownership and partition - 18th Edition written by Shri. Mitra wherein it was written as follows:-

"Plea of ouster to be specifically taken:- The burden is heavily upon the co-owner setting up ouster to prove adverse character of such possession by asserting affirmatively and that too to the knowledge of other members that he asserted the exclusive hostile title and other members were completely excluded from enjoying the property and such adverse possession continued for the statutory period of 12 years. But mere mutation of name in the name of the elder brother of the family for the collection of the rent does not prove hostile and against the other brothers.

So when the co-owner has not set up the plea of ouster, he cannot plead acquisition of title by adverse possession.

32. In this case, the second defendant/mother has executed a registered release deed relinquishing her share in the suit property in favour of the plaintiffs for a valid consideration. The second defendant has also filed a written statement before the trial court admitting the execution of the release deed in favour of the plaintiffs after receipt of consideration. While so, the plea of ouster raised by the first defendant is without any legal force. Therefore, having regard to the entire facts and circumstances involved in this case, we find that the first defendant is not entitled to raise the plea of ouster or limitation in filing the suit.

33. The alternative submission advanced by the learned counsel appearing for the first defendant/appellant is that the second defendant/mother has no right to execute the release deed at all and consequently, the first defendant is also entitled to a share of the second defendant/mother in the suit property. We find that the release deed dated 28.12.2005 was executed by the second defendant and registered before the competent registering authority for a valid consideration. By virtue of such release deed, the plaintiffs become absolute owners of the share, which the second defendant is entitled to in the suit property. Such transfer made by the second defendant in favour of the plaintiffs falls within the meaning of a valid 'transfer' contained in Section 5 of the Transfer of Property Act. While so, it is futile on the part of the first defendant to contend

that the release deed will also enure to his benefit to get a share in the suit property. In this context, useful reference can be made to the decision of the Honourable Supreme Court in (Kuppuswami Chettiar vs. A.S.P.A. Arumugam Chettiar and another) reported in AIR 1967 Supreme Court 1395 wherein it was held in para No.6 as follows:-

"6.Now, it cannot be disputed that a release can be usefully employed as a form of conveyance by a person having some right or interest to another having a limited estate e.g., by a reminderman to a tenant for life and the release then operates as an enlargement of the limited estate. But in this case, we are not concerned with the release in favour of the holder of a limited estate. How the deed was in favour of a person having no interest in the property and it could not take effect as an enlargement of an existing estate. It was intended to be and was a transfer of ownership. A deed called a deed of release can, by using words of sufficient amplitude, transfer title to one having no title before the transfer....

34. In this case, admittedly, the mother/second defendant executed the release deed dated 28.12.2005 after receipt of valid consideration from the plaintiffs and it was also registered before the competent registering authority which disclose the intention of the effect transfer of her share in the suit property in favour of their daughters, the plaintiffs herein. In such circumstance, the submissions made by the learned counsel for the first defendant/appellant that the release deed dated 28.12.2005 executed by the second defendant in favour of the plaintiffs will also enure to his benefit is legally unsustainable.

35. It is well settled that for filing a suit for partition, the principles laid down under the Limitation Act has no application. Even otherwise, the second defendant/mother has executed the release deed on 28.12.2005 and three years thereafter, the plaintiffs thought it fit to file the suit for partition. It is needless to mention that in a suit for partition, the possession of the first defendant or second defendant in the suit property is construed to be a joint possession of the suit property for and on behalf of the plaintiffs. In such circumstance also, we are not inclined to accede to the plea of ouster or limitation raised by the first defendant.

36. The yet another submission made by the learned counsel appearing for the first defendant/appellant is that the second plaintiff has not entered into the witness box during trial and therefore, it amounts to admission by the second plaintiff with

respect to the averments made in the written statement filed by the first defendant. We find no force in such submission of the counsel for the first defendant/appellant. During the course of trial, the first plaintiff stepped into the witness box and adduced evidence. Such evidence adduced by the first plaintiff is for and on behalf of the second plaintiff as well. Further, merely because one of the plaintiffs in the suit did not step into the witness box, it cannot be construed as an admission of the defence raised in the written statement.

37. As regards the plea of the learned counsel for the first defendant/ appellant to permit the appellant to receive the documents at the appellate stage, admittedly, the first defendant has not filed a single document before the trial court to substantiate his defence. While so, the first defendant/appellant has filed MP No. 1 of 2014 before this Court seeking leave to receive documents at the appellate stage. In the affidavit filed in support of this petition, it is contended by the first defendant that he has handed over the documents to the counsel engaged by him before the trial court, but the counsel has misplaced those documents and eventually did not file the documents before the trial court. It is further stated that when the first defendant asked the counsel engaged by him for not filing the documents in support of his defence, he was informed that in a suit of this nature, it is enough for the first defendant to lead oral evidence and the burden is on the plaintiffs to prove their case. Further it is stated that after the trial court passed the preliminary decree in the suit filed by the plaintiffs, the counsel has returned back the document and the first defendant also received it. In this regard, it is contended by the learned counsel for the first defendant/appellant that this Court, in exercise of the powers conferred under Order 41 Rule 27 of the Code of Civil Procedure is empowered to receive the documents at the appellate stage to render complete justice. Opposing the said plea, the learned counsel for the plaintiffs/respondents 1 and 2 would contend that the reasons assigned by the first defendant for not marking the documents before the trial court are vague and bald. The present petition has been filed only to fill up the lacuna in the defence projected by the first defendant.

38. In this regard, useful referene can be made to the decision of the Honourable Apex Court in the case of (Malayalam Plantations Limited vs. State of Kerala and another) reported in AIR 2011 Supreme Court 559 which was relied on by the learned counsel for the plaintiffs/respondents 1 and 2. In that case, it was held by the Honourable Apex Court as follows:-

11. If any petition is filed under Order 41 Rule 27 in an appeal, it is incumbent on the part of the appellate Court to consider at the time of hearing of the appeal on merits so as to find out whether the

documents or evidence sought to be adduced have any relevance/bearing in the issues involved. Further, additional evidence could be adduced in one of the three situations namely (a) whether the trial court has illegally refused the evidence although it ought to have permitted (b) whether the evidence sought to be adduced by the party was not available despite the exercise of due diligence and (c) whether additional evidence was necessary in order to enable the Appellate Court to pronounce the judgment or any other substantial cause of similar nature. It is equally well settled that additional evidence cannot be permitted to be adduced so as to fill in the lacuna or to patch up the weak points in the case."

39. Applying the above decision of the Honourable Supreme Court to the case on hand, the claim of the first defendant for reception of additional document will not fall in any of the parameters laid down by the Honourable Supreme Court. It is not the case of the first defendant that he has filed the documents before the trial court but it was unlawfully rejected by the trial court. It is also not the case of the first defendant that in spite of exercise of due diligence, he was prevented from filing the documents in his possession. The claim made by the first defendant for not marking the documents before the trial court is that he has entrusted the documents to his counsel but he misplaced the documents and did not file the documents before the trial court. It is further stated that the counsel engaged by him before the trial court has informed that it is sufficient for him to lead oral evidence to disprove the case of the plaintiffs. In such circumstances, we are of the view that the first defendant ought to have filed an affidavit of the counsel engaged by him before the trial court to substantiate the above allegations. The first defendant did not do so. In the absence of an affidavit of the counsel engaged by the first defendant, we are not in a position to accept the theory put forth by the first defendant for not marking the documents before the trial court. Further, it is not open to the first defendant to make fresh allegations and call upon the other side to admit or deny such allegations at the stage of appeal, which is contrary to the provisions contained under Order 41 Rule 27 of CPC. Therefore, we are of the view that the plea of the first defendant to grant leave to mark the additional documents at the appellate stage cannot be countenanced and it has to be rejected.

40. For all the reasons mentioned above, we confirm the preliminary decree and judgment passed by the trial Court. The appeal suit is dismissed. No costs. Miscellaneous Petition No. 1 of 2014 filed by the first defendant for reception of additional documents is dismissed. Miscellaneous Petition Nos. 1 and 2 of 2013 are closed. Having regard to the fact that the

suit was filed by the plaintiffs/respondents 1 and 2 herein for partition of the suit property in the year 2009, the trial court is directed complete the final decree proceedings and to pass orders thereof within a period of four months from the date of receipt of a copy of this Judgment.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

To

The Additional District Judge
Kancheepuram at Chengalpattu

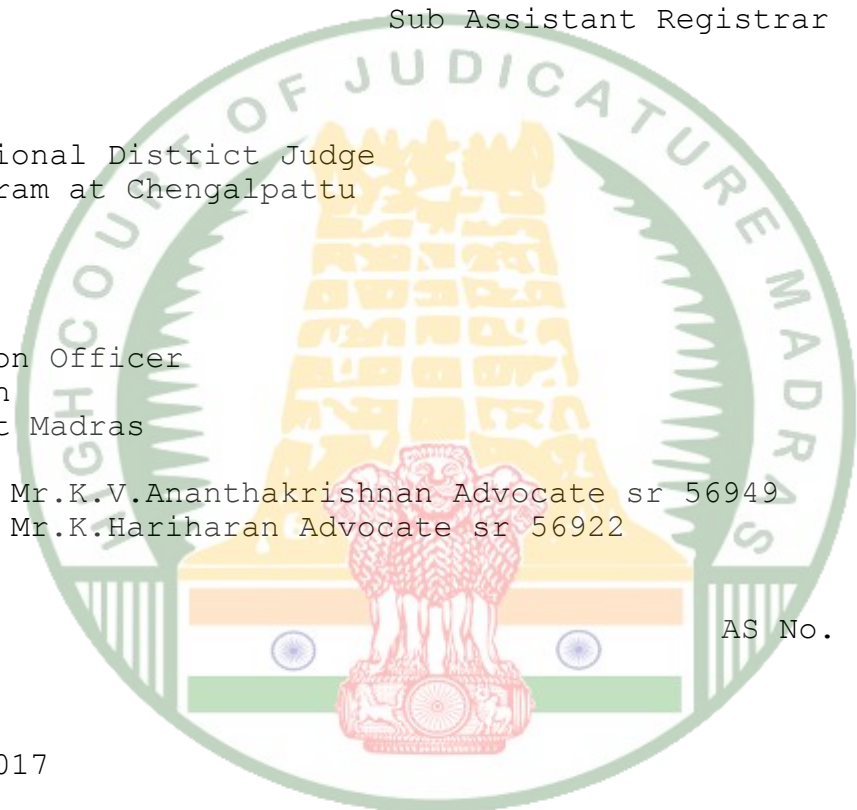
copy to

The Section Officer
VR Section
High Court Madras

+2 ccs to Mr.K.V.Ananthakrishnan Advocate sr 56949
+2 ccs to Mr.K.Hariharan Advocate sr 56922

AS No. 190 of 2013

ssi(co)
aa05/10/2017

The seal of the High Court of Madras is a circular emblem. It features a central yellow temple gopuram (tower) with a red lion capital on top. Below the gopuram is a red elephant capital. The entire emblem is set against a background of horizontal stripes (green, white, orange, white, green). The words "HIGH COURT OF JUDICATURE MADRAS" are written in a circle around the emblem. Below the emblem, the motto "सत्यमेव जयते" (Satyameva Jayate) is written in Devanagari script.

WEB COPY