

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.09.2019

PRONOUNCED ON : 01.11.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

A.S.No.760 of 1995

1. Saravana Kangeya Gounder
2. Ramaswamy Appellants/Plaintiffs

Vs.

1. Dhanalakshmi Ammal
2. Karthikeyan (minor)
3. Periyamayaki (minor)
4. Agathilingam Gounder
5. Saravana Kangeyan
6. Balasubramanian
7. Ponnuswamy Gounder
8. Kaliappa Gounder (died)
9. Thammanna Gounder
10. Muthuswamy Gounder (Deceased)
11. Venkataramanaswami
12. Pankajam
13. Palaniswamy Gounder Respondents/Defendants 3 to 14

(R10 died memo recorded dated 10.01.2019)

(R2 & R3 declared as major & their guardianship
is discharged vide order of the Court dated 23.09.2019)

(R13 brought on record as LR of the deceased R8
viz., Kaliappa Gounder vide Court order dated
13.11.2018 made in C.M.P. No.22130 of 2017)

Prayer: Appeal Suit filed under Section 96 of Civil
Procedure Code as against the judgment and decree dated
21.01.1994, passed in O.S.No.79 of 82, on the file of the
Subordinate Court, Dharapuram.

For Appellants : Mr.B.Vijayakumar

For R5 & R6 : Mr.R.Singaravelan, Senior Counsel
for M/s. V.Ambika

For R7 : Mr.V.Ananthamoorthy

For R1 to R4,R9,
R11, R12 and R13: No appearance/Set exparte
vide order dated 26.09.2019

For R10 : Notice dispensed with

JUDGMENT

Aggrieved over the judgment and decree dated 21.01.1994, passed in O.S. No.79 of 82, on the file of the Subordinate Court, Dharapuram, the plaintiffs have come forward with the present first appeal.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3. Suit for partition.

4. The case of the plaintiffs, in brief, is that the first defendant is their step mother and the senior wife of their father Palani Kangaya Gounder and the plaintiffs' mother Sivakami ammal was the second wife of Palani Kangaya Gounder and she is no more. Palani Kangaya Gounder and the plaintiffs constituted members of a joint family and are possessed of properties more specifically described in the plaint A schedule and were in the enjoyment of the same till the demise of Palani Kangaya Gounder in or about 1967 and during the life time of Palani Kangaya Gounder and the mother of the plaintiffs, a nominal partition deed seems to have been entered into by Palani Kangaya Gounder on the one hand and the plaintiffs represented by their mother and guardian on the other hand in the year 1964. However, the abovesaid partition deed was not acted upon and was not given effect to and the plaintiffs' father continued to be in the possession of the entire properties under the joint family. After the demise of Sivakami Ammal, the plaintiffs were living as the members of the family belonging to Palani Kangaya Gounder and the abovesaid partition deed was treated as non-est and on attaining majority, the plaintiffs have also not affirmed the said partition deed. The partition effected was also neither fair nor proper, as valuable properties had been kept apart as representing their father's share and useless properties were sought to be allotted to the plaintiffs share. The same is not binding upon the plaintiffs and the plaintiffs are entitled to ignore the same. Further, in the suit laid by the first defendant in O.S.No.133/1967, on the file of the District Munsif Court, Dharapuram, no evidence was adduced regarding the abovesaid partition, which would go to show that the abovesaid partition was not acted upon and it was sham and nominal and the defendants 1 and 2 are estopped from

claiming any rights under the abovesaid partition deed. In any event, the decision in O.S.No.133/1967 regarding the partition would operate as resjudicata. The second defendant is the sister's son of Palani Kangaya Gounder and on gaining confidence, he had instigated Palani Kangaya Gounder to execute a registered settlement deed dated 07.06.1966 in respect of the valuable properties described in the plaint B schedule in his name as well as in the name of the first defendant and the abovesaid settlement deed is not valid and the first defendant got a registered maintenance deed dated 16.07.1951 and obtained valuable properties and hence, the abovesaid two deeds were fraudulently obtained in respect of the joint family properties and hence, void and not binding on the plaintiffs. Despite the abovesaid deeds, the properties continued to remain in the possession and enjoyment of Palani Kangaya Gounder as the joint family properties. The properties comprised in the abovesaid maintenance and settlement deeds are described in the plaint B schedule. Palani Kangaya Gounder died intestate and the defendants 1 and 2 propounded the Will said to have been executed by Palani Kangaya Gounder which was the subject matter of O.S.No.133/1967 and in the abovesaid suit, the Will projected by the defendants 1 and 2 had been declared as not true and genuine and the appeal preferred against the same in A.S.No.11 of 1971 was also dismissed and the abovesaid Will projected by the defendants 1 and 2 is therefore not valid and binding upon the plaintiffs. The decision with reference to the same in the earlier proceedings would operate as resjudicata. The first defendant purported to execute the settlement deed in respect of the properties described in the plaint C schedule on 23.04.1970 purchased in her name by Palani Kangaya Gounder out of the joint family funds. However, the said properties had only been treated as joint family properties. The sale deed dated 14.05.1959 is a nominal transaction purchased in the name of the Sivakami ammal for the benefit of the family. The properties described in the plaint D schedule are the joint family properties and in the possession of the plaintiffs. Thus, the plaint A, B, C and D schedule properties are all the joint family properties belonging to Palani Kangaya Gounder and after his demise, the plaintiffs and the first defendant have succeeded to the same. The plaintiffs are entitled to 2/3 share by birth and 2/3 share out of the 1/3 share belonging to their father. In other words, the plaintiffs are entitled to 8/9th share in the plaint schedule properties and the first defendant is entitled to the remaining 1/9th share. The second defendant has no right over the plaint schedule properties and he has executed a registered mortgage deed dated 30.05.1968 in favour of the defendants 4 and 5. The second defendant has no right to encumber the properties not belonging to him. The abovesaid mortgage is

not valid and binding on the plaintiffs. After the institution of the suit, the defendants 1 and 2 have alienated certain properties in favour of the defendants 7 and 8 and therefore, the defendants 7 and 8 have been impleaded as parties. Inasmuch as the plaintiff F schedule properties are in the possession of defendants 9 to 11, they are also made as parties to the proceedings and Palani Kangaya Gounder had mortgaged the plaintiff C schedule properties in favour of Kuppammal and Lakshmiammal and the second defendant had claimed right from them and hence, the 12th defendant has been impleaded as a party and hence, according to the plaintiffs, the need for the suit for partition.

5. The first defendant filed the written statement adopted by the defendants 3, 7 and 8 and put forth the case denying that the plaintiff A schedule properties belonged to the plaintiffs and their father Palani Kangaya Gounder as the joint family ancestral properties. The grand father of the plaintiffs, namely, Palani Kangaya Gounder became insolvent and thereafter, the mortgagee Muthusami Gounder @ Avanasai Gounder filed a suit in O.S.No.118 of 1931, on the file of the Subordinate Court, Coimbatore and the entire properties belonging to the abovesaid Palani Kangaya Gounder were purchased by the decree holder and others and therefore, there were no ancestral properties in the hands of Palani Kangaya Gounder, the father of the plaintiffs. Therefore, the case of the plaintiffs that Palani Kangaya Gounder had ancestral properties and the plaintiffs had right over the same is false. The plaintiffs' father had subsequently purchased 54.50 acres by virtue of the sale deed dated 04.01.1943, from Muthusami Gounder and they are his self acquired properties and on 16.7.1951, he executed a maintenance deed in favour of the first defendant conveying the 8 acres of land in S.F.Nos.414 and 415 and since then, it is only first defendant who has been enjoying the said property separately. By way of the sale deed dated 14.06.1959, Palani Kangaya Gounder and the first defendant jointly purchased 13.77 acres in S.F.Nos. 338 and 339 B and each of them is entitled to common $\frac{1}{2}$ share in the abovesaid items and they have also mortgaged the said properties. Subsequently, Palani Kangaya Gounder sold it to Sellamuthu Gounder and others an extent of 10.58 acres consisting of the portions in S.F.Nos.414, 409 and 475 and therefore, Palani Kangaya Gounder and the first defendant had been exercising absolute right in respect of the properties belonging to them separately and therefore, it is false to contend that the plaintiff schedule properties are the joint family properties of Palani Kangaya Gounder and the plaintiffs. Inasmuch as the plaintiffs' mother and her brothers wanted separate properties, Palani Kangaya Gounder gave them an extent of 26.12 acres in S.F.Nos.525 B, 542 B and 543 by virtue of the partition deed dated

17.04.1964 and the abovesaid properties had been granted to the plaintiffs who were minors represented by their mother and guardian Sivakami ammal and the remaining properties were retained by Palani Kangaya Gounder as described in the abovesaid partition deed. The abovesaid partition deed had been brought about with the mutual consent and desire of the parties concerned and therefore, the case of the plaintiffs that the abovesaid partition deed was nominally effected and not acted upon is false and on the other hand, the abovesaid partition deed was acted upon and the plaintiffs themselves have exercised full ownership in respect of the properties allotted to them under the abovesaid partition deed. The case of the plaintiffs that the abovesaid partition deed was not fair and useless properties were granted to them is false. The properties allotted to the plaintiffs were free from encumbrance and they were not allotted any debt, whereas, the properties retained by their father is subject to encumbrance and also liable to discharge several debts. The plaintiffs were amply benefited by way of the abovesaid partition deed and Palani Kangaya Gounder had sold 6 acres of land in S.No.544 B to Muthusami Gounder. The plaintiffs have failed to include the said properties in the present suit. The reference in the plaint to O.S. No.133/67 by the plaintiffs is misleading and irrelevant. The dispute in the abovesaid suit was with reference to the Will left by Palani Kangaya Gounder in respect of the properties concerned and the said suit has nothing to do with the plaint schedule properties. So, the case of the plaintiffs that the decision rendered in O.S.No.133 of 1967 would operate as resjudicata to the pleas set out by the defendants qua the partition deed of the year 1964 is false. The settlement deed executed by Palani Kangaya Gounder dated 07.06.1966 is valid and binding upon the plaintiffs. The maintenance deed dated 16.07.1951 in favour of the first defendant is true and valid. The properties comprised in the maintenance deed and the settlement deed were enjoyed by the defendants 1 and 2 separately. The plaintiffs are not entitled to claim any partition in the properties covered under the abovesaid maintenance deed and the settlement deed. The first defendant contributed her share of consideration towards the sale deed dated 14.05.1959 and therefore, the allegations that the abovesaid sale deed is a nominal one and it is purchased in the name of the first defendant for the benefit of the family is false. The common $\frac{1}{2}$ share of the properties covered in the abovesaid sale deed belongs to the first defendant absolutely. The first defendant has no objection for the division of the $\frac{1}{2}$ share belonging to Palani Kangaya Gounder in the properties comprised in the abovesaid sale deed. The settlement deed executed by the first defendant in favour of the third defendant on 23.04.1970 is valid and the plaintiffs are not entitled to question the same. The plaint D schedule properties are

the lands allotted to the share of the plaintiffs under the partition deed dated 17.04.1964 and enjoyed by them in their own right. The plaintiffs are not entitled to any other lands excepting the plaint D schedule properties. Other than claiming their true share in the common $\frac{1}{2}$ share in S.F.Nos. 338 and 339 B, the plaintiffs are not entitled to claim any share in the other plaint schedule properties. The plaintiffs' mother had been living separately and therefore, the claim of the plaintiffs that even after the partition deed dated 17.04.1964, they had been living with Palani Kangaya Gounder and enjoying the properties above is false. The sixth defendant is not a co-sharer of the suit properties and he has no right over the suit properties. The suit properties are not properly described and there is no cause of action for the suit. The suit properties are not properly valued and the plaintiffs cannot seek any relief of partition without setting aside the said partition deed dated 17.04.1964 to which they are eonominee parties and the court fee paid is incorrect and the suit is barred by limitation and hence, the suit is liable to be dismissed.

6. The additional written statement has been filed by the first defendant and adopted by the defendants 7 and 8, wherein, it has been pleaded that the properties described in the plaint 'E' schedule belonged to the family of the first defendant's father. They were brought to sale in the decree obtained in O.S.No.342 of 1956, on the file of the District Munsif Court, Dharapuram against the first defendant's father Venkataramanasami Gounder and his sons and in the execution proceedings, the properties were purchased by the first defendant out of her own separate funds. Since her father and her brothers were the original owners of the properties and the first defendant did not apply for the possession of the same, the defendant's father and brothers had been exercising the full ownership over the said properties and also alienated the same and the first defendant had also executed a release deed in respect of the first sale deed. In the other sale deed executed after the death of her father, she joined as the legal heir of her father. The first defendant did not claim any right in the plaint E schedule properties and no one including the plaintiffs would be entitled to claim any right in respect of the plaint 'E' schedule properties. They were sold to the third parties and the purchasers are in the possession and enjoyment of the same. The purchaser have to be impleaded as the parties to the suit. Hence, the suit is bad for non-joinder of necessary parties. In any event, the plaintiffs are not entitled to claim any share in the 'E' schedule properties and the plaintiffs' claim is barred by limitation and the suit is liable to be dismissed.

7. In the additional written statement filed by the first defendant, the case has been projected that the plaintiffs are not entitled to claim any relief against the E and G schedule properties. The plaint E schedule properties never belong to the plaintiffs ancestrally and as already referred to, the same belong to the first defendant's father and his legal representatives including the first defendant. The plaint G schedule properties are not entitled to be divided without setting aside the sale deed executed by the first defendant's father in respect of the G schedule properties. The plaintiffs cannot claim any right with reference to the same and the suit laid by the plaintiffs with reference to the plaint G schedule properties is barred by limitation. Furthermore, the properties covered under the maintenance deed dated 16.07.1951 became the absolute properties of the first defendant by virtue of section 14(1) of the Hindu Succession Act of 1967 and hence, the suit is liable to be dismissed.

8. The plaintiffs have filed the reply statement contending that the sale effected in respect of the plaint E and G schedule properties are pendente lite and hence, the pendente lite purchasers are not necessary to be impleaded. Furthermore, the defendants 7 and 8 have impleaded themselves as parties. It is only after the suit that the mortgage was assigned to the 12th defendant and there is no need on the part of the plaintiffs to set aside the false sale deeds as alleged by the first defendant and hence, the suit may be decreed as prayed for.

9. The second defendant filed a written statement contending that the suit properties are not the ancestral properties of Palani Kangaya Gounder as claimed by the plaintiffs. The suit properties are the self acquired properties of Palani Kangaya Gounder and during his life time, he had made provisions for the maintenance in favour of the first defendant and furthermore, also effected partition deed allotting shares to the plaintiffs and the abovesaid partition deed is true, valid and binding on the plaintiffs. Palani Kangaya Gounder had also executed a settlement deed in respect of certain properties in favour of the defendants 1 and 2 and the same is true, valid and binding on the plaintiffs. Without setting aside the partition deed dated 17.04.1964, the plaintiffs are not entitled to claim any reliefs in the suit. The defendants 1 and 2 are enjoying the properties covered under the settlement deed dated 07.06.1966 since the date of the execution. The decision rendered in O.S.No.133 of 1967 would not operate as resjudicata with reference to the defence version put forth by the defendants. The plaintiffs are not entitled to claim any share in the suit properties. The sixth defendant has been mistakenly

impleaded as a party and he has no right over the suit properties. The suit is barred by limitation and the suit properties have not been properly described. There is no cause of action for the suit. In other aspects, the second defendant has adopted the written statement filed by the first defendant and therefore, the suit is liable to be dismissed.

10. The sixth defendant filed a written statement contending that he is a bonafide purchaser in S.F.No.338 and 339-B as per the sale deed dated 20.07.1972 and enjoying the same since then. The defendants therefore prayed to allot the abovesaid 6 acres in their favour and dispose of the suit accordingly.

11. The seventh defendant has filed the additional written statement adopted by the eighth defendant, wherein, he has claimed that the plaintiffs are not entitled to seek any reliefs in respect of the plaint E schedule properties. The plaintiffs' father has nothing to do with the Court auction sale effected in O.S.No.342 of 56, on the file of the District Munsif Court, Dharapuram. The allegations that the funds were supplied by the plaintiffs' father for the purchase of the said properties by the first defendant is false. The abovesaid properties described in the E schedule originally belonged to Venkataramanasami, the father of the first defendant. When the same had been brought for sale, the first defendant purchased the same in the auction and they are the separate properties of the first defendant. Inasmuch as the abovesaid properties had been jointly enjoyed by her father and mother, she has not taken the possession of the same and the Court auction sale was lost due to efflux of time and the plaintiffs are not entitled to claim any share in the plaint C schedule properties and further would also putforth the case that the plaintiffs are not entitled to claim any share in the plaint C schedule properties belatedly and the said claim is barred by limitation and adverse possession and prays for the dismissal of the plaintiff's suit.

12. The ninth defendant had filed the written statement contending that the plaintiffs' father sold the G schedule properties on 16.07.1965 for valid consideration to one Muthusami Gounder and Muthusami Gounder sold the same to the defendants 9 to 11 and the plaintiffs therefore are not entitled to claim any share in respect of the plaint G schedule properties and the sale of the plaint G schedule properties by the plaintiffs' father is binding upon the plaintiffs and Muthusami Gounder as well as the defendants 9 to 11 are bonafide purchasers for value without notice and the plaintiffs are not entitled to claim any share in the same without setting aside the sale deed by his father in respect of the G schedule properties and

hence, the suit is liable to be dismissed.

13. On the basis of the abovesaid pleas set out by the respective parties, the following issues were framed by the trial Court for consideration:

1. Whether the partition deed dated 17.04.1964 executed by Palani Kangaya Gounder is nominal and not acted upon?

2. Whether the plaintiffs are estopped from challenging the abovesaid partition deed dated 17.04.1964?

3. Whether Palani Kangaya Gounder and the plaintiffs remained as joint family even after the execution of the partition deed dated 17.04.1964?

4. Whether the maintenance deed and the settlement deed executed by Palani Kangaya Gounder are valid?

5. Whether the decision rendered in O.S.No. 133 of 1967 on the file of the District Munsif Court, Dharapuram would operate as resjudicata to the present suit?

6. Whether the plaint C schedule properties were purchased Benami in the name of the first defendant from the joint family income?

7. Whether the mortgage deed executed by the second defendant in favour of the fourth and fifth defendants is valid and binding upon the plaintiffs?

8. Whether the sixth defendant is entitled to any right in the plaint schedule properties?

9. In which of the plaint schedule properties the plaintiffs are entitled to claim partition?

10. Whether there is cause of action for the suit?

11. Whether the suit as framed is not maintainable?

12. Whether the suit has not been properly valued?

13. Whether the suit is barred by limitation?

14. Whether the plaint E schedule properties were purchased by Palani Kangaya Gounder Benami in the name of the first defendant?

15. Whether the plaintiffs are entitled to challenge the sale effected in favour of the first defendant in respect of the plaint E schedule properties?

16. Whether the plaintiffs are estopped from claiming any right in respect of the plaint A schedule properties?

17. Whether the suit is not maintainable on account of non impleading of necessary parties?

Issues framed on 02.08.1977:

1. Whether the plaint G schedule properties are the joint family properties of the plaintiffs and their father?

2. Whether the sale effected by the plaintiffs' father in respect of the plaint G schedule properties is binding upon the plaintiffs?

3. Whether the defendants 9 to 11 have prescribed title to the plaint G schedule properties as claimed by them?

4. Whether the defendants 9 to 11 had purchased the G schedule properties for valid consideration bonafidely without notice? Whether they are entitled to claim any equity in respect of the said properties?

5. Whether the defendants 9 to 11 are entitled to claim any damages for the improvements made in respect of the plaint G schedule properties?

6. Whether the plaintiffs are entitled claim any share in the plaint G schedule properties without setting aside the sale deed dated 16.07.1965

executed by their father with reference to the same? Whether the suit as framed by the plaintiff is not maintainable?

7. Whether the defendants 9 to 11 are entitled to any compensation costs?

8. Whether the plaintiffs are entitled to claim any right in respect of the mortgaged properties obtained by the 12th defendant?

Issues framed on 18.07.1978:

Whether the first defendant had acquired absolute right over the properties by virtue of Section 14(1) of the Hindu Succession Act of 1956?

Issues framed on 17.10.1982

Whether the plaintiffs are statutorily barred from claiming $\frac{1}{2}$ share in the plaint C schedule properties?

Issues framed on 23.03.1984:

Whether the plaint schedule properties are the joint family properties belonging to the plaintiffs and their father Palani Kangaya Gounder or the separate properties of Palani Kangaya Gounder?

14. In support of the plaintiffs' case PWS 1 to 14 were examined Exs.A1 to A36 were marked. On the side of the defendants, DWs1 to 11 were examined, Exs.D1 to D84 were marked.

15. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to declare that the plaintiffs are jointly entitled to 1/3 share in the plaint C schedule properties and accordingly granted the preliminary decree in respect of the plaint C schedule properties and dismissed their suit in other aspects. Impugning the same, the present first appeal has been preferred by the plaintiffs.

16. The following main points arise for determination in this first appeal:

1. Whether the suit properties are the joint family properties of Palani Kangaya Gounder and the plaintiffs as put forth by the plaintiffs or the separate properties of the Palani

Kangaya Gounder as put forth by the defendants?

2. Whether the partition deed dated 17.04.1964 is true, valid and binding on the plaintiffs?

3. Whether the plaintiffs are entitled to claim any relief prayed for without setting aside the partition deed dated 17.04.1964?

4. Whether the maintenance deed and the settlement deed executed by Palani Kangaya Gounder in favour of the defendants 1 and 2 are true, valid and binding on the part of the plaintiffs?

5. Whether the plaint C schedule properties had been purchased Benami in the name of the first defendant as put forth by the plaintiffs?

6. Whether the plaintiffs are entitled to claim any share in the plaint schedule properties as prayed for?

7. To what relief the plaintiffs/appellants are entitled to ?

8. To what relief the defendants are entitled to?

Point Nos.1 to 6:

17. The relationship between the parties is not in dispute. It is found that the first defendant, since deceased, is the senior wife of the deceased Palani Kangaya Gounder. The plaintiffs' mother Sivakami ammal is the second wife of the deceased Palani Kangaya Gounder and through Sivakami ammal, the plaintiffs are born. It is also found that the plaintiffs' grandfather is also named as Palani Kangaya Gounder. The primary question that has to be decided in the suit is whether the plaint schedule properties are the joint family properties of Palani Kangaya Gounder and the plaintiffs as put forth by the plaintiffs or the separate properties of Palani Kangaya Gounder as contended by the defendants. According to the plaintiffs, Palani Kangaya Gounder, their father, had ancestral properties and out of the income derived from the same, he had acquired the plaint A schedule properties. From the materials placed on record, it is found that the grandfather of the plaintiffs, namely, Palani Kangaya Gounder had been declared as insolvent and accordingly, all his properties were brought for auction and it is found that one Muthusami Gounder @ Avanasai Gounder had purchased the properties along with others in the Court auction. According to the plaintiffs, the abovesaid properties had

been purchased by their father Palani Kangaya Gounder in the name of Muthusami Gounder @ Avanasi Gounder and accordingly, further put forth the case that the mortgage executed by their grandfather had been nominally effected in favour of Muthusami Gounder with a view to defeat the creditors. It is found that the plaintiffs' father Palani Kangaya Gounder had purchased the properties from Muthusami Gounder @ Avanasi Gounder by way of a sale deed dated 12.01.1943, marked as Ex.B1. On a perusal of the recitals contained in the abovesaid sale deed, it is found that there are clear recitals contained therein pointing to the purchase of the properties by Muthusami Gounder @ Avanasi Gounder in the Court auction with reference to the same and subsequently, the sale in favour of the plaintiffs' father Palani Kangaya Gounder. By virtue of the sale deed dated 04.01.1943, a total extent of 54.50 acres had been acquired by the plaintiffs' father Palani Kangaya Gounder. As rightly determined by the trial Court from the materials available on record, it is found that inasmuch as the grandfather of Palani Kangaya Gounder had been declared as insolvent, the inevitable conclusion that could be made is that all his properties had been brought to auction and the same had been purchased by Muthusami Gounder @ Avanasi Gounder and others and the plaintiffs' father had subsequently purchased the plaintiff A schedule properties from Muthusami Gounder @ Avanasi Gounder by virtue of the sale deed Ex.B1. In such view of the matter, the claim of the plaintiffs that the mortgage effected by their grandfather and the purchase made in the name of their father are all nominally effected on account of the close relationship, as such, cannot be countenanced sans any proof pointing to the same. When it is found that the plaintiffs' father had purchased the properties under Ex.B1 sale deed, nearly 6 years after the same had been purchased by his vendor in the auction, in such view of the matter, the case of the plaintiffs that the properties owned by their father by virtue of Ex.B1 sale deed are ancestral properties, as such, cannot be accepted and believed and therefore, as rightly determined by the trial Court, when there is no material on the part of the plaintiffs to hold that their father had owned any ancestral properties prior to Ex.B1 sale deed and when the ancestral properties owned by their grandfather had already brought to sale through Court auction and purchased by various persons and when it is found that the plaintiffs father had been also engaged in the lease cultivation of others properties and getting income and in such view of the matter, it is found that the properties acquired by the plaintiffs' father Palani Kangaya Gounder under Ex.B1 sale deed are rightly determined to be his separate properties and therefore, the determination of the trial Court that the suit properties are not the joint family properties of Palani Kangaya Gounder do not warrant any interference. I therefore hold

that the plaint schedule properties are the separate properties of Palani Kangaya Gounder and not the joint family properties of Palani Kangaya Gounder and the plaintiffs.

18. The suit properties being the separate properties of Palani Kangaya Gounder, it is thus found that during his life time, he had effected partition allotting certain shares in his favour and certain shares in favour of the plaintiffs' mother and the plaintiffs by virtue of the partition deed dated 17.04.1964, marked as Ex.B4 and accordingly, it is found that by way of the abovesaid partition deed, the plaintiffs had been allotted with 26.12 acres and Palani Kangaya Gounder has been allotted 24.58 acres of land. From the evidence adduced in the matter and also after going through the recitals contained in the partition deed, the case of the defendants that the plaintiffs had been allotted more valuable properties and the properties allotted to Palani Kangaya Gounder are not valuable properties as such cannot be believed and the same has been rightly determined by the trial Court. However, the fact remains that the partition deed dated 17.04.1964 had come to be executed during the life time of Palani Kangaya Gounder allotting the share of the plaintiffs. Therefore, the question that remains to be answered is whether the plaintiffs are entitled to claim the reliefs prayed for without setting aside the abovesaid partition deed in which admittedly they are eonomiee parties.

19. Arguments has been put forth by the plaintiffs that in the suit in O.S. No.133 of 1967, on the file of the District Munsif Court, Dharapuram, the abovesaid partition deed has been declared against the defendants. Therefore, the same would operate as *resjudicata* to the defence version. Considering the nature of the suit involved in O.S. No.133 of 1967 and the issues involved therein, the same being only a money suit and decided along with the O.P.No.13 of 1969, in such view of the matter, inasmuch as the abovesaid sale was centering on the validity of the Will and the partition deed dated 17.04.1964 having not been projected in the said suit and no evidence has been adduced with reference to the same in the above suit and when there is no need for the determination of the truth and validity of the said partition deed in the said suit, in such view of the matter, it is found that as rightly determined by the trial Court, the decision if any rendered in the abovesaid suit qua the partition deed dated 17.04.1964 cannot be held to be substantially raised and determined in the said suit and in such view of the matter, it is found that the decision rendered in O.S.No. 133 of 1967 would not operate as *resjudicata* in respect of the partition deed dated 17.04.1964 as put forth by the defendants.

20. The plaintiffs being the eonominee parties to the abovesaid partition deed, as rightly put forth by the contesting parties, the plaintiffs cannot claim any relief without setting aside the partition deed. In this connection, the trial Court has, following the various decisions cited before it, reported in 1956 (2) M.L.J. page 411 (Sankaranarayana pillai and another Vs. Kandasami pillai) and 1975 (2) M.L.J. Page 304 (R.Muthammal Vs. Narmada and others), rightly held that the plaintiffs being the eonominee parties to the abovesaid partition deed are not entitled to seek the reliefs without setting aside the same as per law. It is found that the plaintiffs are not entitled to claim the reliefs prayed for and on that ground, the plaintiffs suit is legally not sustainable.

21. Though the plaintiffs would claim that the partition deed dated 17.04.1964 is nominal and not acted upon, however, considering the evidence adduced by the respective parties, it is found that following the abovesaid partition deed, when it is found that the plaintiffs' mother had mortgaged the properties allotted to the plaintiffs' share and the plaintiffs had also subsequently alienated the same, the abovesaid factors would only go to show that inasmuch as the abovesaid partition had been truly effected and acted upon, in such view of the matter, the plaintiffs cannot be allowed to ignore the same by contesting that the same had been nominally effected and not acted upon.

22. As above pointed out, the suit properties being the separate properties of Palani Kangaya Gounder, Palani Kangaya Gounder is entitled to execute the maintenance deed in favour of the first defendant and also execute the settlement deed in favour of the defendants 1 and 2 in respect of the properties belonging to him and in such view of the matter, the claim of the plaintiffs that the maintenance deed executed in favour of the first defendant dated 16.07.1951 marked as Ex.B2 and the settlement deed executed by Palani Kangaya Gounder in favour of the defendants 1 and 2 dated 07.06.1966 marked as Ex.B6 are not true, valid and binding upon them, as such, cannot be accepted in any manner. When it is found that the defendants 1 and 2 had accepted the abovesaid maintenance deed and the settlement deed and acted upon the same and enjoying the properties comprised therein and furthermore, when Palani Kangaya Gounder is entitled to execute the abovesaid deeds in favour of the defendants 1 and 2, in such view of matter, the case of the plaintiffs that they are not truly effected, not given effect to and binding upon them, as such, cannot be believed and accepted. As regards the case of the plaintiffs that there are some contradictions with reference to the repetition of the

properties in the maintenance deed and the settlement deed, as such, also cannot be accepted and the same has also been rightly considered and determined by the trial Court and accordingly, held that the abovesaid contradictions would not in any manner render invalid, the maintenance deed and the settlement deed executed by Palani Kangaya Gounder in favour of the defendants 1 and 2 and rightly held them to be true and valid and even binding upon the plaintiffs. Furthermore, as regards the properties allotted to the first defendant by Palani Kangaya Gounder, the same would also ripen into her absolute estate by virtue of Section 14 (1) of the Hindu Succession Act in favour of the first defendant, particularly, as regards the properties comprised in the maintenance deed marked as Ex.B2.

23. The plaint C schedule properties are found to have acquired in the name of Palani Kangaya Gounder and the first defendant. Though the plaintiffs would claim that the name of the first defendant is nominally included in the abovesaid sale deed, however, when the materials placed on record go to show that both Palani Kangaya Gounder and the first defendant had acquired the plaint C schedule properties, it is found that both are entitled to equal share in the abovesaid properties and therefore, it is found that at the most the plaintiffs would be entitled to claim only their share in respect of the $\frac{1}{2}$ share belonging to Palani Kangaya Gounder qua the plaint C schedule properties. Furthermore, considering the materials placed on record, when it is found that both the plaintiffs and the defendants have effected the sale transactions in respect of the plaint C schedule properties, in toto, inasmuch as Palani Kangaya Gounder had died intestate, with reference to his $\frac{1}{2}$ share in the plaint C schedule properties, the plaintiffs as his sons are found to be entitled to $\frac{2}{3}$ share in the plaint C schedule properties and the determination of the trial Court with reference to the same requires no interference. Therefore, the claim of the plaintiffs that the plaint C schedule properties had been purchased Benami in the name of the first defendant is unacceptable and rejected.

24. As regards the plaint E schedule properties are concerned, the plaintiffs would put forth the case that the same had been acquired by Palani Kangaya Gounder Benami in the name of the first defendant. However, the materials go to disclose that the properties originally belonged to the first defendant's father and they had been brought for sale and the same had been acquired by the first defendant and thereafter, the first defendant had not taken the possession of the same and the said properties continued to be remaining in the possession and enjoyment of her father and brothers and in such view of the matter, when the plaint E schedule properties are not shown to be belonging

to Palani Kangaya Gounder and enjoyed by him at any point of time, the trial Court has rightly determined that the plaintiffs are not entitled to claim any share in the same and no interference is called for with the abovesaid determination of the trial Court.

25. With reference to the plaint G schedule properties, when it is found that the same had been alienated by Palani Kangaya Gounder during his life time and when as above pointed out, the properties held by Palani KangayaGounder are his separate properties, the same cannot be questioned by the plaintiffs and therefore, the trial Court is found to be justified in declining the claim of shares put for the by the plaintiffs in respect of the plaint G schedule properties.

26. In the light of the abovesaid discussions, the point Nos.1 to 6 formulated in the first appeal are accordingly answered against the plaintiffs and in favour of the defendants.

Point Nos.7 and 8:

27. For the reasons aforesaid, the judgment and decree dated 21.01.1994, passed in O.S. No.79 of 82, on the file of the Subordinate Court, Dharapuram are confirmed and resultantly, the first appeal is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

sli

To:

The Subordinate Judge, Dharapuram.

Copy to:

The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.V.Anandha Murthy, Advocate, S.R.No.90632

+1cc to Mr.B.Viajayakumar, Advocate, S.R.No.90503

+1cc to M/s.V.Ambika, Advocate, S.R.No.91025

A.S.No.760 of 1995

(CO)

CB(14/08/2020)