

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.06.2019

PRONOUNCED ON : 20.08.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

A.S.No.1005 of 1989

1.Veerappa Kounder  
2.Veerammal

...Appellants/Defendants 2 & 4

Vs.

1.Subbaraya Kounder (Deceased)  
2.Damodara Kounder (Deceased)  
3.Janakirama  
4.Anathayi Ammal  
5.Venkatapathi  
6.Arumugam  
7.Ramachandran  
8.Rajakumari  
9.Valli  
10.Sivabagyam  
(RR4 to 10 brought on record as  
LRs of the deceased second respondent  
vide order of Court dated 02.11.2007  
made in CMP.No.12373/05 to 12375/05)

11.Muniammal  
12.Anbalagan  
13.S.Jayaraman  
14.S.Gopalakrishnan  
15.S.Chakrapani  
16.S.Uthiravel  
17.S.Thulasingham  
18.Rajalakshmi  
19.Vijaya

...Respondents/plaintiffs &  
Defendants 1 & 3

(RR11 to 19 brought on record as  
LRs of the deceased 1<sup>st</sup> respondent  
vide order of Court dated 21.08.2017  
made in CMP No.602 & 603/2013  
in A.S.No.1005 / 1989).

Prayer :- First Appeal has been filed under Section 96 CPC against the Judgement and Decree dated 31.03.1989 passed in O.S.No.235 of 1982 on the file of the Principal Subordinate Court, Cuddalore.

For Appellants : Ms.R.Meenal

For Respondents: No appearance / Set exparte  
vide order dated 26.06.2019

#### JUDGMENT

Aggrieved over the Judgement and Decree dated 31.03.1989 passed in O.S.No.235 of 1982 on the file of the Principal Subordinate Court, Cuddalore, the defendants 2 and 4 in the abovesaid suit 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 plaintiff in brief is that the plaintiff and the defendants 1 to 3 are the sons of Vasudeva Kounder (since deceased) and they constitute members of a Hindu Joint family and the 4<sup>th</sup> defendant is the wife of the second defendant. The properties described in the plaint "A" schedule belong to the aforesaid joint family and thus, the plaintiff and the defendants 1 to 3 are each entitled to  $\frac{1}{4}$  share in the abovesaid properties. The plaintiff's father Vasudeva Kounder died in or about 1963 and his wife Sivabagiammal died in or about 1967 and after his marriage, the plaintiff was not able to lead a peaceful life on account of the frequent quarrels amongst the ladies in the family and so, he separated himself from the other members of the joint family without having divided his share in the joint family properties and the defendants 1 to 3 are quite conscious of the abovesaid fact that the plaintiff has become separated in status alone and having right to claim his due share in the joint family properties, accordingly, it is stated by the plaintiff that while living separately, he was allowed to enjoy the plaint items 31, 32, 40 and north western 21 cents in item No.42 for his livelihood with the understanding that all the properties of the family could be divided later by metes and bounds and by the side of the items 30, 31 and 40, an extent of 3 acre 33 cents of punja land was owned by one Ariputhiri Kounder and he leased out the same to the plaintiff and the abovesaid lands had no irrigation facility and the plaintiff sunk a borewell and installed an electric motor pumbset in item

No.42 and with the help of the supply of water through the abovesaid Motor pumpset, the plaintiff was engaged in the agricultural operations and earning good income and also enjoying the leasehold lands as abovestated. The plaintiff had been repeatedly requesting the defendants 1 to 3 for the allotment of his due share in the suit properties. But, the defendants had been postponing the same under some pretext or the other. The plaintiff did not like to go to the Court for partition, considering the reputation of the family and taking advantage of the same, the suit in O.S.No.98 of 1979 has been levied by the defendants for partition on the file of the Subordinate Court, Cuddalore, without making the plaintiff as a party to the abovesaid suit and the defendants seem to have obtained a collusive decree in the abovesaid suit as if the properties belonged to them only and the second defendant has manoeuvred in such a way as to have for his share, the most valuable items and on the basis of the decree passed in the said suit, the defendants are also attempting to divide the properties between themselves and the defendants are not entitled to do so and hence, according to the plaintiff, he has been necessitated to institute the suit against the defendants for appropriate reliefs.

5.The averments contained in the written statement filed by the first defendant are that the suit laid by the plaintiff is not maintainable either in law or on facts and admitted the relationship between the parties set out in the plaint by the plaintiff and according to the first defendant, the joint family did not own large extents of ancestral properties as put forth in the plaint and the common ancestor Damodara Kounder, the great grandfather was working hard to live and he has left a small extent of property in Pungunam village in R.S.No.290 with an extent of 0.55 cents, which was hardly sufficient to run the family itself and the same is described as item No.25 in the plaint "A" schedule. Their grandfather Subbaraya Kounder has also acquired some properties either with his own ability or with the joint venture of himself and Vasudeva Kounder, the father of the plaintiff and the defendants 1 to 3 to an extent of about 3 acres 24 cents in the abovesaid village described as items 14 to 18, 20, 22 and 24 in the plaint schedule and an extent of 0.30 cents of Punja in Pulavanur Village described as item No.1 of the plaint schedule., the first defendant and his father Vasudeva Kounder with their hard work and joint venture in the agricultural and with the aid of the income from the common ancestral properties left by their grandfather started acquiring properties in the name of their father from 1953 onwards till 1957 as detailed in the written statement and thus, the first defendant and his father had acquired properties

to an extent of 5.57 acres during the abovesaid period and the other defendants were only youngsters then and the father was in management of the joint family till 1960 when he celebrated the marriage of the first defendant and the plaintiff during his management and the first defendant was forced to burden the family liabilities and headed the joint family and during the management of their father, family funds to the tune of Rs.1,500/- and 2,200/- were advanced to Arumuga Chettiar under bogiam deeds which were obtained in the name of the first defendant in respect of the properties described in the written statement and Arumuga Chettiar could not redeem the said lands and he had chosen to sell the same to the joint family and in the year 1961, the lands to the extent of 7.02 acres were purchased in the name of the first defendant from Arumuga Chettiar for a valid consideration with an undertaking to discharge the earlier bogiam deeds by him in favour of the first defendant and paid the various amounts as set out in the written statement during the course of the execution of the document and the registration and for the balance sum of Rs.12,000/-, the first defendant along with the plaintiff and the defendants 2 & 3 executed a simple mortgage on the same date of purchase in the name of Arumuga Chettiar's wife Annathammal and the abovesaid mortgage was gradually discharged by the first defendant and one Velayutha Chettiar, the vendor of the abovesaid properties has filed the suit against the first defendant and his father Arumuga Chettiar for partition claiming the share in the said properties in O.S.No.104 of 1968 on the file of the Subordinate Court, Cuddalore and after contest, the same was dismissed, the appeal preferred by him was also dismissed and the first defendant was forced to spend large amounts to retain those properties in the family till 1979, the first defendant got an extent of 1.06 acres in item 27 of the plaint schedule in exchange and also purchased an extent of 2.74 acres and an extent of 0.54 cents for a valid consideration set out in items 28, 42 and 43 of the plaint schedule in the year 1960 and also purchased the various other lands as set out in the written statements from the various persons described in the plaint schedule and accordingly, it is stated by him that a total extent of 12 acres 50 cents was purchased in the name of the first defendant only from out of the income of the joint family properties and they were dealt with by the members of the family and the first defendant never claimed any exclusive title to those properties, likewise from the joint family funds, the properties were purchased in the name of the second defendant and in the name of his wife as set out in the written statement and they did not have any independent means to acquire the suit properties and further, according to them, bogiam transaction entered into out of the family aid in the name of the second

defendant and the second defendant had also acquired certain properties in the name of his wife benami, out of the funds received towards the bogiam and the plaintiff is correct in including those of the items also for division. Further, admitted that the second wife of the plaintiff was not cooperation with the other women in the family, hence, the plaintiff was necessitated set out a separate mess and also admitted the case of the plaintiff that he had been granted certain portions of the family properties for his livelihood and further admitted that the suit properties had not been divided by metes and bounds as such and also admitted that the plaintiff had sunk a borewell as put forth in the plaint and been enjoying the lands given to him and stated that the second defendant has levied the partition suit in O.S.No.98 of 1979 in the Cuddalore Court and though he had instructed his counsel to contest the said suit, the defendant is not aware of the subsequent proceedings in the abovesaid suit and pursuant to the decree passed in the abovesaid suit obtained exparte on the part of the second defendant, the second defendant had not taken actual delivery of the properties as per the decree and the delivery alleged to have been obtained is only paper delivery and therefore, according to him, he had no objection in the division of the suit properties as put forth in the plaint and also contended that the suit is bad for non joinder of necessary parties and bad for partial partition and accordingly, prayed for the dismissal of the plaintiff's suit.

6.The second defendant resisted the plaintiff's suit contending that the suit laid by the plaintiff is not maintainable either in law or on facts and according to him, the joint family consisted of only the defendants 1 to 3 and the plaintiff ceased to be a member of the joint family after his marriage and the plaintiff, after his marriage, expressed a desire to leave the family after taking his legitimate share in the family properties and accordingly, certain properties had been given to him as described in the plaint towards the plaintiff's share and therefore, after separation, the plaintiff cannot claim again to be a member of the joint family thenceforth and therefore, on that score alone, the plaintiff is not entitled to suit for partition as a member of the joint family and the plaintiff has been in exclusive possession and enjoyment of the properties given to him and the plaintiff is not co-sharer in respect of the family properties and the second defendant has filed a suit in O.S.No.98 of 1979 for partition claiming his 1/3 share, the defendants 1 & 3 did not contest the said suit and remained ex parte and partition decree has been granted in favour of the second defendant and pursuant to the same, the final decree proceedings were initiated and the final

decree was passed in favour of the second defendant and based on the same, he has obtained the delivery, the properties allotted towards his share and therefore, according to the second defendant, the plaintiff has no cause of action and the suit laid by the plaintiff is therefore liable to be dismissed.

7.The third defendant has filed the written statement contending that the suit is not maintainable either in law or on facts and according to him, both the plaintiff and the second defendant got themselves divided and separated from the family and living separately and they ceased to be members of the joint family and the second defendant had filed the vexatious suit in O.S.No.98 of 1979 for partition and though the defendants 1 to 4 contested the same, the suit was decreed exparte and they have filed the application to set aside the exparte decree and the same is pending. The plaintiff and the second defendant are in the possession and enjoyment of the properties left to their share in the oral partition and the remaining family properties are only in the possession and enjoyment of the defendants 1 to 3 and the plaintiff is not entitled to seek the relief prayed for and hence, the suit is liable to be dismissed.

8.The fourth defendant has filed the written statement contending that she is an unnecessary party to the proceedings and she is the absolute owner of the items 6 & 7 of the plaint "A" schedule and the abovesaid items are not subjected and liable for partition and accordingly, prayed for the dismissal of the plaintiff's suit.

9.Based on the abovesaid pleas put forth by the respective parties, the following issues were framed by the trial Court for consideration:

1.Whether the claim of the defendants 1 to 3 that the plaintiff has separated himself from the joint family by taking away his share in the family properties is true and whether their claim that the plaintiff is not a member of the joint family is true?

2.Whether the decree passed in O.S.No.98 of 1979 is binding upon the plaintiff?

3.Whether the case of the defendants that the first defendant and his father had purchased an extent of 5.57 acres of land out of their joint exertion during

1953 - 1956 is true?

4. Whether the claim of the first defendant that he had purchased an extent of 7 acres and 2 cents for a sum of Rs.22,000/- in Tharasu village during 1961 is true?

5. Whether the extent of 12 acres and 5 cents purchased in the name of the first defendant had been acquired out of the family funds and belongs to the family?

6. Whether the items 2, 3, 11 of the plaint "A" schedule property had been acquired for the second defendant's family out of the first defendant's family funds is true?

7. Whether it is true that the items 6 & 7 had been purchased Benami in the name of the 4<sup>th</sup> defendant or whether the claim of the 4<sup>th</sup> defendant that he had acquired the abovesaid items out of his own funds is true?

8. Whether the suit is bad for non-joinder of parties?

9. Whether the plaintiff is entitled to claim of  $\frac{1}{4}$  share as prayed for?

10. Whether the plaintiff is entitled to claim accounts of income from the suit properties in respect of his share?

11. Whether the plaintiff is entitled to mesne profits?

12. To what relief the plaintiff is entitled to?

10. In support of the plaintiff's case, PWs1 to 3 were examined and Exs.A1 to A5 were marked. On the side of the defendants', DWs1 and 2 were examined and Exs.B1 to B44 were marked.

11. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to determine that the plaintiff is entitled to obtain partition and separate possession of his  $\frac{1}{4}$  share in the suit properties and accordingly, granted the preliminary decree in favour of the plaintiff and held that the second defendant is liable to bear the cost of the plaintiff. Impugning the judgment and decree of the trial Court, the present first appeal has been laid by the defendants 2 & 4.

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

(i). Whether the plaintiff is entitled to obtain partition and separate possession of  $\frac{1}{4}$  share in the suit properties as claimed in the plaint?

(ii). Whether the case of the defendants 2 & 4 that the plaintiff had ceased to be a member of the joint family and set up a separate family by taking away his share in the suit properties is true?

(iii). Whether the plea of oral partition put forth by the defendants is true?

(iv). Whether the suit properties are the joint family properties belonging to the plaintiff and the defendants 1 to 3?

(v). Whether the claim of the defendants 2 & 4 that they had acquired the properties set out in the written statements out of their own funds and their further claim that the abovesaid properties are not liable for partition is true?

(vi). To what relief the plaintiff is entitled to?

(vii). To what relief the defendants 2 & 4 /appellants are entitled to?

13. Point Nos. I to V

The relationship between the parties is not in dispute. It is found that the plaintiff and the defendants 1 to 3 are the

sons of Vasudeva Kounder and the 4<sup>th</sup> defendant is the wife of the second defendant. Now, according to the plaintiff, the suit properties are the joint family properties belonging to the plaintiff and the defendants 1 to 3 and they had been acquired out of the ancestral nucleus derived from their forefathers and the defendants had no independent income to acquire the suit properties on their own and further, according to the plaintiff, owing to misunderstanding between the ladies in the family, he had been necessitated to set out a separate family and accordingly, certain family properties had been entrusted to him for his living and however, according to the plaintiff, the suit properties had not been divided by metes and bounds and hence, had come forward with the suit seeking for partition and separate possession of his  $\frac{1}{4}$  share in the suit properties and according to the plaintiff, the suit laid by the second defendant claiming partition in the suit properties in O.S.No.98 of 1979 is not binding on him as according to him, he is not a party to the abovesaid suit proceedings and hence, according to him, he has been necessitated to institute the suit for appropriate reliefs.

14. In this case, though the defendants 1 to 3 had filed statements opposing the plaintiff's claim, particularly, the first defendant filed the written statement running to several pages, as rightly found and determined by the Court below, it is seen that the first defendant, in toto, has admitted the claim of the plaintiff that the joint family owned considerable ancestral properties and further admitted that out of the income derived from the ancestral properties, the other properties had been acquired and also admitted that out of the joint family exertion, ie., the first defendant and their forefather Vasudeva Kounder, certain items of the suit properties had been acquired and further, admitted only out of the family funds, the properties had been acquired in the name of the second defendant as well as in the name of the 4<sup>th</sup> defendant and that they had no independent income to acquire the suit properties and also further admitted that the various bogiam transactions had also been entered into in the name of the second defendant and all of them had been based on the family funds and accordingly, accepted the claim of the plaintiff that he is entitled to obtain his  $\frac{1}{4}$  share in the suit properties. It is thus found that the first defendant examined as DW1 in the matter has also tendered evidence on the abovesaid lines in detail admitting that all the suit properties are only the joint family properties and that they had been acquired only with the aid of the ancestral nucleus and that the plaintiff is entitled to obtain the relief of partition as prayed for.

15.The plaintiff's suit had been mainly challenged by the defendants 2 & 4 contending that the plaintiff had ceased to be the member of the joint family and according to them, the plaintiff had long back got himself separated from the joint family by taking certain family properties towards his share and therefore, according to them, the plaintiff cannot now claim that he still continues to be the member of the joint family and entitled to seek partition and further, according to the defendants 2 & 4, the second defendant has laid the partition suit in O.S.No.98 of 1979 against the other family members and obtained his share in the family properties and the abovesaid suit ended in final decree and pursuant to the same, according to the defendants 2 and 4, he had taken separate possession of his share in the family properties and therefore, the plaintiff is not entitled to maintain the claim of partition in the family properties and furthermore, according to the 4<sup>th</sup> defendant, in particular, the properties standing in her name had been acquired out of her own and not with the aid of the family nucleus as put forth by the plaintiff and the first defendant.

16.The third defendant has also pleaded that oral partition being effected in the family and further according to the third defendant, both the plaintiff and the second defendant had got themselves separated and therefore, they are not entitled to claim any partition in the family properties.

17.However, considering the materials placed on record, it is found that the plea of oral partition put forth by the defendants is found to be unacceptable, particularly, when the defendants have not come forward with any specific case as to when the alleged oral partition took place and what are the properties subjected to the oral partition and whether the oral partition had been given effect to by the parties concerned and what are the properties allotted to each member in the abovesaid alleged oral partition and with reference to the same, when there is no acceptable and convincing materials on the part of the defendants, particularly, on the part of the third defendant and when it is seen that the third defendant has not even entered into the witness box and when the abovesaid plea of oral partition said to have been effected in the family as put forth by the third defendant and the second defendant has not been substantiated with clear and conscious pleas in the written statement and also not buttressed by acceptable and reliable evidence, in such view of the matter, it is found that as rightly determined by the trial Court, the plea of oral partition projected by the defendants cannot be countenanced and it is found that the trial Court has analysed the abovesaid aspects of the matter in detail and rightly disbelieved the plea

of oral partition projected on the part of the defendants.

18. Considering the materials placed on record, it is found that the joint family consisting of the plaintiff and the defendants 1 to 3 owned adequate and considerable ancestral properties and accordingly, it is found that the plaintiff and the defendants have been engaged mainly in the occupation of cultivation and it is thus evident that all the properties belonging to the joint family had been acquired only with the aid and the assistance of the ancestral nucleus and when there is no material on the part of the second defendant as well as the 4<sup>th</sup> defendant to evidence that they had independent income to acquire the properties standing in their respective names, particularly, when the existence of the ancestral nucleus has been established and moreover, when the ancestral nucleus is found to be capable of yielding adequate and sufficient income, in such view of the matter, it is for the defendants 2 & 4 to establish that the properties standing in their names had been acquired without the support of the ancestral nucleus and that they had been acquired out of their own income and when there is no material and proof on the part of the defendants 2 & 4 that at the relevant point of time, they had independent income of their own, in such view of the matter, as rightly found and determined by the trial Court, based on the evidence projected in the matter, all the properties set out in the plaint are only the joint family properties belonging to the plaintiff and the defendants as projected by the plaintiff and resultantly, it is found that the claim of the defendants 2 & 4 that the properties standing in their names has been acquired out of their own funds, as such, cannot be believed and the abovesaid case has been rightly turned down by the trial Court.

19. The main plea put forth by the second defendant is that the plaintiff had got himself separated from the family by taking away certain family properties for his living and therefore, the plaintiff, thereafter, cannot claim himself to be a member of the joint family and hence, according to the second defendant, the suit laid by the plaintiff for partition claiming himself to be a member of the joint family is unsustainable in the eyes of law and on that score alone, the suit is liable to be dismissed.

20. No doubt, as could be seen from the pleas put forth by the respective parties and the evidence adduced in the matter, it is found that the plaintiff had been forced to leave the joint family and set up a separate family with his wife on account of misunderstanding amongst the womenfolk in the joint family and in such view of the matter, for sustaining his

separate family, it is found that the plaintiff was allowed to enjoy certain items of the family properties and on the basis of the same, it is seen that the plaintiff had maintained his family separately and when as abovenoted, there has been no division of the joint family properties in entirety and the oral partition pleaded by the defendants is found to be not true and established and when according to the plaintiff, his separate residence is only a division in status and not separation from the joint family as such and when there is no proof on the part of the contesting defendants that the suit properties had been divided and thereby, the plaintiff had been allotted separate shares at the time of separate residence and on the other hand, when it is found that some items of the family properties had been allowed to be enjoyed by the family members separately, for the sake of convenience, in order to maintain his separate family, on that score, we cannot infer and hold that there has been division of the family properties as sought to be made out by the contesting defendants and on the other hand, it is seen that only for convenience, the plaintiff had been necessitated to set up separate residence and the abovesaid factors cannot be projected to hold that the plaintiff has become separated from the joint family and thereby, he had ceased to be the member of the joint family and when the members of the joint family properties are entitled to maintain separate residence without division of the joint family properties and when such separate residence is acceptable in the eyes of law and on that score alone, we cannot infer and hold that there has been complete division of the joint family properties and that, the plaintiff had got himself separated from the joint family as sought to be made out by the defendants. Therefore, the plea put forth by the second defendant in particular and the third defendant that the plaintiff had ceased to be a member of the joint family, when he had set up a separate family on his own, as such, cannot be accepted and the abovesaid separation could only be at the most held to be in status and as far as the family properties are concerned, as rightly put forth by the plaintiff, he continued to be a co-sharer in respect of their family properties and in joint possession of the family properties and thereby, entitled to his lawful share of the same. The abovesaid aspect had been rightly assessed and determined by the trial Court on the basis of the materials put forth by the respective parties and in my considered opinion, no reason is warranted to interfere with the abovesaid findings of the trial Court.

21.The plea put forth by the second defendant in particular is that he had levied the suit in O.S.No.98 of 1979 for partition on the file of the subordinate Court, Cuddalore

against the other family members and obtained partition and separate possession of his share in the suit properties and therefore, the plaintiff cannot be allowed to reopen the partition already effected by way of the abovesaid proceedings and hence, the plaint is liable to be dismissed.

22.However, the abovesaid plea of the second defendant cannot be accepted. As abovenoted, the plaintiff, had not at all ceased to be a member of the joint family and continued to be a co-sharer in so far as the family properties are concerned and the separate residence of the plaintiff could only be construed as a division in status and not division in respect of the family properties and furthermore, as abovenoted, the contesting defendants had failed to establish the plea of oral partition put forth by them, in such view of the matter, when the plaintiff continued to be a member of the joint family, the suit levied by the second defendant in O.S.No.98 of 1979 for partition of the family properties without impleading the plaintiff as a party to the same, as rightly put forth by the plaintiff, the proceedings effected in the abovesaid suit would not in any manner bind the plaintiff and in such view of the matter, it is found that second defendant cannot be allowed to take umbrage under the proceedings and decree effected in O.S.No.98 of 1979 for rejecting the claim of the plaintiff's share in the family properties. When the plaintiff is found to be member of the joint family, any division of the family properties without the plaintiff would not bind upon the plaintiff and in such view of the matter, the trial Court is found to be wholly justified in holding that the decree obtained by the second defendant in O.S.No.98 of 1979 is not binding upon the plaintiff and the plaintiff being not a party to the abovesaid proceedings, the plaintiff is entitled to ignore the same and seek the partition and separate possession of his share in the suit properties as a member of the joint family.

23.In the light of the abovesaid discussions, the trial Court having considered all the issues involved in the matter, in the right perspective based on the proper appreciation of the materials placed on record as well as the position of law governing the same, in such view of the matter, qua the abovesaid determination of the trial Court, as above pointed out, I do not find any valid reason to disturb the findings and conclusions of the trial Court for upholding the plaintiff's case and accordingly, the Point Nos.1 to 5 are answered in favour of the plaintiff and against the defendants.

Point Nos.VI & VII

24.For the reasons aforestated, the Judgement and Decree dated 31.03.1989 passed in O.S.No.235 of 1982 on the file of the Subordinate Court, Cuddalore, are confirmed and resultantly, the first appeal is dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(Insp cell)

//True Copy//

Sub Assistant Registrar

sms

To

The Principal Subordinate Judge Cuddalore

Copy to

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

+1cc to M/s.R.Subramanian Advocate sr71048

A.S.No.1005 of 1989

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