

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 19.09.2019

Delivered on: 26.09.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.Nos. 1020 and 1022 of 1998

1. Arunachalam
2. Karupayee ... Appellants in both SAs

Vs.

1. Sarasal @ Sarasayal
2. Thangamani @ Sivagami
3. Ramasamy (deceased)
4. Muthulakshmi
5. Prabhu
6. S.Prema ... Respondents in both SAs
(RR4 to 6 brought on record as
LRs of the deceased R3 vide order
of Court dated 05.03.2015 made
in CMP.Nos.40 to 45/2015 in
SA.Nos.1020 and 1022 of 1998)

PRAYER in SA.No.1020 of 1998: Second Appeal filed under Section 100 of C.P.C., against the decree and judgment dated 06.02.1998 rendered in A.S.No.207 of 1997 on the file of the II Additional District Judge, Erode, modifying the decree and judgment dated 25.04.1997 rendered in O.S.No.183 of 1989 on the file of the Subordinate Judge, Gobichettipalayam.

PRAYER in SA.No.1022 of 1998: Second Appeal filed under Section 100 of C.P.C., against the decree and judgment dated 06.02.1998 rendered in A.S.No.208 of 1997 on the file of the II Additional District Judge, Erode, modifying the decree and judgment dated 25.04.1997 rendered in O.S.No.161 of 1986 on the file of the Subordinate Judge, Gobichettipalayam.

For Appellants in
both SAs

: Mr.R.T.Doraisamy

For Respondents in
both SAs

: Mr.B.Ram Kumar
for Mr.N.Narayanaswamy

for R1,R2, R4 to R6

COMMON JUDGMENT

SA.No.1020 of 1998 has been filed by the plaintiffs against the judgment and decree passed in A.S.No.207 of 1997 on the file of the II Additional District Judge, Erode dated 06.02.1998, confirming the judgment and decree passed by the Sub-Judge, Gobichettipalayam in O.S.No.183 of 1989 dated 25.04.1997.

2. S.A.No.1022 of 1998 has been filed by the defendants against the judgment and decree passed by the II Additional District Judge, Erode, in A.S.No.208 of 1997 dated 06.02.1998 modifying the judgment and decree passed by the Sub-Judge, Gobichettipalayam in OS.No.161 of 1986 dated 25.04.1997.

3. The appellants in S.A.No.1020 of 1998 along with one Marappa Gounder had filed a suit in O.S.No.137 of 1986 on the file of the District Munsif, Gobichettipalayam, for the relief of permanent injunction to restrain the defendants therein from interfering with their peaceful possession and enjoyment of the suit properties. The said suit was subsequently transferred to the Court of Sub-Judge, Gobichettipalayam and re-numbered as O.S.No.183 of 1989. The defendants in that suit had filed a suit in O.S.No.161 of 1986 on the file of the Sub-Judge, Gobichettipalayam to divide the suit properties into 16 equal shares and allot five such shares to them and also for mesne profits. The learned Sub-Judge, Gobichettipalayam by the common judgment dated 25.04.1997 had passed a preliminary decree in O.S.No.161 of 1986 to divide the suit properties into 16 equal shares and allot five such shares to the plaintiffs while holding that the fourth defendant is entitled to get 58 cents in the suit properties and also entitled to get one share in the first defendant's share. Further, he held that the plaintiffs are entitled to get the house which was constructed by them, in Item No.2 on equity basis, but they are not entitled for mesne profits. Further, he dismissed the suit in O.S.No.183 of 1989. In both the suits, the learned sub-Judge directed the parties to bear their respective costs.

4. Aggrieved by the same, the plaintiffs 2 and 3 in O.S.No.183 of 1989 had filed an appeal in A.S.No.207 of 1997 and the defendants 2 and 3 in O.S.No.161 of 1986 had filed an appeal in A.S.No.208 of 1997 on the file of the II Additional District Judge, Erode. The learned II Additional District Judge, Erode, by the common judgment dated 06.02.1998 had dismissed the appeal in A.S.No.207 of 1997 with costs and thereby confirmed the judgment and decree passed by the trial Court. However, he partly allowed the appeal in A.S.No.208 of 1997 and modified the judgment and decree passed by the trial Court and set aside the

finding that the fourth defendant is entitled to get $\frac{1}{4}$ share in the first defendant's share. He confirmed the reliefs granted by the trial court in favour of the plaintiffs. Feeling aggrieved, the plaintiffs 2 and 3 in O.S.No.183 of 1989 had filed the second appeal in S.A.No.1020 of 1998 and the defendants 2 and 3 in O.S.No.161 of 1986 had filed the second appeal in S.A.No.1022 of 1998.

5. For the sake of convenience, the parties are referred to as described in O.S.No.161 of 1986.

6. The averments made in O.S.No.161 of 1986 are, in brief, as follows:

(a) The first defendant Marappa Gounder got two wives namely, 1) Nanjammal and 2) Karupayee. The first plaintiff namely, Ammasai and the fourth defendant Ramasamy were born through his first wife. The second defendant Arunachalam was born through the second wife namely, Karupayee (third defendant). The suit properties are the ancestral properties of the first defendant and the defendants. They were enjoying the suit properties without dividing the same by metes and bounds.

(b) The first plaintiff's brother namely, Ramasamy (fourth defendant) had filed a suit in O.S.No.830 of 1970 on the file of the District Munsif, Gobichettipalayam, for the relief of partition. In that suit, a preliminary decree was passed on 20.08.1977. As against the same, an appeal was filed in A.S.No.59 of 1978 on the file of the Sub Court, Erode and the same was disposed of on 04.09.1978. In the said suit, the first plaintiff Ammasai and the defendants 1 and 2 namely, Marappa Gounder and Arunachalam had jointly contested the case. No permanent partition took place between the first plaintiff and the defendants 1 and 2. Only for their convenience, they have been enjoying the properties. The first plaintiff had constructed a house in Plot No.18 of Item No.2 of the suit properties with the help of money provided by his Father-in-law and out of his own earnings.

(c) The first plaintiff demanded the defendants to divide the suit properties into four equal shares and allot one such share to him. At that time, the first defendant told him, that after the marriage of the second defendant, the property can be divided, but the defendants 1 and 2 filed a suit in O.S.No.137 of 1986 on the file of the District Munsif, Gobichettipalayam stating that in the year 1973, the properties were divided orally and in the said oral partition, Plot Nos.22A and 22B were allotted to them and that the first plaintiff is trying to interfere with their peaceful possession and enjoyment of the said properties and hence, they filed the suit for

permanent injunction. With a view to deprive the rights of the first plaintiff, the first defendant had executed a settlement deed in favour of the third defendant. Actually, no such partition took place and hence, the first plaintiff was constrained to file the above suit for the relief of partition.

7. The averments made in the written statement filed by the second defendant in O.S.No.161 of 1986 and adopted by the defendants 1 and 3 are, in brief, as follows:

(a) In the suit which was filed by the fourth defendant for partition in O.S.No.830 of 1970 on the file of the District Munsif, Gobichettipalayam, the defendants took a stand that already the properties were orally partitioned. Accepting the said contentions, the learned District Munsif, Gobichettipalayam had passed a decree in respect of the house property alone, in respect of other properties, the suit was dismissed. As against the same, the said Ramasamy (fourth defendant) had not filed any appeal. After allotting the share to the fourth defendant, the first plaintiff and the defendants had enjoyed the properties commonly which are shown in yellow colour in the Advocate Commissioner's plan which was filed in O.S.No.830 of 1970. In the year 1973, the first plaintiff's marriage was performed and thereafter, the first plaintiff made a request to allot his share. Accordingly, the properties which are mentioned in Items 4, 5, 13, 17 and 18 in the plaint schedule were orally allotted to the share of the first plaintiff. For the past 14 years, the first plaintiff was enjoying the aforesaid items separately. The first plaintiff had constructed a house in Plot.No.18 and residing there. But, suppressing the aforesaid facts, the first plaintiff had filed the above suit for partition. The first plaintiff is enjoying the income which is derived from the aforesaid items of property. The first plaintiff had got electricity connection to the aforesaid house and he is paying house tax.

(b) As against the dismissal of the suit in O.S.No.830 of 1970 with regard to other items, the plaintiff therein (fourth defendant) had not filed any appeal. On the other hand, the sixth defendant therein namely, Valliammal had filed an appeal and the same was disposed of. In order to ascertain the possession, an Advocate Commissioner was appointed in I.A.No.427 of 1992 and the Advocate Commissioner also filed his report with a plan after inspecting the suit properties. If really, property was not allotted to the share of the first plaintiff, he should have asked the said relief in O.S.No.830 of 1970 itself. Instead of that he cannot file a separate suit. The present suit is barred by the principle of res judicata.

(c) The allegation that the first plaintiff had constructed a house from and out of the funds provided by his father-in-law and out of his own earnings are all false. The allegations that only for the sake of convenience, the parties were enjoying the properties separately and no permanent partition took place are also false. Only after, oral partition, the first plaintiff had constructed a house in Plot No18. The suit is bad for non-joinder of necessary party namely, Valliammal. The allegation that with a view to deprive the rights of the first plaintiff, the first defendant had executed a settlement deed in favour of the third defendant are all false. After oral partition, the first defendant had executed the settlement deed in respect of his share alone in favour of the third defendant and the same cannot be objected by the first plaintiff. Therefore, the defendants 1 to 3 prayed to dismiss the suit.

8. The averments made in the amended plaint filed in O.S.No.183 of 1989 are, in brief, as follows:-

(a) The third plaintiff is the second wife of the first plaintiff. The second plaintiff was born through the second wife (third plaintiff). The defendants 1 and 4 born through the first wife. Since during pendency of the suit, the first plaintiff died, his legal representatives have been impleaded as defendants 2 and 3. The first plaintiff also died and his legal representatives are the plaintiffs 2 and 3 and the defendants 1 and 4. Already the first plaintiff executed a settlement deed in favour of his second wife (third plaintiff) in respect of his share in the suit properties.

(b) The suit property is the ancestral property of the first plaintiff and the same has been shown in Green colour in the plaint plan. Apart from the suit property, the properties which are shown in Red and yellow colours in the plaint plan also ancestral properties of the first plaintiff. After the death of the first wife namely, Nanjammal, the first plaintiff married the third plaintiff as second wife. The fourth defendant is the eldest son born through the first wife and for him, already the property, which is shown in Red colour in the plaint plan, was allotted in the oral partition. But, suppressing the said fact, the fourth defendant had filed a suit in O.S.No.830 of 1970 on the file of the District Munsif, Gobichettipalayam, for the relief of partition. In the said suit, in respect of the house alone a partition was ordered but, in respect of landed properties, the Court had accepted the oral partition and hence, dismissed the suit in respect of the landed properties. As against the same, the fourth defendant herein did not file any appeal. Three years, after filing of the suit in O.S.No.830 of 1970, the first defendant got married and

thereafter, he made a request to partition his share and to give his share separately. Accordingly, the first plaintiff orally partitioned the properties and gave the Yellow marked portion to the first defendant. For the past 13 years, the first defendant had been cultivating the Yellow marked portion. Further, he constructed a house separately in a portion allotted to him.

(c) After allotting the Yellow marked portion to the first defendant, the plaintiffs 1 and 2 had jointly enjoyed the Green marked portion by paying kist separately. Likewise, the first defendant also got kist assessed separately for his Yellow marked portion. Therefore, the first defendant is not having any right over the Green marked portion (suit properties). During pendency of the suit in O.S.No.830 of 1970, an Advocate Commissioner was appointed in I.A.No.427 of 1972 to note down the physical possession of the properties. Accordingly, the learned Advocate Commissioner had inspected the properties and filed a report stating that the parties had been enjoying their respective shares separately. After oral partition, the plaintiffs 1 and 2 deepened the well which is situated in the suit properties and re-claimed the land by spending up to Rs.10,000/-. Since the well had been deepened, it is having copious water. Out of jealous, the first defendant attempted to destroy the turmeric crops and hence, it has become necessary for the plaintiffs to file a suit for permanent injunction.

9. The averments made in the written statement filed by the first defendant in O.S.No.183 of 1989 are, in brief, as follows:-

The allegations that after three years of the filing of the suit in O.S.No.830 of 1970, the first defendant got married and made a request to partition the property and allot his share and accordingly, the Yellow marked portion in the plaint plan was allotted to the share of the first defendant are all false. It is also false to allege that for the past 13 years, the first defendant had been cultivating the Yellow marked portion separately and the plaintiffs are cultivating the suit properties separately. When the suit in O.S.No.830 of 1970 was disposed of on 20.08.1977, if really the properties were orally divided between the plaintiffs and the first defendant, the said fact would have been brought to the notice of the Court in O.S.No.830 of 1970 itself. The present suit has been filed at the instigation of the second wife and his sons (plaintiffs 2 and 3) with a view to deprive the rights of the first defendant. It is false to allege that the plaintiffs 1 and 2 had deepened the well and reclaimed the suit property by spending a sum up to Rs.10,000/-. It is true, that the first defendant had constructed a house from and out of the funds provided by his

father-in-law. There was no permanent partition between the plaintiffs and the first defendant. The alleged cause of action is false and therefore, the first defendant prayed to dismiss the suit.

10. The defendants 2 to 4 did not file any written statement.

11. Based on the aforesaid pleadings, the learned Sub-Judge, Gobichettipalayam, had framed necessary issues and tried both the suits jointly and evidence was recorded in O.S.No.161 of 1986 and the same was treated as evidence in O.S.No.183 of 1989.

12. During trial, on the side of the plaintiffs, the second plaintiff in O.S.No.161 of 1986 was examined as PW1 and Exs.A1 to A13 were marked as exhibits. On the side of the defendants, the fourth defendant in O.S.No.161 of 1986 was examined as DW1. The defendants 2 and 3 in O.S.No.161 of 1986 were examined as DW2 and DW4 respectively and two more witnesses were examined as DW3 and DW5. Exs.B1 to B11 were marked as exhibits on the side of the defendants.

13. The learned Sub-Judge, Gobichettipalayam, after considering the materials placed before him, found that the oral partition alleged by the defendants in O.S.No.161 of 1986 and the plaintiffs in O.S.No.183 of 1989 is false. He further found that the alleged settlement deed (Ex.B11) executed by the first defendant in O.S.No.161 of 1986 in favour of the third defendant is not valid as there was no partition between the co-parceners and the said settlement deed was executed without the consent of other co-perceners. He further found that since the first plaintiff in O.S.No.161 of 1986 is also in joint possession and enjoyment of the suit properties, he is not entitled to ask for mesne profits. He further found that since already the first defendant's sister Valliammal got separated by getting her share, the suit is not bad for non-joinder of necessary parties. He further found that eventhough the fourth defendant had already got separated by getting his share, after the death of the first defendant, the fourth defendant is entitled to get 1/4th share in the first defendant's share. Accordingly, he passed a preliminary decree directing to divide the suit properties into 16 equal share and allot five such shares to the plaintiffs, that the fourth defendant apart from, 58 cents of land which was already allotted to him, is entitled to 1/4th share in the first defendant's share and that the house which has been constructed by the first plaintiff in Item No.2 at Plot No.18 has to be allotted to the plaintiffs on equity basis. He dismissed the suit in O.S.No.161 of 1986 in respect of the mesne profits. He further dismissed the suit in O.S.No.183 of 1989 and directed the parties to bear their respective costs in both the suits.

14. Aggrieved by the dismissal of the suit in O.S.No.183 of 1989, the plaintiffs 2 and 3 therein had filed an appeal in A.S.No.207 of 1997. Against passing of the preliminary decree in O.S.No.161 of 1986, the defendants 2 and 3 therein had filed an appeal in A.S.No.208 of 1997 on the file of the II Additional District Judge, Erode. The learned II Additional District Judge, Erode by the common judgment dated 06.02.1998 had dismissed the appeal in A.S.No.207 of 1997 with costs. However, he partly allowed the appeal in A.S.No.208 of 1997 and modified the preliminary decree passed by the trial Court in O.S.No.161 of 1986 to the effect that passing of the decree in favour of the fourth defendant that he is entitled to get 1/4th share in the first defendant's share alone was set aside and confirmed the reliefs which were granted by the trial Court in favour of the plaintiffs.

15. Feeling aggrieved, the plaintiffs 2 and 3 in O.S.No.183 of 1989 had filed the second appeal in S.A.No.1020 of 1998 and the defendants 2 and 3 in O.S.No.161 of 1986 had filed the second appeal in S.A.No.1022 of 1998.

16. This Court, at the time of admitting the second appeals has formulated the following substantial questions of law:-

S.A.No. 1020 of 1998:

"1. Whether the Courts below are correct in holding that the suit property is a joint family property even after the specific admission of PW1 that she has been enjoying her share separately and she has constructed a house independently in her share.

2. Whether the Courts below are correct after having found that the plaintiffs and defendants are in separate possession of the property for convenient enjoyment in refusing to grant injunction in favour of the plaintiffs?"

S.A.No. 1022 of 1998:

"1. Whether the Courts below are correct in holding that the suit property is a joint family property even after the specific admission of P.W.1 that she was enjoyed her share separately paid kist separately for her share and she has constructed a house independently in her share?

2. Whether the Courts below are correct in holding that the suit is not barred by law of

res judicata though the plaintiff is a party in the partition suit O.S.No.830 of 1970 filed by the fourth defendant with respect of the suit property?"

17. Heard, Mr.R.T.Doraisamy, the learned counsel for the appellants and Mr.B.Ramkumar for Mr.N.Narayanasamy, the learned counsel for the respondents 1, 2 and 4 to 6.

18. The Substantial Questions of law in both the Second Appeals:-

The learned counsel for the appellants has submitted that the Courts below failed to consider that the oral partition can be proved only through oral and circumstantial evidence. He further submitted that the Courts below failed to consider that in the earlier suit i.e., in O.S.No.830 of 1970 the written statement was filed in the year 1970 itself and only thereafter, oral partition took place between the first plaintiff and the defendants 1 and 2 and hence, the said fact was not pleaded in the written statement which was filed in O.S.No.830 of 1970. He further submitted that admittedly, the first plaintiff had constructed a house separately and got electricity service connection and also paying house tax and the said facts would establish that already oral partition took place between the first plaintiff and the defendants 1 and 2.

19. The learned counsel for the appellants has further submitted that PW1 has categorically admitted in her evidence that the properties are being enjoyed separately and the oral evidence of DWs.1 to 5 also would prove that already partition took place and in the said partition, the properties which are shown in Yellow colour in the plan filed along with the written statement were allotted to the share of the first plaintiff and that the defendants 1 and 2 had been enjoying the property jointly and the said property has been shown in Green colour in the plan attached to the written statement. He further submitted that the oral evidence of DWs.1 to 5 would also prove that after oral partition, the defendants 1 and 2 had deepened the well and reclaimed the property which has been shown in Green colour in the plan and since there was a copious water in the well and out of jealous, the first plaintiff tried to destroy the turmeric crops which were raised in the Green colour marked portion and hence, the defendants 1 and 2 constrained to file the suit in O.S.No.137 of 1986 on the file of the District Munsif, Gobichettipalayam, for the relief of permanent

injunction and subsequently, the said suit was transferred to the file of the Sub-Judge, Gobichettipalayam and re-numbered as O.S.No.183 of 1989. He further submitted that the kist receipts produced by both the parties also would prove that already oral partition took place between the first plaintiff and the defendants 1 and 2. He further submitted that if really, no partition took place, the first plaintiff should have asked for partition in the previous suit i.e., in O.S.No.830 of 1970 itself, but he did not ask partition in the said suit and hence, subsequent suit i.e., in O.S.No.161 of 1986 is barred by the principle of res judicata.

20. The learned counsel for the appellants further submitted that since the first plaintiff had filed a suit in O.S.No.161 of 1986 seeking partition, he should have added all the parties, who were parties in the previous suit i.e., in O.S.No.830 of 1970, but he did not implead all the parties and hence, the suit is bad for non-joinder necessary parties. He further submitted that since there was an oral partition between the first plaintiff and the defendants 1 and 2 and the first plaintiff was allotted his share, he cannot question Ex.B11 settlement deed executed by the first defendant in favour of the third defendant. He further submitted that the trial Court without appreciating the aforesaid facts and evidence in a proper perspective had decreed the suit for partition and dismissed the suit which was filed by the appellants in O.S.No.183 of 1989 and the first Appellate Court also confirmed the same mechanically and therefore, he prayed to allow the Second Appeals and set aside the judgment and decree passed by the Courts below and dismiss the suit in O.S.No.161 of 1986 and decree the suit in O.S.No.183 of 1989 as prayed for.

21. Per contra, the learned counsel for the respondents has submitted that in O.S.No.830 of 1970, the first defendant herein had been arrayed as second defendant and the first plaintiff herein and the second defendant herein had been arrayed as defendants 7 and 8. He further submitted that in that suit the first defendant herein had contested the case on behalf of himself and the first plaintiff and the second defendant herein by filing a written statement and in the said written statement, no where stated that an oral partition took place between the first plaintiff herein and the defendants 1 and 2 herein. He further submitted that the said suit was disposed of only on 20.08.1977 and if really any partition took place in the year 1973 itself, the said fact would have been brought to the notice of the Court, by the first defendant herein, but he did not inform to the Court as any such partition took place. He further submitted that the third defendant while examining herself as DW4 had categorically admitted in her cross examination that all the parties are enjoying the properties in common and taking into consideration of all the aforesaid facts, the trial Court

had rightly rejected the plea of oral partition and consequently passed a preliminary decree for partition.

22. The learned counsel for the respondents has further submitted that admittedly, the first plaintiff had constructed the house in the second item of the suit properties out of his own funds, and hence, he got electricity service connection and paying house tax. He further submitted that since the first plaintiff had constructed the house, naturally, he alone entitled to get aforesaid service connection and also pay the house tax and on that grounds, it cannot be said that already partition took place. He further submitted that the trial Court after taking into consideration of all the aforesaid facts had rightly decreed the suit for partition and dismissed the suit which was filed by the appellants for permanent injunction and the same has been confirmed by the first Appellate Court and in the said concurrent factual findings, this Court cannot interfere and therefore, he prayed to dismiss the Second Appeals.

23. It is an admitted fact that the suit properties are ancestral properties of the first defendant Marappa Gounder. It is also an admitted fact that the name of the first wife of Marappa Gounder is Nanjammal and that the first plaintiff (Ammasai) and the fourth defendant (Ramasamy) were born through the first wife. It is also an admitted fact that after the death of the first wife Nanjammal, Marappa Gounder got married the third defendant (Karupayee) and through her the second defendant (Arunachalam) was born.

24. It is also an admitted fact that the fourth defendant Ramasamy had filed a suit in O.S.No.830 of 1970 on the file of the District Munsif, Gobichettipalayam for partition. In that suit, the said Marappa Gounder, Ammasai and Arunachalam had been arrayed as defendants 2, 7 and 8 respectively. It is seen from Ex.A10 (certified copy of the written statement in O.S.No.830 of 1970) that the aforesaid Marappa Gounder, Ammasai and Arunachalam had engaged a common counsel and filed a common written statement. In the said written statement, nowhere it is alleged that there was an oral partition between the said Marappa Gounder, Ammasai and Arunachalam.

25. The learned counsel for the appellants has submitted that since oral partition took place between the first plaintiff (Ammasai) and the defendants 1 and 2 (Marappa Gounder and Arunachalam) only in the year 1973, the said fact was not pleaded in the written statement filed on 17.09.1970. A perusal of Ex.A10 would show that the written statement in O.S.No.830 of 1970 was filed on 17.09.1970. Whereas the defendants 1 and 2 herein pleaded that oral partition took place only in the year 1973. Hence, the contention of the learned counsel for the appellants that the said fact could not be pleaded in the written statement in O.S.No.830 of 1970 has to be accepted.

But nothing prevented the defendants 1 and 2 to file an additional written statement with regard to the subsequent developments. Further, admittedly, the said suit was disposed of only on 20.08.1977 and in such a case, the defendants 1 and 2 herein at least should have brought to the notice of the Court that the first plaintiff herein (Ammasai) also got separated by getting his share. But, the defendants 1 and 2 had not brought to the notice of the Court about the aforesaid facts.

26. It is also to be pointed out that in O.S.No.161 of 1986, the first defendant namely Marappa Gounder had not filed any written statement. It was only the second defendant had filed the written statement and the same had been adopted by the defendants 1 and 3. In the said written statement, it has been stated that after three years of the suit filed by the fourth defendant (Ramasamy) for the relief of partition, the first plaintiff (Ammasai) got married and thereafter, he made a request with the first defendant (Marappa Gounder) to give a portion separately and accordingly, the first defendant had orally allotted the item Nos.4, 5, 13, 17 and 18 of the suit properties to the first plaintiff. For proper appreciation the relevant portion is extracted hereunder:-

“மேற்படி ராமசாமி கோபி டி.மு.கோர்ட்டில் பிரிவினை தாவா தாக்கல் செய்து 3 ஆண்டுகளுக்கு பின்பு வாதிக்கு கோபி பாரியூர் அம்மன் கோயிலில் திருமணம் நடைபெற்றது. திருமணத்திற்கு பின் வாதி 1ம் பிரதிவாதியை அணுகி தனக்கு ஒரு பகுதியை பிரித்துக் கொடுக்கும்படிக்கு கோரியதில் 1ம் பிரதிவாதியும் ஒப்புக் கொண்டு சொத்து விவரத்தில் விவரிக்கப்பட்ட 4, 5, 13, 17 மற்றும் 18 ஆகிய பகுதிகளை வாய்மொழியாக பிரித்துக் கொடுத்துவிட்டார்.”

27. A reading of the aforesaid averments would show that according to the defendants, the first plaintiff after his marriage made a request with the first defendant to give a portion separately but, they have not stated that the first plaintiff asked the first defendant to divide the suit properties and allot his share separately. He asked to give him only a portion. It appears that for constructing a house, he would have asked to give a portion and accordingly, the first defendant gave a portion in which, the first plaintiff had constructed a house.

28. The third defendant, who is the second wife of the first defendant and mother of the second defendant while examining herself as DW4 had stated in her cross examination that “எல்லா சொத்தினையும் ஒன்றாகத்தான் இன்னும் ஒட்டி வருகின்றோம் /” The trial Court relying upon the aforesaid admission made by the third defendant had come to the conclusion that the alleged oral partition is not true and the said finding has been confirmed by the first Appellate Court. Further, if really there was an oral partition between the first plaintiff and the defendants 1 and 2 in the year 1973 itself, the parties would have taken steps to

make mutation in the revenue records. In this case, till the filing of the suits in the year 1986 i.e., for the past 13 years, the defendants 1 and 2 did not take any steps for obtaining separate pattas. All these facts also would lead to an inference that the alleged oral partition is not true.

29. It is also to be pointed out that if really the properties were already orally partitioned, the said Marappa Gounder and Arunachalam would have asked to declare their title over the suit property in O.S.No.137 of 1986, but they did not ask for declaration of their title. On the contrary, they asked for permanent injunction only.

30. The Courts below concurrently found that the suit properties were not already divided and as such, without consent of the other co-parcener (first plaintiff), the first defendant could not execute the settlement deed in favour of the third defendant and hence, the said settlement deed is not valid in any law. It is also to be pointed out that the third defendant while examining herself as DW4 had admitted in her cross examination that she did not know about the boundaries of the property which was gifted to her. She further stated that she does not know about the gift settlement deed made in her favour. So, it is clear that the gift settlement deed (Ex.B11) not at all came into force and it was not acted upon. Taking into consideration of all the aforesaid facts, the Courts below concurrently held that the said settlement deed will not bind upon the first plaintiff and in the said factual concurrent findings this court cannot interfere.

31. In the previous suit, i.e., in O.S.No.830 of 1970 one Valliammal, who is the sister of Marappa Gounder was also one of the parties and in the appeal which was filed by her against the judgment and decree passed in O.S.No.830 of 1970 her share was allotted and as such, she cannot claim any right over the remaining properties. Further as already held by the first Appellate Court that the first son of Marappa Gounder namely, Ramasamy Gounder (fourth defendant) also got separated by getting his share, in pursuance of the decree passed in O.S.No.830 of 1970. Therefore, those persons are not at all necessary parties. Further since, the fourth defendant already got separated, he cannot claim any right in the share of his father (Marappa Gounder) as held by the first Appellate Court. Further since the first plaintiff's share was not decided and allotted in O.S.No.830 of 1970, and in that suit, the first plaintiff herein and the defendants 1 and 2 herein had jointly contested the said suit, the principle of res judicata will not apply.

32. The Courts below taking into consideration of all the aforesaid facts had rightly held that the plaintiffs are entitled to get 5/16th shares in the suit properties and the

defendants are not entitled to the relief of permanent injunction. In the said concurrent findings, this Court cannot interfere. Accordingly, these substantial questions of law are answered against the appellants.

33. In the result, both the Second Appeals are dismissed. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

Sd/-

Assistant Registrar (CS-I)

//True Copy//

Sub Assistant Registrar

Dna

To

1.The II Additional District Judge,
Erode.

2.The Subordinate Judge,
Gobichettipalayam.

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

+1cc to Mr.R.T.Duraisamy, Advocate, S.R.No. 83096

+2cc to Mr.M.Narayanaswamy, Advocate, S.R.No. 83281

VSN II (CO)
GN(30/06/2020)

S.A.Nos.1020 and 1022 of 1998

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