



A.S.No.500 of 2016

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving the Judgment	Date of Pronouncing the Judgment
24.07.2024	27.12.2024

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

A.S.No.500 of 2016
and
C.M.P.No.11197 of 2016

1.Dakshinamoorthi

2.Jothy

3.Nandakumar

4.Dasarathan

5.Roja

6.Sampoornammal

... Appellants

-VS-

Narayanasamy Naicker (Died)

1.Arjuna Naicker (Died)

Moorthy (Died)

2.Dhanapal

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3.Meenakshi Ammal

4.Varadammal

5.M.Mahesh

M.Jawahar (Died)

6.M.Prabakaran

7.Suseela

8.Viswanathan

9.Samanthi

10.Karunakaran

... Respondents

[R7 to R10 brought on record as
LRs of deceased viz., Arjuna
Naicker *vide* Court order dated
12.06.2023 made in
C.M.P.Nos.15606 and 15607 of
2022]

Appeal suit filed under Section 96 of the Civil Procedure Code, 1908, as
against the judgment and decree in O.S.No.243 of 2005, on the file of
Additional District Court, Chengalpattu, dated 21.03.2016.

For Appellants : Mr.V.Raghupathi

For Respondents : R1 – Died
Mr.C.Vigneshwar
for Mr.V.Nicholas for R2 to R10



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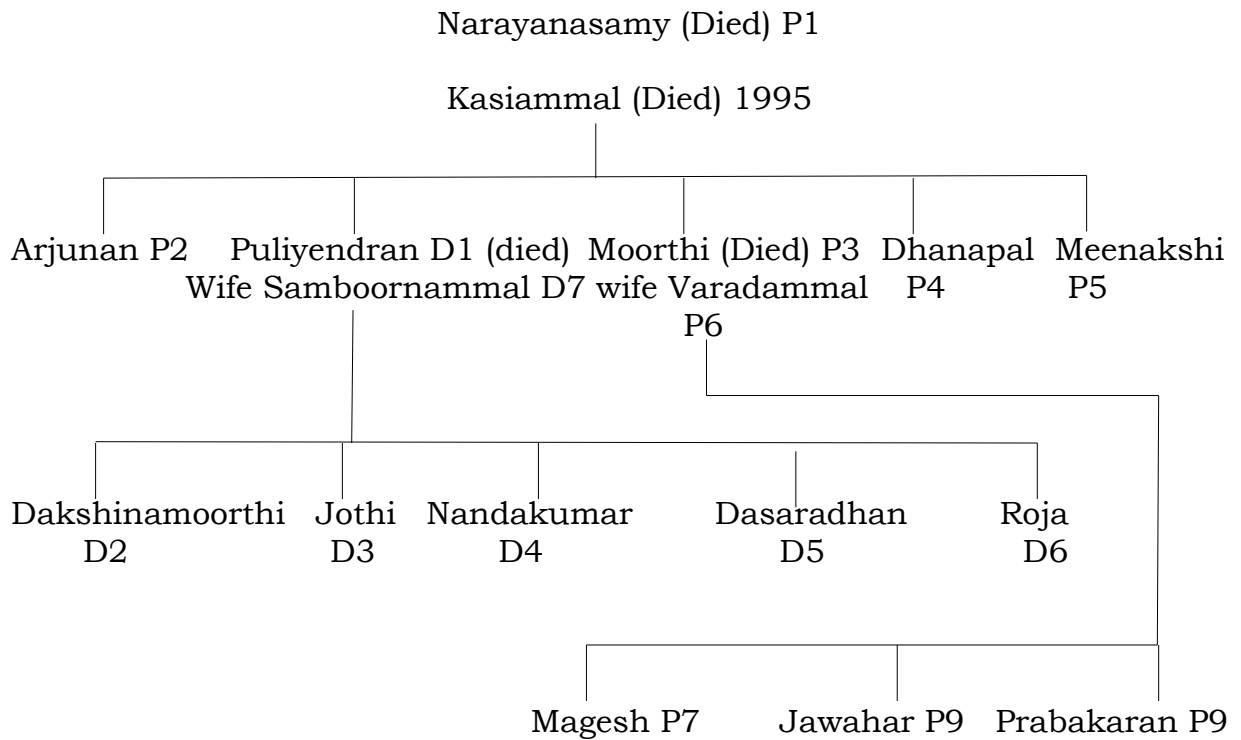


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J U D G M E N T

For the sake of convenience, the parties are referred to as per their ranking the suit.

2. For easy reference, genealogy is as follows:



3. The defendants are the appellants herein.

4. The plaintiffs filed the suit for partition. As per the plaint,



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there are 61 items of suit properties.

5. The first plaintiff, namely, Narayanasamy Naicker, is the father. The second plaintiff, namely, Arjuna Naicker, is the eldest son. The first defendant, namely, Puliyendra Naicker is the second son.

6. Pending suit, the original plaintiff, third plaintiff, eighth plaintiff and the first defendant died and their legal representatives were brought on record as indicated in the cause title of the Judgment passed in the suit. Defendants 6 and 7 were impleaded and recorded as the legal representatives of the deceased first defendant.

7. According to the plaintiffs, the suit properties are joint family properties and hence, they sought for partition and issued a legal notice, dated 24.09.1996 (Ex.A1) to the first defendant. The reply notice of the defendants dated 17.11.1996 is Ex.A2. The suit was presented on 23.02.1998. The plaintiff sought for allotment of 19/25 share in the suit properties and for permanent injunction restraining the defendants from alienating the suit properties and for future prospects.

8. The sum and substance of the plaintiffs' case is that all the



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properties are joint family properties and from and out of the joint family properties, substantial properties were purchased in the name of the family members and the first defendant was acting as a Manager of the joint family from the year 1980. Since he took hostile attitude, a legal notice was issued and the suit for partition was filed.

9. Admittedly, the first plaintiff, namely, Narayanasamy Naicker, is the father. The second plaintiff, namely, Arjuna Naicker, is the eldest son. The first defendant, namely, Puliyendra Naicker, as stated, is not the eldest son. Hence, this Court entertained a doubt as to whether he can be termed as Kartha of the joint family, which is discussed infra.

10. The first defendant filed a written statement. However, before he entering into the witness box, he died. His legal representatives were brought on record. The first defendant, in his written statement dated 24.08.2000, resisted the claim of the plaintiffs that the suit properties are ancestral and joint family properties of the plaintiffs and the first defendant and and the same have been divided during the Tamil month of Thai in 1981 by way of oral family partition before Panchayatars. The plaintiffs and the first defendant have already divided, the partition is true, valid and acted upon.



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Since the partition, the shares are in separate possession and enjoyment of the respective parties. Some shares have been sold and some shares have been mortgaged with the Bank. The sharers have also purchased certain properties after partition and such properties are the self-acquired properties of the sharers. Patta and other revenue records have been separately obtained.

11. It is specifically pleaded in the written statement that the plaintiffs, who claim joint status, purposely omitted to include the properties acquired by them after 1981. The properties purchased in the name of the members of the joint family have been allotted to the other members in the partition took in the Tamil month of Thai in 1981.

12. In the written statement, it is specifically stated by the original first defendant that in the Tamil month of Thai of the year 1981, by way of an oral partition before the Panchayatars, the plaintiffs and the first defendant were already divided and the plaintiffs have purposely omitted to include the properties acquired by them after the oral partition effected in the Tamil month of Thai of the year 1981, however, included the properties that



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13. With regard to the omission of properties to be included in the plaint, it is specifically pleaded that Item No.15 of the suit properties purchased in the name of the defendant's mother in the year 1964 fell to the share of the fourth plaintiff, who sold the same, through his power agent. So also, Item No.19 of the suit properties purchased in the name of the first plaintiff was allotted to the fourth plaintiff, who sold the same through his power agent. Certain items, which are subjected to the family partition, omitted to be included in the suit.

14. The properties purchased in the name of the second plaintiff including Item No.2 fell to the share of the third defendant, who mortgaged the same in favour of one Vedagiri of Thandalam. Like Item Nos.23, 28 and 30 purchased in the share of the second plaintiff. Item Nos.31, 33, 35, 37, 38, 41 and 42 purchased in the name of the second plaintiff was allotted to the first defendant and he obtained patta transfer in his name and he is in separate enjoyment of the same.



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15. After partition, the first defendant purchased properties under different sale deeds from various partition from and out of his self income, which includes cultivable lands, house site together with houses. Such properties are always treated as self-acquired properties of the first defendant. The plaintiffs purposely included such items and made a false claim. In family partition, the first plaintiff not take claims. In the family partition, the first plaintiff did not take any share, except 0.50 Cents of grandfather and it was agreed that he should be maintained by all the sons periodically.

16. The first defendant has taken a further stand that after the oral partition, he has purchased various properties and the properties acquired by him in the oral partition were settled by him in favour of the defendants 2 to 5 by way of two different settlement deeds, dated 23.08.1995, which are acted upon and further, the defendants 2 to 5, who are the sons of the first defendant, out of their hard work for a period of more than thirty years, have developed the properties and made it as more valuable properties in the locality and eyeing for the same, with *mala fide* intention, the partition suit has been laid by the plaintiffs.

17. Further, the property purchased by the second plaintiff after



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the oral partition at Thandalam Village, measuring to an extent of 3 Acres, was not included in the suit. Further, it is stated that, the second plaintiff has got vaalpattarai in 1.00 Acre. He has got tractor also. He has got 5.00 Acres at Vengaleri and 1.00 Acre at Thandalam Village well, pumpset. He has got 12 Acres from family partition at Vengaleri and he is in possession by way of obtaining patta etc.

18. The third defendant has got 9 Acres in the family partition at all 4 village Tractor. The fourth defendant obtained 9.50 Acres in partition in Vengaleri and Thandalam. He has got 2 JCB each worth Rs.15 lakhs, which are rented. He has mortgaged the property obtained in partition. He has also acquired properties after partition including the site at Thiruporur worth Rs.3 lakhs. He has purchased 1 Acre at Thandalam.

19. Thus, in fine, according to the first defendant, while he was alive, he filed the written statement stating that the oral family partition has been effected between the plaintiffs and the defendants in the Tamil month of Thai in the year 1981 and the joint family properties were divided and hence, the suit is bad for repartition, besides the properties purchased by the plaintiffs, after the oral partition, were not included in the suit and hence, the



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suit is bad for partial partition and the attitude of the plaintiffs in not including their properties purchased by them after the oral partition is *mala fide* in nature.

20. After the written statement, the sixth defendant, who is the daughter of the first defendant, was impleaded. Additional written statement was filed by her. Subsequently, after the death of the first defendant, his legal representatives were brought on record and hence, the son of the first defendant has filed additional written statement on 20.01.2007, wherein he has specifically stated that since the fifth plaintiff, who is a man of conscious, has not chosen to contest the case, since there was an oral partition as pleaded by the first defendant, while he was alive, by way of written statement.

21. A reply statement was filed by the plaintiffs 4 and 5 and it was taken on record. After impleadment, the sixth defendant also filed a separate written statement supporting the contention of the first defendant that after the settlement effected by her father, she made lot of improvements over a period of thirty years and in view of the escalation of the price of the land and the various buildings constructed by her from the income of her husband, her Pangalies were unable to digest her enrichment in life.



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22. Additional written statement was filed by the third defendant by stating that the properties are not available for partition, since there was already a partition among the sharers. Separate portions were also given and taken. So also, various additional written statements were filed due to the impleadment of the parties at different stages.

23. The first defendant, while he was alive, filed the written statement stating that he is not the eldest member of the family and he never acted as a Manager of the joint family. There is no reply statement to that effect.

24. The Trial Court has originally formulated five issues, thereafter formulated three additional issues and subsequently, formulated three additional issues and at the time of pronouncing the Judgment, formulated five issues, which are recasted hereunder:

1. *Whether the suit properties are joint family properties or not?*
2. *Whether the oral partition pleaded is true?*



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3. *Whether the settlement deed dt. 23.8.1985 is true and valid and binding on the parties?*
4. *Whether the plaintiff is entitled to the partition as prayed for?*
5. *To What relief?*

25. To prove the case of the plaintiffs, the fourth plaintiff was examined as P.W.1 and one Balarama Naicker was examined as P.W.2 and one Tickaraman was examined as P.W.3 and Exs.A1 to A4 were marked on the side of the plaintiffs. To disprove the case of the plaintiffs, the second defendant was examined as D.W.1 and filed his additional proof affidavit and Exs.B1 to B44 were marked on the side of the defendants.

26. The deceased Narayanasami Naicker originally filed the above suit against the defendants 1 to 6. Subsequently, the third defendant died and plaintiffs 2 to 4 and the first defendant were recognized as the legal representatives of the deceased first plaintiff. Likewise, the eighth plaintiff also died and the sixth plaintiff has been recognized as the legal representatives. Subsequently, the first defendant also died and hence, the defendants 2 to 6 were recognized as the legal representatives and the seventh



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defendant was added as legal representatives of the deceased first defendant.

27. The plaintiffs marked four documents. Exs.A3 and A4 are dated 30.07.1981. These are all sale deeds executed in favour of Dhanabal Naicker / fourth plaintiff and Arjuna Naicer / second plaintiff. The date of the said sale deeds falls after the oral partition. They claim that the lands covered under the said sale deeds are their separate properties. Hence, the following points arise for consideration:

- (i) Whether the suit properties are joint family properties?
- (ii) Whether there was an oral partition effected in the Tamil month of Thai in the year 1981 and it is true and valid.
- (iii) Whether the settlement deed dated 23.08.1995 (Ex.B19) and (Ex.B18) is true and valid.
- (iv) Whether the plaintiffs are entitled for partition.
- (v) Whether the order of the Trial Court is sustainable in law.



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28. The evidence of the plaintiffs in short that all the suit schedule properties are joint family properties and after issuance of legal notice, they filed the suit.

29. Per contra, the defendants had specifically pleaded that there was an oral partition among the family members in the presence of the Panchayatars during the Tamil month of Thai in 1981 and there is no joint family properties available for partition and the first defendant is not the eldest member of the family. The eldest member is the second plaintiff, namely, Arjuna Naicker and hence, at no stretch of imagination, the younger brother be treated as Manager or Kartha of the joint family.

30. Pursuant to the oral partition, the joint family properties were separated and they are in separate possession and enjoyment by the respective family members. In the oral partition, it is specifically stated that the properties purchased before the oral partition in the name of the family members have been allotted to the other members of the family in the year 1981. In this connection, Item Nos.15, 19, 23, 28 and 30 that were purchased in the name of the defendants and the second plaintiff fell into the share of the fourth plaintiff. So also Item Nos.31,33,35, 37, 38, 41 and 42 purchased in



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the name of the second plaintiff, in the oral partition in the month of Thai in 1981, were allotted to the first defendant. Accordingly, the respective persons, namely, second plaintiff and the first defendant were enjoying the properties after obtaining necessary Patta in their names since 1981. So, is the pleadings of the first defendant in the written statement. Before he would enter into the witness box, he died. Hence, his son, who is the second defendant was examined as D.W.1. He was youngster. He could not able to specify the other properties.

31. The second leg of the contention of the defendants is that after the oral partition, the first defendant purchased various properties from and out of his sole income and they have been treated as his self-acquired properties and hence, the same are not available for partition. Absolutely, there is no evidence on this score by the plaintiffs.

32. This Court perused Exs.A3 and A4. It is in the name of the fourth plaintiff and second plaintiff, dated 30.07.1981 and admittedly, after the alleged oral partition. They have been purchased in the individual name of the plaintiffs 2 and 4 assumes significance.



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33. After perusing the evidence of D.W.1 coupled with Exs.B1 to B23, this Court has noticed that for the reasons best known, the plaintiffs have chosen not to include the properties purchased by the second plaintiff and the fourth plaintiff, after the oral partition projected by the defendants, which took place during the Tamil month of Thai in 1981.

34. Mr.Ragupathi, learned counsel appearing for the defendants, has drawn my attention to Exs.B5, B6 and B8. Admittedly, these three sale deeds are in favour of the plaintiffs 2 and 4. Admittedly, the properties covered under these documents were purchased after Thai of 1981. But, for the reasons best known, the plaintiffs have chosen not to include these properties, which stand in the name of the plaintiffs 2 and 4. During cross-examination, P.W.1 has spoken the language of silence and evaded to answer the question.

35. Yet another incident is that on perusal of Exs.B10, 11, 12, 13, it is seen that they are dated 23.09.1988, 01.12.2005, 01.12.2005 and 19.02.2003 respectively. All these documents are admittedly after the oral partition 1, namely, after the Tamil month of Thai of 1981 as alleged by the



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first defendant in the written statement and deposed by the D.W.. Admittedly, the lands covered under those documents were not the suit properties assumes significance.

36. Yet another incident is that Exs.B20 and B22, sale deeds, are executed in favour of Puliyendra Naicker / first defendant and thereafter sold by him. For the reasons best known, the plaintiffs have not included these lands under Exs.B20 and B22 assumes significance.

37. Thus, this Court finds that the plaintiffs are taking double stand while including the properties that are purchased by the defendants after 1981. However, for the reasons best known, the plaintiffs have chosen not to include the properties purchased in their names in the suit properties as demonstrated by the defendants under Exs.B5, B6, B8, B10, B11, B12, B14, B18, B20 and B22 and hence, I find that the conduct of the plaintiffs in seeking partition in respect of the properties purchased by the first defendant's family after the Tamil month of Thai of 1981 were included in the partition suit, whereas the properties purchased by the plaintiffs after the Tamil month of Thai, 1981 were not included in the suit properties, thereby, I find that the plaintiffs' stand is exposed and his *mala fideness* is demonstrated



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38. P.W.1 have not offered his explanation as to why the properties purchased after the Tamil month of Thai, 1981 in the name of the plaintiffs were excluded from the suit properties, on the contrary, the properties purchased by the first defendant after the Tamil month of Thai, 1981 were included, he has spoken the language of silence and refused to answer, which goes to show that the plaintiffs have not come to the Court with clean hands, however, besides the defendants by marking those documents have categorically demonstrated the *mala fide* intention of the plaintiffs in seeking partition of the suit properties acquired by the second son of the family, who is not the Kartha.

39. It remains to be stated that the learned Trial Judge, who has not properly appreciated the above facts, has not properly looked into the documents.

40. At the risk of repetition, the defendants have specifically taken a stand that during the Tamil month of Thai, 1981, there was an oral partition and thereafter, the parties have purchased the properties in their respective



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names. The present suit was filed in the year 2005 after more than twenty years from the oral partition. Exs.B14 and B21 are the sale deeds relating to the period prior to the oral partition. The properties covered under these two documents are re-aligned after the oral partition, as could be seen from the revenue records filed from Exs.B29 to B35. So also, this Court has noticed that the second plaintiff has purchased the various survey numbers under Ex.A4 sale deed dated 30.07.1981 and in that, Item Nos.41, 42, 38, 33, 39, 35 and 21 alone were included in the suit properties. Ex.B11, which was purchased after the oral partition as projected by the defendants, by the fourth plaintiff, was not added as a suit property, so also Ex.B12.

41. Further, the lands covered under Exs.B20 and B22 are not added as suit properties. However, the lands covered under Ex.B23 purchased by the first defendant in the year 1981 (after the oral partition) were added as suit properties as Item Nos.32, 36, 43, 34 and 39, which clearly demonstrates the *mala fide* intention of the plaintiffs to take the entire properties of the second defendant, who is the younger son, as joint family properties, which were acquired by him after partition.

42. This Court is conscious of the fact that when the defendants



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come with a specific plea that there was an oral partition, it is for the plaintiffs to plead and prove the same. As stated supra, originally the first defendant Puliyendra Naicker, during his lifetime, has filed a written statement categorically mentioning that during the Tamil month of Thai in 1981, there was an oral partition. However, before he being examined as a witness, he died. His son has filed additional written statement and was examined as D.W.1. The Trial Court has commented upon the evidence of D.W.1, since he was only 25 years old at the time of giving evidence, forgetting the fact that his father while he was alive has clearly pleaded by way of written statement, which is available on record.

43. Yet another incident is that the properties purchased in the name of the fourth plaintiff under Exs.B40 to B44 were not included as suit properties, which also shows *mala fide* intention of the plaintiffs to safeguard their properties purchased after 1981, however wanted to grab a share in the properties of the first defendant purchased by him after 1981.

44. In this connection, as per Ex.B24, there is a separate patta, which is more than 30 years old in favour of the defendants 2 to 5. It remains to be stated that in respect of the second plaintiff, Ex.B27 is the Patta stands



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in the name of the second plaintiff, which is admittedly for the lands purchased after the oral partition as pleaded by the defendants assumes significance.

45. Yet another point is that so also, for the fourth plaintiff, patta, chitta and adangal were issued in respect of the properties covered under Exs.B32 to B35 assumes significance and thus, this Court finds that the first defendant has clearly pleaded the date of oral partition, namely, Tamil month of Thai of 1981, however, before he enters into the witness box, he died.

46. After the oral partition, the plaintiffs have acquired properties in their individual name as per Exs.B5, B6, B8, B10, B11, B12, B13 and B18 and also leased out properties under Exs.B15 and B16. These properties purchased by the plaintiffs after the oral partition were dealt with by them as separate properties not as joint family properties and not included in the suit and hence, I find that the oral partition has been proved by the conduct of the parties.

47. In the instant case, the defendants have categorically filed various documents to show, as discussed supra, that subsequent to the oral partition in the month of Thai, 1981 respective brothers in the family have



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purchased properties in their respective names and they have obtained Patta, Chitta and Adangal in their names and the plaintiffs 2 and 4 also purchased various properties as discussed supra, however, not included in the partition suit, rather chosen to include the properties purchased by the defendants after the oral partition as demonstrated in the preceding paragraphs shows that the plaintiffs have filed the partition suit after the oral partition. By the conduct of the parties, oral partition has been established. Now, the plaintiffs want to reshuffle some of the properties purchased by them with all the properties purchased by the defendants by deleting some of the properties purchased by the plaintiffs. Hence, this Court is constrained to hold that the plaint itself is motivated with malice.

48. After the oral partition, the respective parties are in occupation of their respective shares. Exs.B1 to B4 are the photographs of the houses occupied by the plaintiffs after the oral partition. These Exs.B1 to B4 were admitted by P.W.1 in his cross-examination. Admission is the best piece of evidence. Two of these properties purchased in the name of the first defendant were reallocated in the oral partition in the name of the plaintiffs 2 and 4 assumes significance and also lends credence to the plea of oral partition projected by defendants.



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49. This Court is of the considered view that the defendants have produced sufficient documents to substantiate the fact that there was an oral partition among the family members. The oral partition is acted upon. Some of the properties purchased before the oral partition in one of the family members were allotted to the share of the other family members, as discussed supra and respective family members have purchased properties in their individual name, after the oral partition. Hence, this kind of partition suit cannot be entertained and accordingly, all the points are held in favour of the defendants and this appeal suit is therefore liable to be allowed. It is to be noted that the Trial Court has erroneously misdirected itself and granted the decree of partition and the Judgment and Decree of the Trial Court are therefore liable to be set aside.

50. In the result, this appeal suit is allowed. The Judgment and Decree dated 21.03.2016, passed in O.S.No.243 of 2005, on the file of the Additional District Court, Chengalpattu, are set aside. Consequently, O.S.No.243 of 2005 is dismissed. Connected miscellaneous petition is closed. No costs.



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27.12.2024

NCC : Yes / No

Index : Yes / No

Internet : Yes / No

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To:

1.The Additional District Judge,
Chengalpattu.

2.The Section Officer,
VR Section,
Madras High Court,
Chennai.



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RMT.TEEKAA RAMAN, J.

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JUDGMENT
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