BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on: 06.03.2024

Pronounced on: 04.06.2024

CORAM:

THE HON'BLE MR.JUSTICE **P. DHANABAL**

A.S(MD)No.222 of 1999

Rasina Bivi ..4th Defendant/Appellant

.Vs.

1. P.K.S.Amanulla
2. Kattubava Mohideen(Died)
3. Ahamed Meeran
4. Sultan Mohaideen
5. Diwan Mohideen Bivi(Died) ..Defendants 1 to 3 &5/Respondents
6. Subaida Bivi

(6th Respondent brought on record as LR of the deceased 5th Respondent vide Court order dated 29.07.2022 made in CMP(MD) No.6561 of 2022)

7.S.K.Nathugar Sulthan
8. Seyad Mohamed Ali

(Respondents 7 and 8 are brought on record as LR of the deceased 2nd Respondent vide Court order dated 09.10.2022 made in CMP(MD) No. 11341 of 2023)

Prayer : This Appeal Suit has been filed under Section 96 of C.P.C., against the judgment and decree dated 13.07.1995 made in O.S. No. 21 of 1982 on the file of the Additional Sub Court, Tirunelveli.

For Appellants : Mrs. N.Krishnaveni, Senior Counsel for Mr.J.R.Rajaraman

For R-1 : Mr.S.V.Shanmugarajan
For R3& R6 : Mr.K.Prabhakar
For R7& R8 : Mr.R.Kannan

JUDGMENT

This Appeal Suit has been filed as against the judgment and decree passed in O.S. No.21 of 1982 on the file of the Additional Sub Court, Tirunelveli, wherein the first respondent has filed a suit for the relief of partition and separate possession. The suit was decreed in favour of the plaintiff.

2.As against the decree and judgment passed by the trial Court, the fourth defendant has preferred this present appeal.

3. For the sake of convenience and brevity, the parties herein after will be referred to as per their status/ranking in the Trial Court.

4**. The gist of the plaint averments are as follows:**

The properties described in the first scheduled originally belonged to Mohamed Sultan Mohideen, father of the plaintiff and the defendants 1 to 4 herein and the husband of the 5th defendant. The sites of the 2nd schedule are also belongs to Mohamed Sultan Mohideen but the buildings were put up by the plaintiff, defendants 1 to 3. The said

Mohamed Sultan Mohideen died intestate 20 years back leaving behind him, the plaintiff, the defendants 1 to 4, 5th defendant and two daughthers namely Subaida Bivi and Battikhan Beevi as his legal heirs to succeed his estate. After the demise of Mohamed Sultan Mohideen the daughters namely Subaida Bivi, Battikhan Beevi and the fourth defendants Rasina Bivi relinquished their rights after getting valuable consideration. Therefore the first schedule properties and the site in which the second schedule buildings were put up belongs to the plaintiff and the defendants 1 to 3 and 5. The fifth defendant is entitled to 1/8 share and the remaining 7/8 share belongs to the plaintiff and the defendants 1 to 3. Therefore the plaintiff is entitled to 7/32 share in the first schedule property and the site in the second schedule property.. The buildings available in the second schedule property are put up by the plaintiff's and the defendants 1 to3, thereby the plaintiff is entitled to ¼ share in the second schedule buildings.

4.1. The third schedule properties are business concern. The first item namely Sultania Hotel was founded by the father of the plaintiff in the year 1924. The defendants 4 and 5 have absolutely no right over the properties since they already relinquished their rights therein. But the husband of the fourth defendant namely Mohamed Abubacker Rowthar has 1/3 share and the remaining 2/3 share belongs to the plaintiffs and the defendants 1 to 3. The Mohamed Abubacker Rowthar died about six years back. After his demise, his 1/3rd share devolved upon the 4th defendant and her children. Out of 2/3 share in the said Sulthaniya hotel the plaintiff is entitled to 1/ 4 share it come to 1/6 share in the entirety. The accounts relating to that business was not settled for the past several years. The father of the plaintiff Mohamed Sultan Mohaideen also started restaurant in railway station at Tirunelveli Junction in the year 1947 and thereafter the same was closed in the year 1971. After closing the said canteen the things like catering utensils like tables, chairs etc showcases, bureau were used for starting Niyas hotel i.e., shown as second item of the third schedule. The said hotel Niyas was started in the year 1972 out of the income from the 1st schedule properties as well as from the first item of the third schedule i.e., Sulthaniya Hotel. The said hotel was started on 26.04.1972 as branch of first item Sulthaniya hotel in Madurai Road, Tirunelveli Junction. The second item Niyas Hotel as a matter of fact is part of the Sulthaniya Hotel business. The husband of the fourth defendant namely Mohamed Abubacker Rowther played a leading role in the opening of the second item hotel Niyas so he reserved for himself 2/3 share and 1/3 share was given to the plaintiff and the defendants 1 to 3. The plaintiff is entitled to 1/12 share in the second item hotel business Niyas and the income there from. The defendants have not rendered any true and correct accounts to the share of the plaintiff in the profit from this item business for the past six years The annual profit hotel Niyas may come to Rs.25,000/-. The fourth schedule properties were purchased by the plaintiff, defendants 1 to 3 and Mohamed Abubacker Rowther, out of their joint income. The fourth schedule property belongs in common to the plaintiff, defendants 1 to 3 and the said Mohamed Abubakcer Rowther. The plaintiff is entitled to 1/5 share in the fourth schedule property. After the demise of Mohamed Abubacker Rowther his share devolved upon the fourth defendant and her children. The annual income of the fourth schedule property is about Rs.2,00,000/-.

4.2. The fifth schedule property belongs to the plaintiffs and the defendants 1 to 3. Item 1 is photo studio under the name and style of Fancy Photo Studio. Item 2 is the workshop for recharging car batteries, armature and winding works etc. Item No. 3 is erecting boring pump sets and the machineries relating to this business are worth about Rs.20,000/-. The fourth item is business in crushing stones. The machineries relating to this business are more than Rs.1,00,000/- The plaintiff is entitled to ¼ share in the above said items.

4.3. The vehicles, cattles and other movables mentioned in the sixth schedule belongs in common to the plaintiff and the defendants 1 to 3, therefore the plaintiff is entitled to ¼ share . There are gold jewels, silver vessels worth about Rs. 5,00,000/- and cash about Rs.5,00,000/- with the defendants 1,4 and 5. They belongs to the plaintiffs and the defendants 1 to 3. Therefore the plaintiff is entitled to ¼ share over the said items of the properties. The first defendant have been in management of all the properties including business and he has been realising all the profits but he would not pay the legitimate share due to the plaintiff. Therefore the first defendant is liable to render a true and correct account for atleast three years.

4.4. The seventh schedule property were purchased through income from the third schedule property hotel business in the name of the second defendant and fourth defendant Rasina Bivi. The seventh schedule properties really belongs to the plaintiff and the defendants 1 to 3 and the husband of the fourth defendant. Therefore the plaintiff is entitled to 1/5 share over the seventh schedule of the suit property. When the plaintiff demanded for partition, the defendants refused , thereby he issued notice dated 06.02.1979 calling upon the defendant to give due share of the plaintiff but they evaded to receive the notice, hence he filed the suit.

5**. The brief averments of the written statement filed by the defendants 1 to 3 are as follows:**

The suit is not maintainable either in law or on facts**.** The relationship of the parties are correct. Infact after the death of Sulthan Mohideen in the year 1958 the first defendant filed a suit in O.S. No. 16 of 1958 on the file of this Court for partition and the same was decreed and final decree was also passed . In the said final decree the properties of Sulthan Mohideen were divided among all his heirs and share belonging to the plaintiff and the defendants 1 to 3 were allotted jointly in single blocks wherever possible. These defendants have no objection to give the share to the plaintiff in first schedule of the suit and in the first item of the second schedule and ¼ share in the buildings put up in the second schedule. The second item of the second schedule property was allotted to the fifth defendant in the final decree proceedings. The third item of the second schedule property was purchased by the fifth defendant on 21.11.1966. The 12th item of the second schedule does not belong to the family of the plaintiff. The 13th item of the second schedule property was purchased by the Muhamed Abubacker husband of the fourth defendant. Therefore in these items either the plaintiff or the defendants have no any right or interest over the properties.

5.1. Item 39 of the fourth schedule was also purchased by the fifth defendant and the plaintiff and the defendants 1 to 3 have no right over the said properties. The items 19 to 28 of the fourth schedule do not belong to the family of the plaintiff . Those item belong to third parties not connected with the suit. The 29th item of the IVth schedule extent is not correct and the correct extent is 1.61 acres. In the plaint it was mentioned as 4.85 acres. In item No.17 the correct extent is 2.22 acres and not 7.22 acres. In Item No.18 of the fourth schedule the family owns only 3.15 acres and not 11.16 acres. Except items 19- 28 and 39in the other items Mohamed Abubacker was exclusively entitled to 6 acre, 60-3/4 cents and the remaining extent is jointly own by the defendants 1 to 4 and the late Abubacker. After the demise of Abubucker his wife and children entitled to his share, so the defendants 1 to 4 each are entitled to 1/5 share in the fourth schedule properties, excluding the properties of Abubucker. Sixth item schedule property exclusively belongs to the first defendant and he started his fancy studio through his separate funds, so the plaintiff is not entitled to any share over the properties. The second item of the fifth schedule property is a leasehold premises and belongs to one Ettappan. The said premise was taken for lease by the Abubucker the husband of the fourth defendant and put up a small room for conducting electrical work shop but he could not commence the business, except fixing the name board. Therefore the plaintiff is not entitled to any right over the said property.

5.2. The item 3 of the fifth schedule is bore well pumpset machine etc. do not belongs to the family of the plaintiff and the defendants. The item four of the schedule S.No. 830 is not correct infact that is situated in S.F. No.835.The said crushing machine and other equipments are exclusively belongs to the first defendant. Neither the plaintiff nor other defendants have right over the said properties. The family does not own any of the movable described in the sixth schedule. The item 5 of 6^{th}

scheduled was sold about 3-4 years ago and the RC book was also transferred in the name of purchaser. The seventh item of seventh schedule belongs to hotel Niyas which exclusively belongs to the fourth defendant and her children. The cattle and the bullock carts mentioned in the plaint in the 6th schedule are false. The seventh schedule properties, first item was purchased by the fifth defendant and it exclusively belongs to her. The second item allotted to the fifth defendant through final decree proceedings. The items 5 to 8, 10 and 11 in the seventh schedule properties were purchased by the fourth defendant and the same are exclusive properties. The 9th item was purchased by the second defendant and it belongs to him exclusively.

5.3. The item 1 of the third schedule is non vegetarian hotel namely Hotel Sulthaniya and it was started by the father of the plaintiff and defendants 1 to 4 and subsequently the husband of the fourth defendant was taken as partner and he was given 1/3 share in the hotel business.

After some time the partners of Sulthaniya hotel started a new hotel namely Niyas and the State of affairs continued till June 1973 and thereafter the said business was dissolved and the former Sulthaniya hotel and the Abubucker retires from Sulthaniya hotel and he started Hotel Niyas from 01.07.1973,thereby the hotel Niyas exclusively belongs to the Abubucker. Thereafter the said Abubucker entered into agreement with D.S. Augustine Fernando and Ameer Mohideen as partner and he agreed to give 12.5% share on net profit each to them. Therefore either the plaintiff or other defendants had no interest in hotel Niyas. The said Abubucker died on 08.09.1975 leaving behind fourth defendant and her children as legal heirs. Thereafter the hotel was run by the fourth defendant and her children as exclusive business, as such the plaintiff and the defendants 1 to 3 have no right over the Niyas hotel business, therefore the suit is liable to be dismissed.

6. **The brief averments of the written statement filed by the fourth defendant are as follows:**

The suit is not maintainable either in law or on facts. The plaintiff is not entitled to any relief as claimed in the suit. Originally the some of suit properties purchased by Sulthan Mohaideen. After his demise partition suit was filed in O.S. No.16 of 1958 on the file of the Sub Court, Tirunelveli and final decree was also passed. The daughters of Mohamed Sulthan Mohideen never relinquished their rights. The husband of the fourth defendant namely Mohamed Abubucker purchased item No. 13 of second schedule property and after his demise the fourth defendants and her children are enjoying the property and the plaintiff has no right over the said property. The fourth defendant does not claim any interest in item No.1 of the third schedule business ie Sulthaniya Hotel. The fourth defendant and her children are exclusively entitled to item 2 of the third schedule Niyas Hotel business. Neither the plaintiff nor the defendants 1 to 3 have any interest over the said business. In the Sulthaniya hotel business Mohamed Abubucker was partner of ¼ share and thereafter they started branch of Sulthaniya hotel in the name of Hotel Niyas. For starting of above said business Abubucker borrowed Rs.50,000/- and he contributed his time and energy . In or about June 1973 the partners of

Sulthaniya Hotel and its branch hotel Niyas dissolved its firm w.e.f. 30.06.1973. After dissolution Mohamed Abubucker gave up his share in the Sulthaniya Hotel and became the sole owner of Hotel Niyas. After the such dissolution the plaintiff and the defendants 1 to 3 agreed to conduct hotel Sulthaniya as partners and the defendants 1 to 3 gave up their share in Hotel Niyas. Mohamed Abubucker intimated the said fact to the income tax department that he had no further interest in the Hotel Sulthaniya and he has become the sole proprietor of Hotel Niyas. Thereafter Mohamed Abubucker constituted a new partnership firm consisting of himself and two of his faithful employees namely one Augustine Fernando and Ameer Mohaideen. The said two persons did not contribute any capital and they were only taken as working partners and they were given 12.5% share on net profit.

6.1. The said Mohamed Abubucker died on 08.07.1975 and after his demise the firm Hotel Niyas got dissolved and settled among the heirs of Abubukcer and working partners. The accounts were settled to working partners. The license of hotel Niyas stands in the name of this defendant and she assessed to income tax and sales tax in respect of Hotel Niyas. Neither the plaintiff not the defendants 1 to 3 have any right, interest or title over the Hotel Niyas . The husband of the defendant late Abubucket purchased 6 acres 60 ¾ cents in fourth schedule punja lands and therefore the said properties exclusively belongs to the fourth defendant and her children. In the remaining properties she is entitled to 1/5 share along with her children. The fourth defendant had purchased items 5 to 8 , 10 and 11 of the seventh schedule land. The husband of the fourth defendant got lease, the second item of the fifth schedule property from the Jameendhar of Ettyapauram for running electrical works and only installed name boards but not commenced business. This defendant was allotted item 3 of the 7th schedule through final decree proceedings in the partition suit. In other properties of this defendant has no any right, therefore the suit is liable to be dismissed.

7. **The brief averment of the written statement filed by the fifth defendant are as follows:**

The suit is not maintainable either in law or on facts. The plaintiff is not entitled to any relief. The properties of Mohamed Sulthan Mohaideedn were partitioned through final decree proceedings in O.S.No.16 of 1958 and in that partition the first schedule suit properties were allotted to plaintiffs and defendants 1 to 3 jointly The second item of second schedule property was allotted to the fifth defendant towards her share and she had put up building on her own funds and the third item of the second schedule property was purchased by the fifth defendant through her own earnings through sale deed dated 21.11.1996. Item 39 of the fourth schedule property, item 1 of seventh schedule were purchased by this defendant through separate sale deed. The second item of the seventh schedule was allotted to the share of the sixth defendant in the final decree proceedings in O.S. No. 16 of 1958. The items 3 and 4 of the seventh schedule was allotted to Subaida Beevi and Parrikannu Beevi and they separately enjoying their shares, therefore the above said properties purchased by the fifth defendant and allotted to her through partition are all belongs to the fifth defendant as her exclusive properties, therefore the plaintiff cannot seek partition over those properties, hence the suit is liable to be dismissed.

8.The additional written statement filed by the fourth defendant are as follows:

As per the averments in para 7 of the plaint Mohamed Abubacker Rowther died about six years before filing of the suit, if it is so the said claim in the respect of item of the third schedule property is hopelessly barred by limitation because partnership was dissolved on the death of one of the partners.

9. The reply statement filed by the plaintiff are as follows:

The plaintiff does not know about the partition through O.S. No.16 of 1958. At the time of final decree proceedings he was minor and represented through his mother/5th defendant and she never informed about the final decree proceedings. Therefore as admitted by the defendants 1 to 3 the plaintiff is entitled to ¼ share in the first and second schedule properties. The properties were purchased by the defendants 1 and 3 through income derived out of the joint family business. The plaintiff never gave up his share in the Niyas hotel business. Infact the plaintiff married one converted muslim lady and the same was not accepted by the family members, therefore all the defendants colluded together and inorder to defeat the valuable rights of the plaintiff over the suit properties they filed written statement. The fifth defendant has not rendered accounts to the plaintiff and she purchased the second item of the third scheduled property through the share of minor and thereby he will take separate proceedings and he will take steps to correct the survey number and other defects in the plaint.

10. Based on the above said pleadings and hearing both sides, the trial Court has framed the following issues:

1. Whether plaintiff is entitled to have share in First and third items of second scheduled property?

2. Whether second and third items in second schedule and 19 to 28 items in fourth schedule are joint properties of plaintiff and defendants 1 to 3? Whether plaintiff is entitled to have share in it? If so, to what extent?

3. Whether D5 is the owner of third item in second schedule, 39 item in fourth schedule first two items in seventh schedule properties by way of purchase and Final decree in 0.5. 16/58?

4. Whether the extent of properties as specificed in plaint schedule as 2 acre 22 cents, 3 acre 15 cents, one acre 61 cents in item 17, 18, 29 of fourth schedule is correct?

5. Except 19 to 28 items and 39 item in fourth schedule the remaining properties in which 6 acre 60 3/4 cents are owned to fourth defendant and her children? Whether D4 is entitled to have 1/4share of the remaining properties?

6. Whether the properties mentionedin sixth schedule owned to plaintiff and Defendants?

7. Whether plaintiff is entitled to have any share in First to fourth items in fifth schedule?

8. Whether fifth item in sixth schedule was already sold ever?

9. Whether seventh item in sixth schedule belong individually to D4 and

her children?

10. Whether items 5 to 8, 10 and 11 in seventh schedule are individually entitled to founth defendant?

11. Whether nineth item in seventh schedule is individually owned to second defendant ?

12. Whether plaintiff is entitled to have any share in second item of Third schedule? Whether plaintiff is entitled to have the relief of dissolution of partnership business and rendition of accounts?

13. Whether plaintiff entitled to have the relief as sought for in para 19 (a) of the plaint?

14. What relief, the plaintiff is entitled to have

11.Before the trial Court on the side of plaintiff, P.W.1 and P.W. 2 were examined and documents Ex.A1 to A7 were marked. On the side of the defendants D.W.1 and D.W 2 were examined and documents were marked as Ex.B.1 to B112 and Court documents were marked as Ex.C.1 to C.5.

12. After considering the evidences adduced on both sides the trial Court decreed the suit. As against the decree and judgment the present appeal has been preferred by the 4th defendant on the following grounds:-

Grounds of Appeal

1. The judgment and decree of the learned Additional Sub Judge are contrary to law, weight of evidence and probabilities of the case.

2. The learned Additional Subordinate Judge failed to see that the plaint avements clearly show that the business concerns described in it in 1 and 2 in the 3rd schedule are different entities and that there is neither pleading nor evidence to show that the two hotels were run by one and the same partnership firm.

3. The learned Additional Sub Judge failed to see that there is no written partnership agreement between parties at no point of time and that the oral agreement in the year 1973 by which 4th defendant's husband took the business hotel Niyaz exclusively after giving up his share in Hotel Sultania cannot be disbelieved for want of written deed or instrument.

4. The learned Additional Subordinate Judge failed to see that the subsequent conduct of parties and the manner in which the two hotels were run after 1973 would prove that there is no connection between the two hotels after 1973 ie.. after the agreement between parties.

5. The learned Additional Sub Judge failed to see that the retirements of 4th defendant's husband from the business hotel Sultania and others from Hotel

Niyaz were effected by mutual consent and that no notice is required as contemplated under Sec. 32 of Indian Partnership Act. The learned Additional Sub Judge failed to advert to the pleadings and evidence in this respect.

6. The learned Additional Subordinate Judge failed to see that the changes in the two business had been notified to all the departments concerned and the two hotels were thereafter treated as two different entities for all purposes.

7. The learned Additional Subordinate Judge failed to see that the genuineness of Ex. B-40 was never disputed and that there is no reason to disbelieve or discredit the genuineness of this document in the absence of any attempt to disprove its genuineness.

8. The learned Additional Subordinate Judge ought to have seen that the documents Ex.B-41 and B-42 would show that hotel Niyaz was run by 4th defendant's husband as his exclusive business and that these documents cannot be brushed aside in the absence of any contrary evidence.

9. The reasonings of the learned Subordinate Judge in coming to the conclusion that the death of 4th defendant's husband had no consequences upon the alleged partnership are not sound and contrary to the provisions of Indian Partnership Act. The learned Addl. Subordinate Judge failed to see that continuance of business and conti- nuance of partnership are two different aspects and that the existence of a partnership agreement cannot be inferred

merely because the business is continued.

10. The learned Additional Subordinate Judge failed to see that the name transfer in respect of Hotel Niyaz effected in favour of 4th defendant who is a Kosha Lady in all the revenue records, licence and various depart- mental entries would prove the case of defendants that the business Hotel Niyaz was the exclusive property of 4th defendant.

11. Since it is nobody's case that 4th defendant was managing hotel Niyaz, the inference drawn by the learned Addl. Subordinate Judge on the basis of Ex. B-46 is erroneous.

12. In the absence of any evidence or material to discredit or disbelieve the account books and other documents produced before the court pertaining to the two hotels, the learned Addl. Subordinate Judge ought to have accepted the genuineness of these documents.

13. The learned Additional Subordinate Judge failed to see that a copy of letter sent to telephone department was not produced as the same was not in the custody of sender and that no adverse inference can be drawn against 4th defendant for this.

14. The learned Additional Subordinate Judge erred in granting 1/4 share in schedule I and II even though the plaintiff claimed only 7/32 share. The learned Additional Subordinate Judge further failed to see that the plaintiff is not

entitled to claim anything in Schedule II except item-1.

15. Since there is no positive evidence to show that the defendants purchased the properties under various documents from and out of the funds of alleged partnership, the learned Addl, Sub Judge erred in holding that such properties are the common properties of plaintiff and defendants.

16. The learned Additional Sub Judge erred in applying Sec. 16 of the Indian Partnership Act to the present case without reference to the scope of Sec. 16 of Part- nership Act and the facts and circumstances of the present case.

17. The learned Additional Subordinate Judge failed to see that Sec. 16 contemplates a situation where a partner who derives any profit from any transaction, of the firm, or from the use of the property or business connection of the firm or the firm name to account. Since in the present case, neither pleading nor evidence to attract Sec. 16 of the Indian Partnership Act, the learned Addl. Subordinate Judge ought to have held that the said provision has no application in the present case.

18. The learned Additional Subordinate Judge failed to see that the properties purchased in the name of 4th defendant and her husband, 4th defendant, and defendants 1 and 2 are their separate properties and that they have been enjoying the same as their exclusive property to the knowledge of all

including the plaintiff. The plaintiff who has acquiscised the position cannot question the same after a lapse of so many years.

19. The learned Additional Subordinate Judge ought to have held that the movable properties described in 6th schedule are all imaginary and that they are not available for partition. Since none of the Commissioner's report reveals the existence of these properties, the learned Additional Subordinate Judge erred in decreeing the suit in respect of this schedule.

20. Since the properties described in the 7th schedule are the exclusive properties of defendants 2, 4 & 5 as evidenced from the respective sale deeds and the judgment in the earlier partition suit.

21. Having regard to the fact that the plaintiff claims only 1/6 share in Hotel Sultania and 1/12 share in Hotel Niyaz, the alleged partnerships, the learned Addl. Subordinate Judge erred in granting 1/5 share in the profits of the two hotels after taking accounts.

22. The other reasons assigned by the learned Addl. Subordinate Judge in support of his conclusions are therefore erroneous and unsustainable in law.

13. The learned counsel appearing for the appellant would contend that the plaintiff has filed a suit for the relief of partition and separate possession of the suit properties. Infact the properties of Mohamed Sultan Mohaideen were partitioned through final decree proceedings in O.S.No. 21 of 1982 on the file of the Sub Court, Tirunelveli. In the said partition all the legal heirs of the deceased Mohamed Sultan Mohideen were allotted share through final decree proceedings. In the said final decree proceedings the properties were jointly allotted to plaintiff and the defendants 1 to 3. The properties mentioned in the first schedule and some other properties were allotted to the plaintiff and defendants 1 to 3 through final decree proceedings. All the properties allotted to them through partition were not included in the plaint. Further the plaintiff pleaded in the plaint that daughters of Mohammed Sulthan Mohaideen relinquished their share after getting valuable consideration but the said fact is denied by the defendants. While so the plaintiff has to prove that the daughters of Mohammed Sulthan Mohideen had relinquished their right and all the properties are available for partition. The appellant has no right over the first schedule property and the defendants 1 to 3 have also no objection in respect of division of property of first schedule. The trial Court has decreed the suit in respect of 7/32 shares over the first schedule property. The description of the property mentioned in the first schedule are not correct . Some of the properties were not included in this plaint and some of the properties not allotted in the partition were also included.

13.1. So far as second schedule properties are concerned, the appellant/fourth defendant has not claimed any right except Sl.No.13of the property which was purchased by the husband of the appellant, but the the trial Court allotted share in all the properties except item No. 1 and 2 by holding that plaintiff is entitled to 7/32 share over the second schedule property but in the judgment the trial Court rendered findings that plaintiff waived his claim in respect of 2,3 items of the 2nd schedule properties, but the trial Court again partitioned ¼ share in the building. There is no pleadings in the plaint that items No.13 was purchased in the name of Mohamed Abubacker out of the income of the firm and it belongs to the firm but granted decree for paritiiton. Further, the trial Court failed to discuss about the items no.5,9,11 and 12 of the second schedule properties. Section 16 of the partnership act is not at all applicable to the present case.

13.2. As far as the third schedule is concerned according to the plaintiff he is entitled to 1/6 share over the first item and 1/12 share over the second item of the third schedule property but the defendants have proved that partnership continued till 1973 and thereafter Sultaniya hotel was taken over by the plaintiff and the defendants 1 to 3 and the niyas hotel was taken over by Mohamed Abubucker and thereafter he entered into agreement with other two working partners and shared the income of the 12.5% to them. Therefore the second item of the third schedule property is not available for partition and it exclusively belongs to the appellant,but the trial Court erroneously held that this appellant has not entered into witness box and as per the partnership act notice to be given before dissolving the partnership firm and the trial Court disbelieved the Ex.B.40 income tax documents and erroneously granted ¼ share in the third schedule property. The trial Court has not framed any issues in respect of item 1 of the third schedule property. The trial Court failed to consider that the Mohamed Abubucker was retired from partnership firm with the consent of other partners. The trial Court without any valid reason rejected Ex.B.40 to B.42. The trial Court failed to consider that after the demise of partner the firm will be dissolved. Even as per claim of the plaintiff in first item 1/6 share and in the second item 1/12 share of the third schedule properties, but the trial Court has granted ¼ share. The trial Court failed to consider the documents Exs.B40, 43, 46, 55, 56 and 75 B series.

13.3. So far as fourth schedule is concerned according to the plaintiff the fourth schedule was purchased by the plaintiff and the defendants 1 to 3 and the husband of the fourth defendant,thereby the plaintiff is entitled to 1/5 share over the properties. Infact the fourth defendant husband Mohamed Abubucker purchased the 6.60 ¾ acres in the fourth schedule and after demise of her husband she along with her children are entitled to the properties and in the remaining properties she is entitled to 1/5 share. Further according to the defendants 1 to 3 item 39 was purchased by fifth defendant. Items 19 to 28 does not belongs to the family and extent of property in 17,18 and 29 are not correct but the trial Court without considering the same granted decree by allotting 1/5 share over the properties. There is no pleadings in the plaint that 4th schedule was purchased in the name of the Mohamed Abubucker out of the income of the firm and it belongs to the firm. Infact the property was purchased by Mohamed Abubucker through sale deed dated 31.10.1958 which has been marked as Ex.B.6. Per contra the plaintiff has not filed any documents to prove that the properties was purchased through the income of the firm.

13.4. The appellant has not claimed any right over the 5th and 6th schedule properties. As far as 7th schedule properties are concerned the plaintiff seeks 1/5 share over the properties since those properties were purchased out of the income from the hotel business. Infact the fourth defendant purchased items Nos. 5 to 8, 10 and 11 of the 7th schedule and the same are her absolute properties and she purchased the said properties through sale deeds Ex.P.B.57 and 58. But the trial Court without any evidence held that the fourth defendant acquired the said properties only becoming the partner of the hotel Sultaniya and hotel Niyas. Hence as per Section 16 of Indian partnership the properties are belongs to firm. Items 3 and 4 were allotted to Subhaida Bivi and Batkihan bivi under Ex.B.9.

The second item of 7th schedule also allotted to D.5 and the first item was also purchased by D5 through document dated 22.05.1957 but the decree was granted in all properties of seventh schedule property by granting 1/5 share. The trial Court failed to consider that Ex.B.7 and B.8 sale deed dated 08.11.1978 in the name of Rashina bivi and section 16 of partnership act is not applicable to the present case.

13.5. The properties were purchased in the name of the individual through own earning and there was not joint possession and the plaintiff has no right over the properties purchased by the parties in their own names. The plaintiffs has to prove that the properties were purchased in the names of the individuals through the income of the joint properties, but there is no evidence to prove the same and the plaintiff has examined only P.W.1 and P.W.2 and there is no independent witnesses were examined to prove the purchase of the properties through income of the partnership business. But the trial Court failed to consider the said aspects and erroneously decreed the suit. Further the leaned counsel appearing for the appellant has relied on the judgments in the case of K.R. Sathyanarayana

Rao and another.vs. K.R.Venkoba Rao and others reported in 1998 0 AIR (Mad) 276 and Dr. Vijayakumar Rau.vs. Dr.B.Manohar Rama Rau and others in C.S.No.912 of 2004.

14. The learned counsel appearing for the respondents would contend that the suit properties are originally belongs to one Mohamed Sultan Mohaideen who is the father of the plaintiff and the defendants 1 to 4 and her husband /5th defendant. The said properties are shown as first and second item of the schedule. The third item of the property are common to the plaintiff and the defendants 1 to 3 and one Mohammed Abubucker who is the husband of the fourth defendant. The fourth and the seventh item of the properties are purchased through the income derived from the 3rd schedule properties. The fifth item of the property is the movable property belongs to the family of the plaintiff and the defendant. The plaintiff is not aware about the partition of the properties of his father through final decree proceedings in O.S. No. 16 of 198 and after filing written statement only he came to know about the partition, therefore the

plaintiff is entitled to ¼ share over the first and second item of the schedule properties. In the third schedule property in the first item the plaintiff is entitled to 1/6 share and in the second item of the third schedule property the plaintiff is entitled to 1/12 share. In the 4,5,7 items of the properties he is entitled to 1/5 share. Inorder to prove the case of the plaintiff he has examined P.W.1 and P.W. 2 and marked documents Ex.A1 to A17 and the defendants also admitted the partnership of third item of the properties, thereby they have to prove that the partnership firm was dissolved and thereafter hotel Niyas was started exclusively by the husband of the fourth defendant namely Mohamed Abubucker but the fourth defendant has not entered into witness box and failed to examine her as witness. The defendants once admitted the partnership they have to prove that the properties were purchased separately through their separate income but they have not proved their separate income, thereby the trial Court has correctly decreed the suit and passed final decree. Therefore the judgment and decree of the trial Court are liable to be confirmed and this appeal is to be dismissed.

15. This Court heard both sides and upon hearing both sides and perusing the records and the judgment of the trial Court, the points for determination in this appeal are

1) Whether the first item of the suit property contains all the properties allotted to the share of the plaintiff and the defendants 1 to 3 through final decree proceedings in O.S. No.16 of 1958?

2) Whether the second schedule of the suit properties belongs to Mohammed Sultan Mohideen and all the properties of second schedule are available for partition?

3) Whether the third schedule properties partnership business belongs to the plaintiff and the defendants 1 to 3 and one Mohammed Abubucker?

4)Whether the Sl.No.13 in third item of the second Schedule property was purchased by Mohamed Abubucker and the same is his absolute property?

5)Whether all the properties mentioned in fourth schedule belongs to the plaintiff and the defendants 1 to 4 and Mohammed Abubucker?

6) Whether the Mohamed Abubucker purchased the properties except items 19- 28 and 39 of the fourth schedule property?

7) Whether the properties items numbers 5 to 8, 10 and 11 of seventh schedule properties were purchased by the fourth defendant?

8)Whether the plaintiff is entitled to ¼ share over the first and second schedule properties?

9)Whether the plaintiff is entitled to 1/6 share in the first item and 1/12 share in the second item of the third schedule properties?

10)Whether the plaintiff is entitled to 1/5 share over the fourth schedule properties?

11) Whether the plaintiff is entitled to 1/5 share over the seventh schedule properties?

12) Whether the decree and judgment passed by the trial Court are sustainable in law andfacts?

13) Whether the appeal has to be allowed or not?

14) To what other relief the appellant is entitled to?

16. Before answering the issues it is appropriate to discuss about some important happenings in the case. The plaintiff has filed a suit for relief of partition and separate possession. Before the trial Court on the side of the plaintiff P.W.1 and P.W. 2 were examined and marked Ex.A1 to A7. On the side of the defendants D.W.1 and D.W. 2 were examined and documents Ex.B.1 to 112 were marked. Court documents namely advocate commissioner's reports were also marked as Ex.C.1 to C5. The trial Court has decreed the suit and thereafter the said decree and judgment were challenged through this appeal. After filing of this appeal some of the documents/exhibits in respect of hotel business and the suit properties were mis placed (A15, 16, B16 to 19, B23, B33, B53 to 56, B66, B67,

B72, B73, B76, B77 and B79 to 112). There is no evidence as to when the said documents were misplaced and by whom they were misplaced has not been identified.

17. When the matter came for hearing both side counsels represented that more than five years back the documents which were marked as exhibits were misplaced and those documents were ledgers and bills books in respect of hotel business and there is no copies available with the parties and thereby the predecessors who heard the case were unable to re-construct the documents and they also agreed to dispose the case with the available documents. Further this appeal is pending for more than 25 years and the original suit is in the year 1982. Therefore this Court is inclined to hear the learned counsels appearing on both sides based on available records, to dispose the case and to meet the ends of Justice.

Point No.1

18. The plaintiff has filed the suit for partition alleging that the suit properties belonged to his father namely Mohamed Sulthan Mohideen and he died intestate leaving behind his wife, fifth defendant and plaintiff and defendants 1 to 3 and daughter/fourth defendant and one Batikhan Bivi and Subhaida Bivi. The said daughters of Mohamed Sulthan Mohideen relinquished their rights over the properties, thereby the plaintiff and the defendants 1 to 4 alone are entitled to share over the properties of Mohamed Sulthan Mohideen. The defendants have filed written statement stating that the properties of Mohamed Sulthan Mohideen were partitioned between his heirs through final decree proceedings in I.A. No.256 of 1958 in O.S. No.16 of 1958. Thereafter the plaintiff filed reply statement stating that he is entitled to ¼ share over the properties. In order to prove the said partition the defendants have file

copy of the final decree proceedings as Ex.P.9 and the said Ex.P.9 reveals that the properties of Mohamed Sulthan Mohaideen were partitioned between his share and in the said final decree proceedings Á schedule properties were allotted to the plaintiff and the defendants 1 to 3 jointly. The first schedule of the suit properties are shown as A schedule property in the earlier final decree proceedings. Apart from the 1st schedule properties some other properties were also shown in the final decree proceedings. Some of the items mentioned in the first schedule also does not find place in Ex.B.9 final decree proceedings. Therefore it is the duty of the plaintiff to establish that the 1st schedule properties are available for partition. According to the defendants the first schedule properties were already allotted to the shares of plaintiff and defendants 1 to 3 and they have no objection for partition over the properties. The trial Curt has already passed preliminary decree in respect of share in the first schedule and there is no appeal or cross objection filed by the defendants 1 to 3 and 5 and the present appeal is filed by the fourth defendant. Admittedly the appellant/fourth defendant has no right over the first schedule of the suit properties.

(i) However, it is admitted fact that the properties of Mohammed Sultan Mohideen were partitioned through his legal heirs in the year 1958 in the partition suit in O.S.No.16 of 1958. The said copy of final decree proceedings in I.A.No.256 of 1958 in O.S.No.16 of 1958 was marked as Ex.B.9 and on perusal of Ex.B.9 it reveals that already properties of Mohammed Sultan Mohideen were partitioned between legal heirs of Mohamed Sultan Mohideen. The plaintiff and Defendants 1 to 3 were jointly allotted shares through the said partition. All the properties contained in the partition in the year 1958 through final decree proceedings have not been included in this plaint and some of the properties were not included and some of the properties which are not mentioned in the final decree proceedings are also included in the plaint 1st schedule. As per Ex.B.9, S.F.No.106/3 an extent of 43 cents in Thatchanallur village, S.F.No.313/3 an extent of 57 cents, and S.F.No. 320/2 an extent of 37 cents in Puthoor village, S.F.No.183/2 an extent of 29 cents and S.F.No.183/3 an extent of 31 cents in Sindhu Poonthurai village, have also been allotted to the shares of plaintiff and defendants 1 to 3, but those properties have not been included in this suit. Further item 8 of 1st schedule S.F.No.152/6 only 58 cents allotted in Ex.B.9 but in the plaint it was mentioned as 1.75 acres. Similarly item 9 of 1st schedule does not contain in Ex.B.9. Further as per Ex.B.9 in S.F.No.152/1 44 cents, S.F.No.152/4 - 0.03 alone allotted. But in the plaint, it was mentioned as acre 1.54 and acre 1.17 respectively. Therefore, from the above discussion, it is clear that the plaintiff has not included all the properties that were allotted to the plaintiff and defendants 1 and 3 through final decree proceedings.

Points Nos. 2 and 4

19. According to the plaintiff the second schedule properties are land properties belonging to the Mohamed Sulthan Mohaideen and the building were constructed by the plaintiff and the defendants 1 to 3, therefore in the land properties he is entitled to ¼ share over the properties. According to the defendants 1 to 3 they have no objection for partition in respect of 1st item of second schedule property and second item of the second schedule was allotted to the fifth defendant in the final

decree in O.S. No. 16 of 1958 and the third item of the property was purchased by the fifth defendant through sale deed dated 21.11.1996 and Sl. No.12 does not belong to the family and Sl. No.13 in third item was purchased by Mohamed Abubucker. The appellant/fourth defendant has not claimed any right in second schedule except Sl.No.13 item in second schedule. According to the defendants properties in Sl. NO.13 of second schedule was purchased by Mohamed Abubucker. In order to prove the same, the fourth defendant has not entered in to witness box and not examined any witnesses. However the defendant side witnesses D.W.1 and D.W.2 have categorically deposed about the purchase of the property by Mohamed Abubucker through sale deed Ex.B.65. On careful perusal of Ex.B.65 it revealed that the 13th item of 2nd schedule was purchased in the name of Mohammed Abubucker through sale deed dated 11.6.1958.

20. The plaintiff has not pleaded in the pleading that the property of Sl.No.13 in third item of second schedule was purchased through the income of Hotel business. It is well settled law that once the document is registered in favour of particular person it can be presumed that he is the owner of the property and that document is genuine unless the contrary is proved. There is no any averments in the pleadings in respect of the Sl.No.13th item of second schedule property. In the pleadings only stated that "the sites on which the 2nd schedule buildings have been put up also belonged to Mohammed Sultan Mohideen. Now the 1st schedule property and the site on which the 2nd schedule buildings were put up belonged to the plaintiffs and defendants 1 to 3 and 5. The plaintiff is entitled to 7/32 share in the 1st schedule and the site in the 2nd schedule property. The buildings in the 2nd schedule property were put up by the plaintiff and the defendants 1 to 3. The plaintiff is entitled to 1/4th share in

the 2nd schedule buildings". Per contra, Ex.B.65 reveals that the 13th item of 2nd schedule was purchased by Mohamed Abubucker Rawther through sale deed dated 11.6.1958. Therefore the plaintiff failed to prove that the property belongs to Mohamed Sulthan Mohaideen, on the other hand the available evidence shows that the property was purchased by Mohamed Abubucker. There is no pleadings that the suit 13th item of 2nd schedule was purchased through hotel business in the name of Mohamed Abubucker. Even as per pleadings in the plaint, the hotel Sultania the annual net income is about 5,000/- and the plaintiff is entitled to 1/6th share and accounts relating to this business have not been settled for the past several years. The suit was filed in year 1982. Therefore, according to plaint pleadings, several years prior to the year of suit, the accounts have not been settled. But the sale deed in the name of Mohammed Abubucker Rawther is in the year 1958. Therefore, even as per plaint pleadings, there is no possibility to purchase the 13th item of 2nd schedule property from the 3rd schedule hotel Sultania business.

21. It is admitted fact that the hotel Niyas was started in the year 1973, therefore, it is not possible to purchase the 13th item of 2nd schedule through hotel business. The trial court failed to consider the said aspect and without considering that no pleadings about the purchase of 13th item of 2nd schedule wrongly held that since the Mohamed Abubucker Rowther was a partner in the hotel business, the property purchased in his name was purchased from hotel income. Merely because the Mohamed Abubucker Rawther was a partner of Sultania hotel without any evidence for the income from the hotel business it cannot be said that the property was purchased through partnership business and the property belongs to partnership firm. Therefore, the findings of the trial court is erroneous and

the same is unsustainable and liable to be set aside. In view of the said discussions, it is clear that the 2nd schedule 13th item was purchased by husband of D4 and not belongs to Mohammed Sultan Mohideen.

22. According to the defendants the second item of the schedule property was allotted to 5th defendant in the final decree in O.S.No.16 of 1958 and the third item of second schedule property was purchased by the fifth defendant through sale deed dated 21.11.1966 and the plaintiff also admitted in his evidence that the second item of the second schedule property belongs to his mother and S.No.3 in third item was purchased by his mother and item No.12 does not belong to his family. Therefore the plaintiff failed to prove that the second schedule properties are available for partition. The plaintiff is not in a position to say about the exact properties which are available for partition. The plaintiff has not even stated about the nature of properties of 2nd schedule and not stated about

as to how the properties were acquired.

23. The trial Court in this context rendered its finding that the plaintiff waived his claim in respect of item No. 2, 3 of second schedule property, but while passing decree awarded 7/32 share over the properties and ¼ share over the buildings of second schedule properties. There is no discussion about the entitlement of share to the parties. The above said allotment of shares are not in accordance with law. The trial Court failed to consider that no pleadings in the plaint in respect of second schedule properties as to their nature of acquisition. There is no evidence that the 13th item of second schedule was purchased by Mohamed Abubucker out of the income of the partnership firm and the trial Court has not discussed anything about items nos.5,9,11 and 12 of second schedule property, however decreed the suit. Further the trial Court has held that as per Section 16 of partnership act the properties stands in the name of

Mohamed Abubucker also to be construed a property of firm but there is no pleadings to that effect and without any pleadings the trial Court has rendered its findings, therefore the above said finding is erroneous. Therefore the plaintiffs failed to prove that the second schedule properties belonged to Mohamed Sultan Mohideen and all the items are available for partition. The defendants proved that item 13 of second schedule was purchased by Mohamed Abubucker Rawther and the same is his absolute property. Thus the points are answered.

Point No.3

24.The case of the plaintiff is that the father of the plaintiff and the defendants 1 to 4 had started hotel business in the name of Sulthaniya Hotel in the year 1924 and thereafter Mohamed Abubucker was also included in the said business. 2/3 share belongs to the plaintiff and the defendants 1 to 3 and 1/3 share belongs to Mohamed Abubucker. The said hotel business is shown as first item of third schedule property. Thereafter in the year 1973 branch of Sulthaniya Hotel, the hotel Niyas was started and in that hotel business 2/3 share belonged to Mohamed Abubucker and 1/3 share belongs to the plaintiff and the defendants 1 to 3. Therefore the plaintiff is entitled to 1/6 share over the first item of third schedule property and 1/12 share in the second item of third schedule property. The further contention of the plaintiff is that the defendants have not shared the income of the third schedule business and they are liable to render accounts and he is entitled to share over the properties. According to the defendants the said Sultaniya hotel was started by the father of the plaintiff and the defendants 1 to 4 and and also admitted 1/3 share of Mohamed Abubucker in the Hotel Sulthaniya and thereafter Hotel Niyas was also started and the same was also admitted. Per contra the defendants pleaded that in the year 1973 the partnership business was dissolved and the Sulthaniya hotel was taken over by the plaintiff and the defendants 1 to 3 and Hotel Niyas was taken over by Mohamed Abubucker. Thereafter the said Mohamed Abubucker entered into the partnership agreement with other two persons namely D.S. Augustin fernanando and Ammer Mohaideen and 12.5% share profit was shared to the said partners. The same Mohamed Abubucker died in the year 1975 and after his demise the fourth defendant is running the Hotel Niyas as her exclusive business.

25. In this context, before the trial court, the plaintiff was examined as P.W.1 and he deposed that the 1st item Sultania hotel business was started by his father in the year 1924, the 2nd item of 3rd schedule was started with common business. The Niyas hotel annual income is 40,000/- per annum. D.W.1 in his evidence stated that his father started the Sultania Hotel business and then in the year 1972 Niyas hotel was started and on 1.7.1973 the partnership was dissolved. As per settlement the Sultania

hotel was allotted to the plaintiff and defendants 1 to 3 and the Niyas hotel was allotted to Abubucker. The said Mohamed Abubucker died in the year 1975. The said Mohamed Abubucker during his life time run the Niyas hotel with partnership of D.S. Augustin fernanando and Ammer Mohaideen. After demise of Abubucker the partnership was dissolved and then the said business was run by the 4th defendant as her separate business. The 4th defendant was not examined as witness, however D.W.1 and D.W.2 have produced the documents in respect of 3rd schedule Hotel business.

26. As discussed earlier some documents were misplaced thereby it was not possible to trace out those documents and there is no possibility for reconstrucion of document therefore this Court once again asked the learned both side counsels whether there is any possibility for reconstruction of document, for which, they suggested that there is no

possibility for re-construction of documents and they fairly conceded that to pay some amount to the plaintiff and the learned counsel appearing for the plaintiff also agreed for that. The appellant offered to pay a sum of Rs. 40 lakhs and the learned counsel appearing for the first respondent/plaintiff demanded Rs.70 lakhs. Since there is difference of opinion in respect of quantum of amount for the third schedule of the property, both parties consented to fix the amount by this Court in between Rs.40lakhs to Rs.70 lakhs. This Court taking into consideration the non availability of documents and without going into the merits of the case as suggested by the both side counsels and inorder to meet the ends of justice and under equity inclined to fix a sum of Rs.50,00,000/- to the plaintiff and the defendants have to pay the above said amount to the plaintiff. The appellant/4th defendant has to pay the above said amount to the plaintiff towards share in 3rd schedule.

Point Nos. 5 and 6

27. According to the plaintiff the fourth schedule property was purchased from the income of the third schedule business. The plaintiff has not produced any documents to show the income derived from the hotel business. At the same time, the plaintiff also in the pleading admitted in the pleading that for the past several years, accounts of Sultania hotel and for the past 6 years, the accounts of Niyas Hotel were not produced to him. Further he admitted that the first defendant is liable to render true and correct account for atleast three years. Further the plaintiff has not filed any document to prove that those properties were purchased through income from the third schedule properties. According to the defendant the third item of fourth schedule was purchased by the fifth defendant and item Nos.19-28 does not belong to the family and item Nos. 17,18 and 29 extent are not correct and Mohamed Abubucker purchased 6.60 ¾ acres

and there is no pleadings in the plaint that fourth schedule properties were purchased in the name of Mohamed Abubucker and what is the income of the firm has not been explained by the plaintiff. The Ex.B.6 sale deed dated 03.01.1962 shows that Mohamed Abubucker purchased the properties for an extent of 6.60 ¾ cents from one Vadivelammal. As per pleadings in the plaint the 4th schedule properties was purchased by the plaintiff, defendants 1 to 3 and Mohammed Abubucker Rawther, husband of 4th defendant out of the joint income. But P.W.1 has not stated about the same in his evidence. There is no evidence that what was the joint income and why the property was purchased in the name of Abubucker who was having only 1/3 share in the Sultania hotel, has to be explained by the plaintiff.

28. Once the plaintiff admitted that the properties were purchased in the name of Mohamed Abubucker, it is for him to prove that

the property was purchased through joint income, but the plaintiff failed to prove the same. Even according to plaintiff, the accounts were not rendered for the past several years, while so, it is not possible to purchase the property in the year 1962 in the name of Mohamed Abubucker, through joint income. As per defendants, the item 19 to 28 of 4th schedule are not belongs to the family and items 17, 18 and 29 extent are not correct and item 39 belongs to 5th defendant. Even in the reply statement the plaintiff had undertaken to rectify the mistakes in the plaint pleadings but has not taken any steps to correct the mistakes. While so, it is the duty of the plaintiff to prove that the said properties belongs to family and available for partition. Item 39 was purchased by the 5th defendant. Therefore, there is no evidence that 4th schedule item were purchased through joint income of plaintiff, defendants 1 to 3 and Mohammed Abubucker Rawther. Therefore the plaintiff failed to prove that fourth item of properties are belongs to plaintiff, 1 to 3 defendants and Mohammed Abubucker and the properties are available for partition. Moreover this Court also in the previous point fixed a sum of Rs.50,00,000/- towards third schedule property and thereby the plaintiff is not entitled to the property which stands in the name of Mohamed Abubucker, but the trial Court has failed to consider that the properties were purchased by Mohamed Abubucker and no documents to prove that all the items of 4th schedule were purchased through joint income. Therefore the findings are liable to be set aside.

Point No.7

29.As far as seventh schedule properties are concerned, according to the plaintiff, all the properties were purchased out of the income of the hotel business in the name of 2nd defendant and 4th defendant and there was a benami transactions and thereby he is entitled to 1/5 share over the properties. According to the defendants item nos. 5,6,7,8,10 and 11 were purchased by the fourth defendant through her own income through sale deeds Ex.B.57 and 58. Though the fourth defendant has not entered into witness box the said documents were marked through other defendants and those documents clearly shows that the properties were purchased in the name of the fourth defendant. Similarly the 39th item of the seventh schedule was allotted to the fifth defendant and items Nos 3 and 4 were allotted to the share of Subhaida Bivi and Batikhan Bivi under Ex.B.9. The second item of the property was allotted to D5. Item no.1 of the seventh schedule was purchased by D5 through sale deed dated 22.05.1957, therefore the seventh schedule items were purchased by the individuals. Had the properties were purchased by original parties in their individual name through the income derived from the third schedule property the plaintiff would have questioned about the sale deeds in the name of the individuals immediately but he has not raised any objection immediately after purchase of the properties and he filed the suit in the year 1982. Once the properties purchased in the name of individual it is the presumption that he is the owner of the property unless the contrary is proved.

30. In this case there is no evidence that the properties in the name of 4th defendant were purchased through the income from 3rd schedule hotel business. Further the plaintiff has taken plea of benami transaction and the same has not been proved. The plaintiff failed to prove that what was the income from the 3rd schedule and why the properties were purchased only in the name of 4th defendant when other defendants are parties of hotels. Therefore there is no evidence that the said properties were purchased through the income of the third schedule properties. More over this Court also in the previous point fixed a sum of Rs.50 lakhs to the

plaintiff for the 3rd schedule property thereby the plaintiff is not entitled to any share over the 7th schedule properties.

Points Nos. 8 to 11

31. The plaintiff has sought for relief of partition over the suit properties. According to the plaintiff the 1 and 2 schedule of the properties belongs to his father and 3 schedule properties are common for plaintiff and the defendants 1 to 3 and husband of D4 and other properties namely 4 and 7 properties were purchased through the income of the third item of the property. But the plaintiff has not filed any documents to show that the income derived from the third schedule. Moreover the plaintiff has not examined any witness to prove his case in respect of business except P.W. 2. As far as 1st schdule property is concerned, the appellant has no any right and she did not claim any share. However the plaintiff initially filed the suit stating that the 1st and 2nd schedule belongs to his father and the same are undivided properties. But after filing written statement by the defendants the plaintiff admitted the partition through final decree proceedings in O.S.No.16 of 1958 on the file of Sub Court, Tirunelveli. The said final decree was marked as Ex.B9. As per Ex.B9 the properties

jointly allotted to the plaintiff and defendants 1 to 3 but the plaintiff has not included all properties jointly allotted to him in the earlier partition. More over some of the properties were also included in the 1st schedule without any reference. The defendants have also no objection for partition in respect of 1st schedule. As per earlier partition the properties were jointly allotted to the plaintiff and defendants 1 to 3 thereby the plaintiff is entitled to 1/4 share but the trial Court allotted 7/32 share. However no any appeal or cross objection filed by the other parties. Therefore, the plaintiff is only entitled for partition in respect of the properties allotted to him jointly with 1 to 3 defendants in the earlier partition. While so it is for the plaintiff to include all the properties in the final decree petition since there is no any objection by the other sharers in respect of properties allotted in the earlier partition joinly. The trial Court in the judgment rendered findings that the plaintiff is entitled to 1/4 share in 1st schedule but in the result portion recorded that the preliminary decree is passed as prayed for and decree was passed for 7/32 shares, therefore the above said findings of the trial Court is liable to be modified to the effect that the plaintiff is entitled to 1/4 share over the suit 1st schedule properties.

32. As far as 2nd schedule of the suit properties are concerned the plaintiff has not filed any documents to show that those properties are belongs to family of the plaintiff and the defendants. Already in the previous point, this Court decided that the plaintiff failed to prove that the 2nd schedule properties are belongs to father of plaintiff and all the properties of 2nd schedule are available for partition. Therefore the plaintiff is not entitle to 1/4 share over the 2nd schedule of the suit properties. However if any property available in the 2nd schedule are covered in Ex.B9, the plaintiff is at liberty to include the same in the final decree proceedings in accordance with law.

33. As far as 3rd schedule is concerned, this Court already directed the appellant/4th defendant to pay the plaintiff a sum of Rs.50 lakhs. As far as the 5th and 6th schedule are concerned the appellant has not claimed any share and no appeal filed in respect of 5th and 6th schedule. Already this Court also decided in point no.3 that in lieu of share in the third item, an amount was fixed by this Court. It is the duty of the plaintiff to prove the income from the third schedule property. According to the plaintiff for the past six years the defendants have not

shared the income, whileso he has not stated the income shared to him prior to that period. Therefore, the plaintiff is only entitled to relieves as stated supra. Thus the points are answered.

Point Nos.12 and 13

34. The trial Court has framed proper issues based on the pleadings and hearing both sides and thereafter decreed the suit and granted partition in respect of properties. However the trial Court failed to consider that already the properties of Mohamed Sulthan Mohaideen were partitioned through final decree proceedings in O.S. No.16 of 1958 and the same was suppressed by the plaintiff and after filing written statement only he filed reply statement stating that now only he came to know about the partition. The said partition was took place in the year 1958 and thereafter their respective shares were allotted for the concerned parties and further the plaintiff failed to prove that all the schedule properties belongs to the plaintiff and defendants 1 and 2 and Mohammed

Abubucker. Moreover in other items of the properties namely 2,4 and 7 schedule properties, some of the properties were allotted to the other legal heirs of Mohamed Sulthan Mohaideen through final decree proceedings and most of the properties were purchased by the parties in their individual names. According to the plaintiff the said properties were purchased through income of the third schedule. The plaintiff has not stated in the pleadings upto which year the defendants have shared the income and from which year they failed to share the income from 3rd schedule. Even according to the plaintiff the profit of Niyas hotel was not shared for the past six years. The suit was filed in the year 1982, therefore it is clear that prior to that the profit from hotel business was shared between the parties, if so, it is for the plaintiff to prove that what was the amount shared earlier and how much amount the defendants have to share to the plaintiff. Further the trial Court failed to consider that the properties were purchased in the name of individuals on various dates, while so the plaintiff has to prove about the income derived from the joint business and the properties were purchased from the joint business income.

35. Further the trial Court mainly relied the Section 16 of Indian Partnership Act. The Section 16 of Indian Partnership Act read as follows:

"if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business."

On a careful reading of the Section 16 of Indian Partnership Act, it is clear that if any partner on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business. In the case on hand, it is not the case of the plaintiff that the deceased Mohamed Abubucker being a Partner carried on business of the same nature as and competing with that of the firm. Even as per Pleadings, no accounts of the 2nd item was settled for several years and for II item of 3rd Schedule only, for six years, the accounts have not been settled. While so, there is no applicability of Section 16 of Partnership Act.

36. The trial Court misconstrued the Section 16 of the partnership Act. More over the trial Court failed to consider that there was no written agreement in respect of partnership firm and suit is not filed under Order 30 of C.P.C. by following the procedures for the partnership firm. The said hotel business was based on the oral agreement and no either pleadings or evidence to prove that the properties were purchased in the name of individuals for the partnership firm and the evidence about the income of the 3rd schedule hotel business. Even according to the plaintiff he is entitled to 1/6 share in 1st item of 3rd schedule i.e., Sultania Hotel business and 1/12 share in 2nd item of 3rd schedule Niyas hotel, but the trial Court without considering the same passed preliminary decree for 1/5 share in the 3rd schedule. Further the trial Court has not discussed about the non production of documents for all the items of the properties, but granted decree for all the properties without any documents.The available documents shows that the second item of the third schedule property was

transferred in the name of fourth defendant long back when she has been running the hotel but no relief sought for against the fourth defendant, these aspects have not been considered by the trial Court and the trial Court has decreed the suit, therefore the decree and judgment passed by the trial Court are liable to be modified.

Point No.14

37. This Court in the previous points decided that the plaintiff is only entitle for partition over 1st schedule and he is entitled to receive a sum of Rs.50 lakhs for the 3rd schedule properties. As far as 5 and 6 schedule items are concerned the appellant has no any claim over the said properties. Further the other defendants have not preferred any appeal, therefore this Court also do not want to discuss about those items. Therefore the decree and judgment are liable to be modified by partly allowing this appeal. Apart from that the appellant is not entitled to any other relief. Thus the point is answered.

38.In the result, this appeal suit is partly allowed and the decree and judgment passed by the trial Court in O.S. No.21 of 1982 on the file of the Sub Court, Tirunelveli are modified to the effect that the plaintiff is entitled to ¼ share over the first schedule of the suit properties and the plaintiff is entitled to receive a sum of Rs.50,00,000/- (Rupees Fifty Lakhs only) from the defendants and the appellant/4th defendant is directed to pay a sum of Rs.50,00,000/- (Rupees Fifty Lakhs only) to the 1st respondent/plaintiff towards third item of the property by way of deposit before the trial Court and the plaintiff who is the 1st respondent in the appeal is at liberty to receive the same by filing appropriate applications in accordance with law. The plaintiff is not entitled to any share over the 2, 4 and 7 schedule of the suit properties and the suit is dismissed in respect of 2, 4 and 7 schedule of the suit properties. Time for payment is three months from the date of this judgment. No costs.

04.06.2024

NCC : Yes/No

Index : Yes/No
Internet: Yes/No
aav/mpa

To:

1. The Additional Sub Court, Tirunelveli.

2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

P. DHANABAL,J.

aav/mpa

A.S(MD)No.222 of 1999

04.06.2024