

In the Court of the Subordinate Judge, Gobichettipalayam.

Present:--Selvi.M.Pushparani, B.A., B.L.,
Subordinate Judge.

Tuesday, the 18th day of February 2020
(2051 Thiruvalluvar Aandu; Srivikari Varudam; 6th day of Masi)

Appeal Suit No. 1/2018 and Cross Appeal 1/2018

Appeal Suit No. 1/2018

Minor Vakash by next friend mother Sudha. Appellant/Plaintiff.

/Vs/

1. Karuppusamy (died).
2. Annapoorani.
3. Vasanthamani.
4. Kamaraj.
5. Minor Nithishkumar by
next friend mother Maheswari.
6. Maheswari. Respondents/Defendants.

(6th respondent Impleaded as per order in IA 1/2019 dated 20.08.2019 and the appeal memorandum amended as per order in IA 2/2019 dated 3.10.2019)

Cross Appeal No. 1/2018

1. Vasanthamani.
2. Kamaraj. Cross Appellants/Defendants 3 & 4.

/Vs/

1. Minor Vakash by next friend mother Sudha.
2. Karuppusamy (died).
3. Annapoorani.

4. Minor Nitheshkumar
by next friend mother Maheswari.

5. Maheswari. Respondents/ Plaintiff and
Defendants 1,2,5 & 6.

(5th respondent Impleaded as per order in IA 1/2019 dated 20.08.2019 and the Cross appeal memorandum amended as per order in IA 3/2019 dated 3.10.2019)

This appeal by the plaintiff and cross appeal by the defendants 3 and 4 are preferred against the decree and judgment passed in O.S.75/2007 on 3.10.2017 on the file of the District Munsif, Gobichettipalayam.

The particulars of parties in the Trial Court.

Minor Vakash by next friend mother Sudha. Plaintiff.

/Vs/

1. Karuppusamy (died).

2. Annapoorani.

3. Vasanthamani.

4. Kamaraj.

5. Minor Nitheshkumar by
next friend mother Maheswari. Defendants.

This appeal and cross appeal came up before me on 30.01.2020 for final hearing in the presence of Thiru.S.P.Vadivel and Thiru.S.Gunasekaran, Advocate for the Appellant in Appeal and 1st respondent in Cross Appeal, Thiru.S.Radhakrishnan Advocate for the appellants in cross Appeal and Respondents 3 and 4 in Appeal, Thiru.R.Mahendran, Advocate for 2nd respondent in Appeal and 3rd respondent in Cross Appeal, Thiru.K.R.Prakasan, Advocate for 5th defendant in Appeal and 4th defendant in Cross Appeal and of Thiru.P.Elango, Advocate for the 6th respondent in

Appeal and 5th respondent in cross Appeal and the 1st respondent in appeal and 2nd respondent in cross Appeal reported dead, upon hearing the arguments on both sides, on perusal of the records and having stood over for consideration till this day, this court delivers the following:---

JUDGMENT

The Plaintiff in the suit in OS 75/2007 on the file of the District Munsif, Gobichettipalayam is the appellant herein. The Defendants are the respondents. The plaintiff has filed this appeal suit challenging the decree and judgment of the trial court, the District Munsif Court Gobichettipalayam passed in OS 75/2007 dated 3.10.2017, as the admission made by the defendants that the entire suit properties are the joint family properties, the relief of partition and separate possession has to be granted as prayed for in the suit. The defendants 3 and 4 in the suit in OS 75/2007 on the file of the District Munsif, Gobichettipalayam have preferred the cross-appeal challenging the permission granted to the plaintiff to file a fresh suit claiming partition of a portion of the suit property covered under Ex.A1 partition deed dated 18.6.2014 and dismiss the suit entirely with cost. The plaintiff and the defendants 1,2,5 are the respondents in the cross-appeal. The 6th respondent in appeal and 5th respondent in cross appeal impleaded in the appellate proceedings.

2. The suit has been filed by the plaintiff for partition directing the defendants to divide the suit properties into 12 equal shares and allot three such shares to the plaintiff and put him in separate possession and for cost of the suit.

3. The Gist of the averments in the plaint:-

1) The plaintiff is the son of 1st defendant and the marriage between the plaintiff's mother and 1st defendant took place on 3.10.2001. The 2nd defendant

is the mother of 1st defendant. The 3rd defendant is the daughter of 2nd defendant. The 4th defendant is the husband of 3rd defendant. The marriage between the plaintiff's mother and 1st defendant was dissolved by the consent decree of divorce in HMOP 55/2004 on the file of Sub Court, Gobichettipalayam dated 5.11.2004. No maintenance was given by the 1st defendant to the mother of plaintiff.

2) The suit properties are the joint family properties of the father of defendants 1 and 3 and husband of 2nd defendant namely Palanisamy through the partition deed dated 18.06.1984. The said Palanisamy purchased the other properties by virtue of sale deeds dated 09.07.1986, 26.05.1986, 28.05.1986 and 18.03.1993 through the income of joint family properties allotted in partition deed dated 18.06.1984. Palanisamy died about 13 years ago. Hence, the plaintiff has got right over the suit properties by birth.

3) The deceased Palanisamy and the 1st defendant have got equal shares in the suit properties. The plaintiff is having half share in the share of 1st defendant. The defendants 1 to 3 are having 1/3rd share of deceased Palanisamy. Therefore, the plaintiff is entitled to 3/12 shares, the 1st defendant is entitled to 5/12 shares and the defendants 2 and 3 are each entitled to 2/12 shares in the suit properties.

4) After the divorce between the plaintiff's mother and the 1st defendant, the 1st defendant has not been given any property of maintenance either to the plaintiff or to the plaintiff's mother. The 1st defendant is trying to alienate the property in the name of 4th defendant. If the 1st defendant alienates the suit properties, it will not bind upon the plaintiff. The 1st defendant is bound to provide the alimony to the plaintiff's mother. The 1st defendant married one Maheswari on 1.11.2006 as second marriage and out of the wedlock, son by named Nithishkumar was born to them on 21.08.2007. Hence, the suit for partition to divide the suit properties into 12 equal shares and allot three such

shares to the plaintiff and put him in separate possession.

4. The 1st defendant remained exparte in the suit and a petition under Order 9 Rule 7 of CPC filed along with written statement by the 1st defendant in IA 812/2015 was dismissed by the trial court on 30.03.2016 and no appeal as against the above order.

5. **The averments in the written statement filed by the 2nd defendant:-**

The suit is false, frivolous and not maintainable either in law or on facts. This defendant denies all the plaint allegations except those that are specifically admitted. The 2nd defendant denied the allegation that the 1st defendant and mother of plaintiff got married on 3.10.2001 and the 2nd defendant did not know anything about the marriage. Further the 1st defendant denied all the allegations in the plaintiff and prayed to dismiss the suit with cost.

6. **The averments in the written statement filed by defendants 3 & 4:-**

1) The suit is false, frivolous and not maintainable either in law or on facts. This defendant denies all the plaint allegations except those that are specifically admitted. These defendants were not aware of the alleged marriage between the mother of plaintiff and the 1st defendant and their divorce. Further they were not aware of the birth of the plaintiff. These defendants state that though the properties are the joint family properties of the deceased Palanisamy, the allegation that the plaintiff would be entitled to a birth right in the property is not admitted and the plaintiff is put to strict proof of the allegation.

2) The 3rd defendant became entitled to a common 1/3rd share in the properties of the family along with her father Palanisamy and brother-1st defendant Karuppusamy as per the Hindu Succession Act as amended by

Tamilnadu Act 1 of 1990. The 3rd defendant got married to the 4th defendant only on 22.05.1996. Upon the death of the said Palanisamy in the year 1994, his 1/3rd share devolved upon his legal heirs namely the defendants 1 to 3 herein along with Marayammal, the mother of the deceased Palanisamy. The said Marayammal orally relinquished her share in the share of Palanisamy shortly after the death of the said Palanisamy. Thus, the 3rd defendant became entitled to 4/9th share in the entire properties while the 1st defendant became entitled to 4/9th share and the 2nd defendant became entitled to 1/9th share. The defendants 1 to 3 were enjoying specific portions of the properties for convenience sake without a regular partition until October 2003.

3) At about this period, the 1st defendant was living at Coimbatore under the guise of doing business and he never used to disclose anything about his business to the other defendants. As the 1st defendant needed more money for his business, he demanded for partition in order to sell his share. The 1st defendant wanted the extent of Dry acres 5.00 that he had been enjoying for convenience sake, be allotted to him. Thus, the defendants 1 to 3 partitioned the properties through a registered partition deed dated 20.10.2003 in which the property in RS NO.123/1C of Perumugai Village, described first in the plaint schedule were allotted to the 3rd defendants. Out of the Dry Acres 6.60, combining the other suit properties, an extent of Dry Acres 2/83 in SF 487/1 of Perumugai Village and an extent of Dry Acre 2.17 in SF No. 487/3 of Perumugai Village, totally measuring to Dry Acre 5.00 was allotted to the 1st defendant as he had demanded and the remaining Dry Acre 1.60 in SF 487/1 of Perumugai Village was allotted to the 2nd defendant.

4) The 4th defendant, in the interest of the family, obtained loans and purchased the property allotted to the 1st defendant in two separate sale deeds dated 12.11.2003 for an extent of 2.83 dry acres and 15.12.2003 for an extent of 2.17 dry acres for a total consideration of Rs.5,50,000/-. Thus, the 1st

defendant has already sold all his interest in the entire properties. The defendants 2 and 3 are in actual possession and enjoyment of their respective properties as allotted in the partition dated 20.10.2003 and the 4th defendant is in possession and enjoyment of the property that he purchased as per the sale deeds dated 12.11.2003 and 15.12.2003.

5) The 1st defendant married one Maheswari on 1.11.2006 and out of wedlock, a son was born on 21.08.2007. The child has to be added. Otherwise the suit will be bad for non-joinder of necessary party.

6) The defendants 2 to 4 came to know about the divorce proceedings between the mother of plaintiff and the 1st defendant. On enquiry the defendants 2 to 4 learnt that the 1st defendant fall in love with the mother of plaintiff and lived with her at Coimbatore without marriage. The mother of the plaintiff forced the 1st defendant for the creation of the alleged marriage certificate which is not legally valid. Since the marriage had not taken place on 3.10.2001 between the mother of plaintiff and the 1st defendant, the plaintiff cannot claim to be the legitimate child of the 1st defendant. Hence, the plaintiff cannot claim a birth right in the family properties.

7) Because of the mother of plaintiff, the 1st defendant borrowed huge amount and was eventually forced to sell the property. The entire sale consideration was taken away by the mother of plaintiff. The plaintiff's mother after converting the 1st defendant's property into liquid asset and grabbing all that, forced him to part from her and was instrumental in hushing up a divorce proceeding without adhering to the legal norms. Even in the legal proceedings, a sum of Rs.1,00,000/- has been paid towards the maintenance of the mother and the welfare of the plaintiff.

8) Even if the plaintiff proves that he is the legitimate child of the 1st defendant, he has ceased to have any interest in the property as his father, the 1st defendant, has already got himself divided in status from the family through

the partition dated 20.10.2003 and he has sold the property for consideration in the interest the family consisting of himself, the son and his wife. Having taken the entire sale proceeds of the property, it is not now open for the plaintiff to claim for a partition in the property. The plaintiff could have made a claim for a 1/3rd share in the property allotted to the 1st defendant in the partition deed dated 20.10.2003. But, the plaintiff cannot claim any share in the property, as the 1st defendant has already been sold his share. The 4th defendant is the bona-fide purchaser of the property allotted to the 1st defendant in the family partition. Hence, the suit has to be dismissed with cost.

7. The averments in the written statement filed by the 5th defendant:-

1) The suit is false, frivolous and not maintainable either in law or on facts. This defendant denies all the plaint allegations except those that are specifically admitted. The 1st defendant married the 5th defendant's mother on 1.11.2006 and out of wedlock, the 5th defendant was born to them on 21.8.2007. The marriage between the 1st defendant and the mother of 5th defendant is a valid marriage. Hence, the 5th defendant is the legitimate child of the 1st defendant and the plaintiff is not the legal heir of the 1st defendant. There was no legal marital relationship between the plaintiff's mother and the 1st defendant.

2) When the 1st defendant was doing business, in order to meet out the loss in the business, he demanded partition from the 2nd and 3rd defendants. Hence, a registered partition was taken place between the defendants 1 to 3 on 20.10.2003. When the 1st defendant wanted to sell his share to the third party, the 2nd defendant asked the 1st defendant to sell the same to the 4th defendant. Hence, the 4th defendant purchased the share of 1st defendant through the registered sale deed dated 12.11.2003 and 15.12.2003 for a valuable

consideration of Rs.5,50,000/- and the 1st defendant has given a maintenance amount of Rs.1,00,000/- to the mother of plaintiff. Since, the plaintiff was not in joint possession, the court fee paid by him is not correct. Hence, the suit has to be dismissed with cost.

8. On the basis of the above pleadings of the parties the trial court has framed the following issues.

1. Is the plaintiff entitled to seek partition of the suit properties? If so, to what share?
2. To what other reliefs?

9. On the side of the plaintiff, the plaintiff has examined PW1 and PW2 and Ex.A1 to Ex.A9 were marked. The defendants have examined DW1 and DW2 and Ex.B1 to Ex.B4 were marked. Based on the above oral and documentary evidences, the trial court has dismissed the suit with the observation that the plaintiff is entitled to file a fresh suit for partition with regard to the property in the partition deed dated 18.06.1984. Aggrieved by the said decree and judgment with regard to the dismissal of the suit, the plaintiff has preferred this appeal. Aggrieved by the decree and judgment with regard to the permission granted to the plaintiff to file a fresh suit for partition of the properties covered under the partition deed dated 18.06.1984, the defendants 3 and 4 have preferred the cross-appeal.

10. **The grounds of Appeal:-**

The decree and judgment of the trial court is against law, weight of evidence and the probabilities of the case. The trial court has wrongly held that this appellant is entitled to seek share in Ex.A1 partition deed dated 18.06.2014 alone entered into between the appellant's grand father Palanisamy and his brother and not in Ex.A2 to Ex.A6 documents stating that the appellant

has not proved that Ex.A2 to Ex.A6 are the joint family properties or separate properties of grand father Palanismay. The trial court has failed to note that the defendants 3 and 4 in their statement and evidence before the court have categorically admitted that the properties are the joint family properties. The trial court went wrong stating that the plaintiff has not stated which property was obtained by grand father through partition deed Ex.A1 dated 18.6.1984 and which property was purchased by grand father as per Ex.A2 to Ex.A6. The plaintiff has very well proved the same through proper oral and documentary evidence and hence, the trial court committed an error in this regard. Further the trial court has erred in holding the plaintiff has to file a separate suit for partition over the property in Ex.A1 is against law. Since, the defendants themselves admitted that the entire suit property is joint family property, the plaintiff is entitled for partition with regard to the entire suit property. Therefore, the plaintiff has preferred this appeal and prayed to allow the appeal and decree the suit in toto.

11. The grounds of cross-appeal in AS 1/2018 :-

The decree and judgment of the trial court is against law, weight of evidence and the probabilities of the case in as much as it relates to the decision about the plaintiff being given the right to file a separate suit claiming partition of the properties covered under the partition deed Ex.A1. The trial court erred in holding that the marriage between the plaintiff's mother and the 1st defendant is valid one and the plaintiff is the legitimate son of the 1st defendant is not correct. Further more after the partition between the defendants 1 to 3, the trial court has permitted the plaintiff to file a fresh suit with regard to the partition deed Ex.A1 is not correct. The trial court has failed to consider the fact that the 4th defendant is the bona-fide purchaser. It has not touched upon either the specific plea or the evidence put forth by the

defendants including the sale deeds Ex.B2 and Ex.B4. So, the court has failed to appreciate the fact that there was nothing left to be partitioned and that the sale proceeds were spent by the 1st defendant for clearing the family debts. Hence, it is prayed to allow the cross appeal and also dismiss the appeal in AS 1/2018 and set aside the decree and judgment of the trial court in OS 75/2007 dated 03.10.2017 permitting the plaintiff to file a fresh suit claiming partition of a portion of the suit property covered under Ex.A1, partition deed dated 18.06.1982 and dismiss the suit in its entirety with cost.

12. The points for consideration are:-

1. Whether this appeal can be allowed?
2. Whether the cross-appeal can be allowed?

13. Points 1 and 2 :-

The learned counsel for the appellant has argued that the trial court has wrongly held that this appellant is entitled to seek share in Ex.A1 partition deed alone entered into between the appellant's grand father Palanisamy and his brother and not in Ex.A2 to Ex.A6 documents stating that the appellant has not proved that Ex.A2 to Ex.A6 are the joint family properties or separate properties of grand father Palanisamy. Whereas the defendants in their statement and evidence before the court have categorically admitted that the properties are the joint family properties and hence the findings of the trial court is not correct and further argued that the trial court went wrong stating that the plaintiff has not stated which property was obtained by grand father through partition deed and which property was purchased by grand father and the plaintiff has very well proved the same through proper oral and documentary evidence and hence, the trial court committed an error in this regard. Further the learned counsel for the appellant has argued that the trial

court has erred in holding the plaintiff has to file a separate suit for partition over the property in Ex.A1 is against law and hence considering the above all circumstances, the learned counsel for the appellant has prayed to allow the appeal and the decree the suit as prayed for.

14. The learned counsel for the respondents has argued that the marriage between the plaintiff's mother and the 1st defendant was not known to the family members and the marriage solemnized between them was not proved by the plaintiff and hence the trial court committed an error in holding that the marriage between the plaintiff's mother and the 1st defendant is valid is not correct and further more after the partition between the defendants 1 to 3, the trial court has permitted the plaintiff to file a fresh suit with regard to the partition deed Ex.A1 is not correct, since the partition has already been effected between the family members of the defendants 1 to 3 and furthermore, as the 4th defendant is the bona-fide purchaser, the welfare of the 4th defendant has to be protected by the court and hence considering the all above, the learned counsel for the respondents prayed to allow the cross appeal and dismiss the suit in toto.

15. The case of the plaintiff is concerned, it was contended by the plaintiff that the plaintiff's mother and the 1st defendant got married on 3.10.2001 and they got a decree for divorce dated 5.11.2004 before the competent court of law and hence the marriage between the plaintiff's mother and the 1st defendant was proved. As far as the marriage between the plaintiff's mother and the 1st defendant is concerned, it is the contention of the defendants that they were not aware of the marriage and divorce proceedings between the plaintiff's mother and the 1st defendant. The decree for divorce in HMOP 55/2004 was marked as Ex.A7 and the birth certificate of the plaintiff was marked as

Ex.A8. On perusal of Ex.A1 it is found that consent decree for divorce was granted by the competent court of law between the plaintiff's mother and the 1st defendant. Further it is evident from Ex.A7 that the marriage was solemnized between the plaintiff's mother and the 1st defendant and it is found from Ex.A8 that the plaintiff was born to them through the wedlock. Even though, the marriage was denied by the defendants 2 to 5, the 1st defendant did not appear before this court to say that the marriage between them was not valid. Further, Ex.A7 decree for divorce in HMOP 55/2004 speaks about the marriage between the plaintiff's mother and the 1st defendant and Ex.A8 shows that the plaintiff is the legitimate child of the 1st defendant. Hence, the trial court has correctly come to the conclusion that the marriage between plaintiff's mother and the 1st defendant is a valid marriage and the plaintiff is the legitimate son of the 1st defendant.

16. It is the contention of the plaintiff that the trial court has committed an error in holding that the plaintiff has not proved which of the properties are the self acquired properties of deceased Palanisamy and which of the properties are obtained by him through partition. For the above contention of the appellant, on perusal of written statement filed by the defendants 3 and 4 it reveals that "these defendants state that though the properties are the joint family properties of the deceased Palanisamy, the allegation that the plaintiff would be entitled to a birth right in the property is not admitted and the plaintiff is put to strict proof of the allegation." From the written statement filed by the 3rd and the 4th defendants, it was admitted by them that the suit properties are the joint family properties. Furthermore, the evidence of DW1 reveals that the properties are the joint family properties that DW1 in his cross examination has stated that "தாவா சொத்து விவரத்தில் சொல்லப்பட்டுள்ள சொத்துக்கள் அனைத்தும் பொதுக்குடும்பச் சொத்துக்கள் ஆகும்" Hence, from the

admission made by DW1, it is crystal clear that the properties are the joint family properties. Hence, the conclusion of the trial court that the plaintiff has not proved that the properties are the joint family properties except Ex.A1, is not correct.

17. It is admitted by both sides that the deceased Palanisamy died intestate. It is the case of the defendants that a registered partition has been effected between the defendants 1 to 3 dated 20.10.2003, after partition in order to meet out the loss in the business occurred by the 1st defendant, he has sold out his entire shares to the 4th defendant and hence the 4th defendant is the bona-fide purchaser and further stated that since the 1st defendant has sold out his entire share, the plaintiff is not entitled for partition. For the above contention of the defendants, the learned counsel for the plaintiff has argued that in order to cheat the share of the plaintiff, the defendants has arranged the partition and the 1st defendant has created the sale deeds in sham and nominal in favour of the 4th defendant.

18. The partition deed dated 20.10.2003 was marked as Ex.B1. The sale deeds dated 12.11.2003 and 15.12.2003 were marked as Ex.B2 and Ex.B4 respectively. On perusal of the above documents, it is clear that the partition had been effected between the defendants 1 to 3 in which “A” schedule property was allotted to the 2nd defendant, “B” schedule property was allotted to the 1st defendant and “C” schedule property was allotted to the 3rd defendant. Immediate after partition within one or two months, the 1st defendant has sold out his entire share to the 4th defendant as per Ex.B2 and Ex.B4.

19. Further, the 3rd and 4th defendants have stated in their written statement

in para 7 that “ though the 4th defendant did not have enough money on hand to purchase the property, in the interest of the family, obtained loans and purchased the property allotted to the 1st defendant in two separate sale deeds dated 12.11.2003 for an extent of 2.83 dry acres and 15.12.2003 for an extent of 2.17 dry acres for a total consideration of Rs.5,50,000/- ”. But the defendants have not proved through proper evidence that the 4th defendant obtained loans to purchase the property from the 1st defendant. Further, there was no evidence on the side of the 3rd and 4th defendants to show that the 4th defendant is the bona-fide purchaser, that the 1st defendant has sold out his entire share in order to meet out his business loss. There was no averment at all about the business loss of the 1st defendant. If really there was a loss in the 1st defendant's business, then there must be some documents with regard to his business. Hence, the contention raised on the side of the 4th defendant that the 1st defendant sold out his entire share to meet out the loss in the business and the 4th defendant is the bona-fide purchaser is hereby rejected.

20. It is the case of the plaintiff that the 1st defendant has no right to sell his entire share in which the plaintiff is having right over the share of the 1st defendant by birth and hence the sale deeds executed by the 1st defendant in favour of the 4th defendant will not bind upon the plaintiff's share and relied upon the judgments reported in

(2013) 4 Supreme Court Cases (Civ) 377

(2013) 9 Supreme Court Cases 419

Rohit Chauhan Vs. Surinder Singh and others.
Civil Appeal No. 5475 of 2013 decided on 15.7.2013.

Para 11. We have bestowed our consideration to the rival submissions and we find substance in the submission of Mr.Rao. In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the joint Hindu family and before the commencement of the Hindu

Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition in ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire in that and become a coparcener.

**(2017) 4 MLJ 571
LNIND 2017 MAD 1660**

M.Krishnamoorthy Versus K.Pondeepankar and others.
A.S.No.874 of 2008 Dt. 28.04.2017

Para 29.....In view of the above conclusion, the point that is raised in this appeal is answered in the affirmative and the plaintiff is entitled to sue for partition of the properties, inasmuch as they were allotted to his father at a partition that took place in 1984 as a coparcener of a joint Hindu family and the plaintiff would essentially have a right by birth to seek partition.

Para 30. On facts it is already seen that the Trial court granted a decree only in respect of those properties that fell to the share of the father, the 3rd defendant in the partition and not to the other properties. Hence, I do not find any illegality or irregularity warranting interference by me.

As far as the above decisions are concerned, the sons are entitled for partition in the share of their father which were allotted to them at the time of partition. As far as this case is concerned, as admitted by both sides, the registered partition took place between the defendants 1 to 3 dated 20.10.2003 in which the “B” schedule property was allotted to the 1st defendant. Hence, the plaintiff is having share over the property by way of birth, the sale deeds executed by the 1st defendant in favour of 4th defendant is not binding upon the plaintiff and the plaintiff is absolutely entitled to claim partition over the share of the 1st defendant.

21. Further, observation of the trial court is not correct in relating to the Provision Under Order 7 Rule 3 of Code of Civil Procedure stating that the defendants have not explained what are all the properties are ancestral and what are all the properties purchased out of the income from the ancestral. As discussed earlier, it is found that the documents which were filed on either side that the properties are the joint family properties of the deceased Palanisamy and the same was also admitted in the written statement and evidence of defendants and considering the all above this court comes to the conclusion that the plaintiff need not go for the separate suit regarding with Ex.A1 partition deed and the plaintiff is very well entitled for partition over the share of the deceased 1st defendant allotted in the Ex.B1 partition deed dated 20.10.2003.

22. During the pendency of the suit, the 5th defendant who is the son of 1st defendant through his second marriage was impleaded as a party to the suit. Since the marriage between the plaintiff's mother and the 1st defendant was dissolved by the competent court of law, the marriage between the 5th defendant's mother and 6th defendant is valid and the 5th defendant has automatically become the legal heir of 1st defendant. Further, as discussed earlier, this court already comes to the conclusion that the sale deed dated 12.11.2003 and 15.12.2003 i.e. Ex.B2 and Ex.B4 will not bind upon the plaintiff, which means the share of the 1st defendant remains in the hands of 1st defendant. Hence, the 5th defendant and the plaintiff are entitled in the share of the 1st defendant along with 1st defendant. Hence, considering the all above, the plaintiff is entitled for 1/3rd share over the share of 1st defendant which was allotted to him in the partition deed Ex.B1 dated 20.10.2003.

23. A.S.NO. 1/2018:

In the result, this appeal is partly allowed and the decree and judgment passed in O.S.75/2007 dated 3.10.2017, on the file of the District Munsif, Gobichettipalayam, is set aside and the plaintiff is entitled for partition of 1/3rd share over the share of 1st defendant which was allotted to him in the partition deed Ex.B1 dated 20.10.2003. No cost.

24. Cross Appeal No.1/2018:

In the result, this cross appeal is partly allowed and the decree and judgment passed in O.S.75/2007 dated 3.10.2017, on the file of the District Munsif, Gobichettipalayam, is set aside with regard to the permission granted to the plaintiff to file a fresh suit for partition of the properties covered under the partition deed Ex.A1 dated 18.06.1984 and suit is partly allowed and the 1st respondent/plaintiff is entitled for partition of 1/3rd share over the share of 2nd respondent/1st defendant which was allotted to him in the partition deed Ex.B1 dated 20.10.2003. No cost.

Dictated by me to the steno-typist, typed by her, then corrected and pronounced by me in open court on the 18th day of February 2020.

Sd/- Selvi.M.Pushparani, B.A., B.L.,
Subordinate Judge,
Gobichettipalayam.

List of Additional Documents marked and
List of Additional witnesses examined.

Nil.

Sd/- Selvi.M.Pushparani, B.A., B.L.,
Sub Judge,
Gobi.