

(1987) 11 MAD CK 0048
In the Madras High Court

A.P. Muthu alias Adaikappan and Others	APPELLANT
Vs	
Oa.Pr.M.Ar. Adaikappa Chettiar alias A.R. Adaikappa Chettiar (died) and Others	RESPONDENT

Date of Decision : 19-11-1987

Acts Referred:

Citation : (1987) 2 MLJ 454

Hon'ble Judges : Sivasubramaniam, J

Bench : Division Bench

Judgement

Sivasubramaniam, J.—The unsuccessful plaintiffs in O.S. No. 58 of 1980 on the file of the Subordinate Judge, Devakkottai are the appellants in A.S. No. 700 of 1981 and the fourth defendant in the said suit is the appellant in A.S. No. 707 of 1981.

2. The appellants in A.S. No. 700 of 1981 as plaintiff filed the said suit for a declaration that they are entitled to 3/8ths share in the plaintiff A and B schedule shares and for a permanent injunction restraining the defendants 1 and 2, who are respondents 1 and 2 in both these appeals, from selling or alienating the shares without their consent and the 4th defendant and also for partition and allotment and separate possession of their 3/8ths share in the plaintiff mentioned properties.

3. The material averments in the plaintiff are as follows: - The plaintiffs are the sons of the fourth defendant and the grandsons of the first defendant and the great grandsons of late Rao Bahadur O.A.P.R.M. Arunachalam Chettiar. The plaintiffs and defendants 1 and 4 belong to a very rich well known leading Nattukottai Chettiar family at Pallathur. The great-grandfather of the plaintiffs late Rao Bahadur O.A.P.R.M. Arunachalam Chettiar died on 11-3-1974. They are all industrialists having possessed considerable immovables, movables, business shares in various companies and banks which are either ancestral or acquired out of ancestral nucleus. In or about April 1953, when the fourth defendant was a minor, the properties of the said family were partitioned between the late

O.A.PR.M. Arunachalam Chettiar, the firsts defendant and the 4th defendant represented by his mother Valli Amrnal Achi through the mediation of O.A.Ok.C. Lakshmanan Chettiar and Mr. V. Subra-manian Chettiar of Pallathur. Mr.V. Subramanian Chettiar of Pallathur is now no more. Partition lists were prepared on 13-4-1953 and signed by the late Arunachalam Chettiar, the first defendant and Valliammai Achi representing them through minor the 4th defendant for having accepted the said partition. Each of the sharers was given a list containing not only the list of properties that fell to his share as per the list. but also the other two sharers. Later, on 4-4-1954, in regard to immovable properties, a registered partition deed was also executed by the parties. Except the income from the erstwhile joint family properties, the first defendant has no separate earnings or income. The shares in the third defendant company had been purchased out of the erstwhile joint family fund in the name of the first defendant. PiUt, at the time of partition in April, 1953, the said shares were either fraudulently suppressed to be brought into the hotchpot or had been by BONA FIDE-mistake omitted to be taken into consideration. The first defendant, inspite of the said omission, had treated these shares in the third defendant company as joint family properties and had sub-mitt'ju" his Income Tax returns on that basis. The plaintiffs are entitled to ignore them and they are entitled to 3/8ths share in the said shares and the 4th defendant to 1/8ths share. The bonus shares and other right shares were issued by the company and some other shares of the third defendant company were also acquired out of the income from the said shares. Later, the third defendant company had also issued fresh shares in or about 1978 for the value of Rs. 50 per share. These shares are described in A and B schedules appended to the plaint. The plaintiffs are entitled to their shares in the schedule mentioned properties. The plaintiffs are co-sharers in respect of the same and the first defendant is not entitled to alienate the same without the consent of the plaintiffs and the 4th defendant. They are not co-parceners with the first defendant as there had been a division in status in the year 1953. The first defendant had transferred some of the said shares of the third defendant company in the name of AR. Adaikappa Chettiar Charities Trust nominally and he is also in control of the same. These shares are described in the B Schedule appended to the plaint. The plaintiffs are entitled to ignore these shares and such transfer to the second defendant will not bind the plaintiffs and the 4th defendant. Strained relationship has prevailed in between the first defendant and the 4th defendant in or about 1980, and the first defendant, in order to cause loss or damage to the plaintiffs and the 4th defendant, is negotiating to sell the schedule mentioned shares to one industrialist Ganguswami of Udamalpet and appropriate the sale proceeds for his exclusive benefit. If such a sale of-shares is done, great prejudice and damage will be caused to the plaintiffs and the 4th defendant resulting in multiplicity of proceedings. The plaintiffs also apprehend that similar shares in other companies in the name of the first defendant might have been omitted or suppressed at the time of partition and the plaintiffs have to ascertain about the same and a proper partition is also to be effected in regard to the same. Until such shares are

partitioned between the co-sharers, the defendants 1 and 2 are bound to preserve the shares and are not entitled to deal with the same in any manner whatsoever in order to jeopardise the interests of the plaintiffs. Unless the defendants 1 and 2 are prevented by a permanent injunction from selling the undermentioned without the consent of the plaintiffs and the fourth defendant, the shares are likely to be disposed of by the first defendant. With a view to achieve a binding decision, defendants 3 and 4 are also added as parties to the suit. The plaintiffs are not questioning the partition effected in 1953 in respect of the properties already divided. Therefore, the plaintiffs have come forward with the suit for declaration to the effect that they are entitled to 3/8ths share in the schedule mentioned properties and for a permanent injunction restraining defendants 1 and 2 from selling the schedule mentioned shares in the name of anyone without the consent of the plaintiffs and the fourth defendant and also for partition and separate possession and allotment of 3 shares in the A and B schedule properties though the plaintiffs are not questioning the partition effected in the year 1953 in respect of the properties already divided.

4. The first defendant resisted the suit and filed a written statement raising the following contentions and the same was adopted by the second defendant : The first defendant is permanently residing at No. 48, Lavelle Street, Bangalore. Even during his father's lifetime, the first defendant had his own properties and transactions which were kept by him separate from his family properties. It is true that there was a partition in the family in the year 1953. Only one set of partition list was prepared consisting of 3 lists and the same was kept by the first defendant's father. The first list contains the properties that were allotted to the first defendant's father, the second list contains the properties allotted to the first defendant and third list contains the properties allocated to the shares of the 4th defendant. It is not true that three sets of lists were prepared and each sharer was given one set. The first defendant was living away from his father. The 4th defendant managed to get at a single set of lists and had the same produced by the plaintiffs with such mutilation as to suit their case after seeing a sheet relating to the shares of this defendant from out of the lists of the first defendant. The first defendant has his own separate earnings and that some shares of the third defendant company had been purchased from the joint family funds and such shares were purchased both in the names of this defendant and his father and the shares which had been purchased with joint family funds were brought into the hotchpot and divided in partition during the year 1953. It is incorrect to say that the shares belonging to the family and standing in the name of the first defendant were fraudulently suppressed to be brought into the hotchpot or by mistake omitted to be considered at the time of partition. It is not true to say that the first defendant treated any of the shares belonging to him as joint family properties in his Income Tax returns. As soon as the partition list was finalised, the shares that were allotted to each of the sharers were duly entered into accounts of the respective sharers. The partition lists show that the father of the first defendant and the 4th defendant were each allotted with shares as "

mentioned in the respective lists. The list of the first defendant did not disclose the share of the third defendant company. Therefore, there are reasons to believe that "the 4th defendant had cleverly removed and suppressed the list sheets of the first defendant which contain the particulars of shares that were allotted to him. The first defendant's father and the fourth defendant were directors of the third defendant company and they have signed some of the share certificates issued in the name of this defendant. It is, therefore, idle to contend that the shares in the name of this defendant are either fraudulently suppressed or by mistake omitted to be taken into consideration at the time of partition in the year 1953. The suit is engineered by the fourth defendant through the medirnuin of his sons with a view to harass and annoy the first defendant on account of the dispute that had arisen subsequently between the first defendant and the 4th defendant. The shares listed in the B schedule were all purchased by this defendant in 1978 or 1979 for proper consideration paid by him and were not issued in lieu of old shares. The shares in item No. 4 of the plaint were purchased from VE.A.VE. Aiuthiah Chettiar of Tiruchi. The ledger accounts of this defendant in the third defendant's company would disclose several other shares listed in A and B Schedules in the plaint and they would belie the plaintiff's case of fraud, suppression or inadvertent omission at the partition. The shares listed in B schedule did not belong to this defendant and they belong to the second defendant-Trust to which the first defendant had gifted them in or about 1963. The second defendant is enjoying the benefits of those shares as sole absolute owner acquiring title by adverse possession also. The suit filed in the year 1980 is barred by limitation. Out of the shares listed in A schedule, item 1 was acquired by the first defendant in 1978 and items 2 and 3 have been brought into hotchpot at the time of partition in 1953. Even otherwise, this defendant has been enjoying the said shares as sole and absolute owner acquiring title by adverse possession. Therefore the suit regarding the A schedule properties is also barred by limitation. The plaintiffs were not parties to the partition held in the year 1953. They were born to the 4th defendant long after 1953. They are not entitled to attack the partition on the ground of omission. The 4th defendant is and has been a wholetime Director of the third defendant and was fully aware of the shares held by this defendant and he not having come to Court within the time allowed by law, the plaintiffs cannot maintain the suit to circumvent the bar of limitation. The father of the first defendant, the 4th defendant and the plaintiffs are estopped by their acts, conduct and also acquiescence, laches from questioning the exclusive ownership of the shares of the first defendant. The plaintiffs are not co-sharers with the first defendant. The first defendant is competent to alienate at his whims and fancies and the plaintiffs if at all have any such right of shares, they are entitled to claim a share in the sale proceeds. It is incorrect to say that the transfer of shares listed in B schedule by the first defendant with the second defendant is sham and nominal. There is no motive for the first defendant to make a nominal transfer in favour of the second defendant. The transfer has been made in good faith for a charitable purpose and the rights of the second defendant in respect of these shares cannot

be assailed. It is true that strained relationship prevails in between the first defendant and the 4th defendant, but it is incorrect to say that the first defendant is trying to sell away the suit shares with a view to cause loss to the plaintiffs and the 4th defendant. The plaintiffs and the 4th defendant are well aware that the first defendant is a man of considerable means. There is no need for him to dispose of such shares. The apprehension is only imaginary. The relief of injunction is not proper and consequential and the declaration prayed for cannot be granted, in as much as the frame of the suit is defective and opposed to law. Even assuming that the plaintiffs are entitled to 3/8ths share in the suit shares, they can be adequately compensated in terms of money.

5. Defendants 1 and 2 filed an additional written statement containing the following averments: - The plaintiffs and the 4th defendant have absolutely no Bona fides or genuine claim to seek reopening of the partition held in the year 1953. The 4th defendant was not entitled to more than 1/4th shares at the time of partition in 1953. The first defendant and his father have been over-generous in favouring him with considerable assets of more than what he would legitimately and legally be entitled to. The first defendant and his father had taken several steps to elevate him as one of the Directors of Sri Venkateswara Mills, Udumalpet with considerable perquisites and earnings, out of which the fourth defendant had earned several crores. The fourth defendant is a brilliant and technically qualified degree-holder and a very shrewd business-man who has not interdicted or challenged the partition held in the year 1953, nor had they made any steps to reopen the said partition. The plaintiffs have no legal right or LOCUS STANDI to file the suit, as they were not born in the year 1953 or 1954 and the fourth defendant was not then married. The plaintiffs are, therefore, not co-parceners or co-owners with the first defendant and his father and they never had any privity of estate or contract with the first defendant. The father of the first defendant died in or about 1974 and till his death, he was one of the Managing Directors for several years and later he was a Director of Sri Venkateswara Mills at Udumalpet till his death and he was fully aware of the shareholdings of the first defendant registered in the said company and the creation of trust by the first defendant and the transfer of shares to the said trust as well as to the Collage at Pallathur. No one has questioned the validity of the same at any point of time. Whatever rights the fourth defendant and the plaintiffs had, they were completely lost and got extinguished by limitation and the only person who was competent to question the validity of the partition or transfer of shares was his grandfather, if really the partition was vitiated by fraud, mistake or omission. Even the fourth defendant did not question the same previously. Therefore, the plaintiffs have no better rights than his father had. The plaintiffs have not challenged the participation and representation in the said partition of the 4th defendant. The fourth defendant himself has signed in the shares owned and held by the first defendant in the said partition and he has also signed in several shares as one of the Directors or as whole-time Director and also signed in all records relating to the transfer of shares by the first

defendant to A.R.A.C.C. Charities Trust. Thus, the 4th defendant and the father of the first and the plaintiffs have been guilty of acquiescence and laches and by their acts and conduct they were also estopped from making any claims to the shares possessed and held by the first defendant. The shares held by the first defendant are his separate properties registered in the company registers in his own name and also in the name of AR. Adaikkappa Chettiar Charities Trust. There is no co-ownership between the first defendant and the father of the plaintiffs after 1953 partition. The 4th defendant has failed to bring any action as against him within three years after his attainment of majority. Further, no suit for the relief of partition of a few specified items without setting aside the partition of 1953 could be instituted and the shares have not been valued as per the share market. Unless proper court fee in respect of A and B schedule shares has been paid, the plaintiffs cannot seek any relief in the suit. The fourth defendant had stealthily removed the account, books kept by the father of the first defendant without the knowledge of the first defendant. There was no ancestral nucleus or acquisition. The first defendant has his own separate income and he has been assessed to separate Income Tax. The first defendant has transferred 1049 shares out of generous charitable motive by way of gift in the year 1955 to the College at Pallathur in the name of his mother Seethalakshmi Achi. The 4th defendant is now the Correspondent of the Collage and the first defendant is the Chairman and President of the said trust. The said transfer of 1049 shares in favour of the College is not challenged by the plaintiffs and the transfer in the name of Seethalakshmi Achi College trust has been also recognised and the shareholdings had been transferred in the name of the said trust and the 4th defendant is in possession of the said shares. No exception has been taken by the first defendant till this date in respect of the gifts by the first defendant to any of the charitable institutions. The second defendant is the absolute owner of the shares and further acquisitions therefrom and the plaintiffs are not entitled to question the dedication or transfer to the trust without setting aside such transactions.

6. The fourth defendant filed a separate written statement supporting the case of the plaintiffs and claiming partition of his 1/8th share in the suit properties.

7. Plaintiffs 2 and 3 filed a reply statement repudiating the contentions raised by defendants 1 and 2 in their written statements.

8. The trial Court framed as many as 14 issues arising out of the pleadings of the parties and after a consideration of the evidence adduced by them, dismissed the suit holding that the shares of Sri Vemkates Mills Limited were not left out at the time of partition between Arunachalarn Chettiar and others in 1953, that the plaintiffs and the fourth defendant are not entitled to any shares in the same, that the suit is not maintainable without setting aside the partition in 1953 and that the suit is barred by limitation. Aggrieved against the said decision, the plaintiffs have filed the above regular appeal in A.S. No. 700 of 1981 and the 4th defendant filed an independent appeal in A.S. No. 707 of 1981.

9. Mr. V.R. Bikshewaran, learned Counsel for the appellants in A.S. No. 700 of 1981 and Mr.G.Subramaniarn, learned Counsel for the appellant in A.S. No. 707 of 1981 submit that the following points would arise for consideration in these two appeals:

1. Whether the suit is maintainable?
2. Whether the plaintiffs and the fourth defendant are entitled to any shares in the suit properties?
3. Whether the suit is barred by limitation?

10. The plaintiffs have filed the present suit for declaration and partition of their 3/8th share in the suit properties and the 4th defendant claims 1/8th share for himself. Before dealing with the main controversy in the appeal, we have to take note of the following admitted facts : - One O.A.P.R.M. Arunachalam Chettiar, the ancestor of the plaintiffs and defendants 2 and 3 was a very rich man who was held in high esteem in the society. He is the father of Adikkappa Chettiar, the first defendant in the suit and one O.A.A. Ananthapadmanabhan Chettiar, the 4th defendant in the suit is his grandson. The plaintiffs are the sons of the fourth defendant and great grandsons of the said Arunachalam Chettiar. He died on 11-3-1974. Their family possessed of considerable immovable, movables, business shares in Companies etc. In or about April 1954, when the fourth defendant, who is the father of the plaintiffs, was a minor, the properties were partitioned between the late Arunachalam Chettiar, his son the first defendant and the grandson the fourth defendant represented by his mother Valliammai Achi through the mediation of one O.A.O.K.T. Lakshmanan Chettiar and V. Subramanian Chettiar of Palla-thur. Valliammai Achi has been examined as P.W. 2 and one of the Panchayatdars Lakshmana Chettiar has been examined as P.W. 1 in the suit. Partition lists were prepared on 13-4-1953 and signed by late Arunachalam Chettiar, the first defendant and Valliammai Achi representing the minor 4th defendant for having accepted the said partition. Exs. A1 to A4 are the lists prepared at the intervention of the mediators including P.W. 1. The shares allotted to late Arunachalam Chettiar are found under Ex. A1 and the share of the first defendant under Ex. A2 and Ex. A3 contains the share that was allotted to the fourth defendant. Ex. A-4 is the list containing the items of properties allotted to the said three persons. Subsequently on 4-4-1954 a registered partition deed under Ex. A-5 was also executed by the parties regarding the immovable properties. The plaintiffs and the fourth defendant divided their family properties in the year 1974. The shares which are the subject-matter of the present suit, admittedly stand in the name of the first defendant always and the shares described in B schedule to the plaint have been transferred in the name of the second defendant-trust. Even after the partition in 1953, neither late Arunachalam Chettiar nor the fourth defendant, who were parties to the partition in the year 1953, claimed any right in the said shares. It is only for the first time the plaintiffs, who were not born at the time of the partition in the year 1953, have come forward with this suit in the year 1980 for partition and separate

possession of their shares in the suit properties. It is no doubt true that the suit shares have not been mentioned in the lists Ex. A-1 to Ex. A-4 prepared at the time of partition in the year 1953.

11. Now the plaintiffs claim that except the income from the erstwhile joint family properties, the first defendant had no separate earnings or income. The suit shares of the third defendant Company were purchased out of the joint family fund in the name of the first defendant. However, at the time of partition in April, 1953, the said shares were either fraudulently suppressed to be brought into the hotchpot or had been by BONA FIDE mistake omitted to be taken into consideration. According to the plaintiffs, in spite of such omission, the first defendant had treated the said shares as joint family properties and had submitted his Income Tax returns on that basis. According to them, certain bonus shares and other right shares were issued by the third defendant company in the name of the first defendant. Apart from that, some more shares of the third defendant Company were also acquired out of the income from the said shares. Later on, the third defendant Company had issued fresh share in or about 1978 for the face value of Rs. 10 per share in lieu of the shares for the face value of Rs. 50 per share. These shares are now described in A and B schedules to the plaint. According to the plaintiffs, they are entitled to their shares in all the said shares and they are only co-sharers in respect of the same. The first defendant is, not entitled to alienate the same without their consent. Meanwhile, the first defendant had transferred the shares described in B schedule to the plaint in the third defendant company in the name of AR.-... Adaikappa Chettiar Charities Trust. The plaintiffs claim that the said transfer is nominal and the first defendant continued to have control over the said shares. According to them, it would not affect their rights and the rights of the 4th defendant. Certain misunderstandings arose between the first defendant and the 4th defendant, the father of the plaintiffs. The first defendant attempted to sell the said shares to a third party. The plaintiffs, apprehending that it would affect their rights came forward with the present suit for partition and separate possession. They have also asked for a permanent injunction restraining the defendants 1 and 2 from selling the said shares. They have specifically stated that they are not questioning the partition effected in the year 1953 or about the properties already divided between the members of the family.

12. The claim advanced by the plaintiffs was resisted by the first defendant on the ground that even during the lifetime of his father, he had his own properties and transactions which are kept by him separate from his family properties. According to him, he had his own separate earnings. The shares that were purchased out of the joint family funds were brought into the hotchpot of the joint family and divided between its members. In so far as the suit shares are concerned, he claims exclusive right to the same as having been acquired out of his separate earnings. The shares shown in B schedule were all purchased by him in 1978 or 1979 for proper consideration. The B schedule shares were given to the second defendant trust in or about 1963, and as such he is not the owner of

the same at present. The second defendant trust is enjoying the benefits of those shares as absolute owner having acquired title to the same. Apart from the said factual contentions, the first defendant raised certain legal objections.

According to him, the plaintiffs have no legal right or LOCUS STANDI to file the suit as they were not born in the year 1953 or 1954. Therefore, they are not coparceners or co-owners with the first defendant and his father and they never had any privity of estate or contract with the first defendant. Since the partition was not questioned by the fourth defendant or late Aruna-chalam Chettiar, the plaintiffs, who are the after-born sons of the 4th defendant, have no right to file the present suit for partition. They ought to have filed a suit to set aside the partition held in the year 1953 and asked for reopening the said partition. In any event, according to him, the suit is hopelessly barred by limitation.

13. During the pendency of these appeals, the first defendant, who was the first respondent in the appeals, died on 23.10.1986. Therefore, the fourth defendant, who was the appellant in A.S. No. 707 of 1981 filed a petition in CM. P. No. 563 of 1987 under Order 22, Rule 4, C.F.C. read with the Appellate Side Rules to bring on record the legal representatives of his father, the first respondent Adaikkappa Chettiar. Another petition in C.M.P. No. 564 of 1987 was filed by him u/s 151, C.P.C. to record him as the sole Trustee of AR. Adaikkappa Chettiar Charities Trust in the place of the deceased sole Trustee AR. Adaikkappa Chettiar. According to him, the deceased left behind him his last will and Testament dated 13.10.1986 appointing him as the sole executor of the estate and sole Trustee of the said Trust. A xerox copy of the Will was filed along with the petition. Therefore, he claimed that after the death of Adaikkappa Chettiar, the Will has come into effect and he is entitled to come on record in the place of the first respondent and as sole Trustee of the second respondent Trust and to prosecute the appeal in his capacity as the sole executor of the Will and sole Trustee of the Trust. Similarly, in A.S. No. 707 of 1981, he filed a petition in C.M.P. No. 1441 of 1987 under Order 22, Rule 4, C.P.C., read with Section 151, C.P.C. to cause an entry to be made to the effect that he is the legal representative of the deceased first respondent. He filed another petition in C.M.P.No. 1442 of 1987 under the same provision of law to transpose the second respondent Trust as the 2nd appellant and permit him to proceed with the appeal on the ground that he being the sole heir, sole executor and sole Trustee of the Trust, is entitled to continue the appeal representing both the estate of his father and the second respondent Trust. He further contended that unless the second respondent Trust is also transposed as an appellant, he will be put to embarrassment and it will create conflict of interest. Yet another petition was filed by him in C.M.P.NO. 1443 of 1987 under the same provisions to cause an entry to be made to the effect that the appellant-4th defendant is the sole Trustee of the second respondent Trust and permit him to proceed with the appeal. According to the learned Counsel appearing for the Trust, the said Adaikkappa Chettiar Charities Trust was created by a Trust Deed in 1963 registered in the Office of the Sub Registrar, Bangalore. The founder Adaikkappa Chettiar named himself as the sole Trustee. The founder

of the Trust executed a supplementary deed of Trust dated 17.12.1982 registered as document No. 513 of 1982-83 in the Office of the Sub Registrar, Bangalore in which certain changes were made in the constitution and management of the Trust. It is further contended by the present petitioners that the Chairman of the Board of Trustees of the Trust, Sri Adaikkappa Chettiar, executed a Will dated 18.10.1984 confirming the appointment of the petitioners as additional Trustees under in favour of the Trust Deed and also bequeathing his properties in favour of the Trust absolutely and in the name of other institutions. It is claimed by the petitioners that the Board of Trustees has been administering and managing the affairs of the Trust from 17.12.1982 and after the death of Adaikkappa Chettiar on 23.10.1986, one Surya-narayanan was elected as the Chairman of the Trust. According to the fourth defendant, the Will dated 13.10.1986 was the last Will executed by his father Adaikkappa Chettiar, under which he became the sole executor and legatee of his estate and sole Trustee of Adaikkappa Chettiar Charities Trust. The Board of Trustees has no right or authority to administer the Trust and manage its affairs after the Will dated 13.10.1986 executed by late Adaikkappa Chettiar which came into effect after 23.10.1986. He has cancelled the supplementary Trust deed dated 17.12.1982 by executing a document dated 24.2.1987 and he has taken several steps to streamline the administration of the Trust. Even if there was an earlier Will as stated by the petitioners, the same has been cancelled by the later Will dated 13.10.1986.

14. Learned Counsel for the Trust submitted that after the Trust Deed was amended on 17.12.1982 by a registered deed, the petitioners were appointed as additional Trustees by the founder himself. The said Trust deed excludes all the family members from the appointment of Trustees. The Will dated 18.10.1984 executed by the founder of the Trust also confirms the appointment of the petitioners as Trustees. The Will dated 13.10.1986 relied upon by the fourth defendant is patently a fabricated document and the same has not been registered or probated.

15. After considering the above contentions of the parties in the said interlocutory applications, we held that for the limited purpose of deciding the question to who among the rival claimants is entitled to represent the Trust, we were PRIMA FACIE satisfied that the Trustees of the second defendant Trust would be entitled to do so in the suit and that it is for the appellant in A.S. No. 707 of 1981 to agitate his claims in the manner known to law. Therefore, we are not going to express any opinion on these rival submissions of the parties in these appeals, as it is a matter which will have to be decided in separate proceedings.

16. After the death of the first defendant/first respondent during the pendency of these appeals, the face of the case has changed in so far as the A schedule shares are concerned. The legal representatives, who have come on record in the place of the first defendant, are not contesting the claim of the plaintiffs in any manner. As the second defendant Trust is interested only in the B schedule

shares, it has no LOCUS STANDI to question the rights of the parties in so far as the A schedule shares are concerned in the normal course. We ever, the trustees claim certain rights under the above said Will. But the trust the validity of the Will is not the subject matter of the present suit. As already discussed above, the fourth defendant has set up another Will claiming it to be the last Will and Testament of late Adaikkappa Chettiar. Both these Wills are under dispute and they have not been proved for the purpose of the present case. It is agreed by all the parties concerned that the question relating to the truth and validity of the said Wills can be left open to be decided independently in a separate suit or suits. In view of this position, the rights of the parties are not decided with reference to the said Wills. In the absence of the said Wills, the plaintiffs may be entitled to a share in the A schedule properties. However, it is subject to the rights of the parties under the said Wills. Therefore, the entire question regarding the suit A schedule shares are left open to be decided in a separate suit or suit that may be filed by the respective parties to establish their rights to the A schedule shares. It is open to the parties to raise all their contentions in such a suit. Therefore, we are proceeding to consider the rights of the parties only in respect of the suit B schedule shares which are alleged to have been gifted to the second defendant Trust by the first defendant.

17. POINT NO. 1: - Before going into the merits of the case, it is necessary to dispose of the objections raised by the defendants regarding the maintainability of the suit. It is the specific case of the plaintiffs that during the partition in the year 1953, the suit shares were not taken into consideration owing to fraud, suppression or omission by the first defendant. However, during the course of the trial, the plaintiffs have proceeded only on the basis that it was only an inadvertent omission. The principal objection raised by the defendants was that the plaintiffs were not born or conceived at the time of partition in the year 1953 and, therefore, they are not entitled to challenge the said partition and ask for a fresh partition. The second line of objection was that even if the plaintiffs are entitled to challenge the said partition, they are not entitled to do so on the principles of law laid down by the Supreme Court in *Ratnam Chettiar and Others Vs. S.M. Kuppuswami Chettiar and Others*, .

18. First let us take up the case regarding the right of an after-born son in the properties of the erstwhile joint family. The law relating to the right of an after-born son is well-settled by now. The following principles emerge from the decisions of the Courts and the commentaries of the well-known authors on Hindu Law. In the case of a son born after partition but conceived before such partition, no partition can be made so as to prejudice his rights, because under the Hindu Law a child is presumed to come into existence from the moment it is conceived, and if no proper provision is made for his share at the partition, he is entitled to get his share by reopening it. On the other hand, if he was begotten only after partition, he is entitled to reopen it so as to obtain a share for himself only if the father has not reserved to himself a share thereunder. If on the other hand, a share was allotted to the father under the partition, the son conceived

thereafter is not entitled to reopen it so as to claim a share in the interests of the separate coparceners, but is only entitled to succeed against the property allotted to the father along with his self-acquisitions to the exclusion of the divided sons. The fact that the father has alienated the share allotted to his is no ground for such a son claiming to reopen the partition. The basis of these principles seems to be the concept that a father should not effect a division of the ancestral wealth so long as the mother has not passed the age of child-bearing. This principle found support in the Hindu Law by Colebrooke wherein he has summarised the position as follows:

Hence while his father's right subsists, his choice alone determines the time for making a partition of his own acquired wealth; but, in the case of property inherited from ancestors, it is also requisite that the mother be pastchildbearing; and, with this reserve, the father, or (according to another opinion) he or his son, may choose the time, partition of both sorts of property may be made, when the father's right terminates by his demise, natural or civil. These are the three periods for making a partition according to Jimutavahana and the rest. But Vijnaneswarara observes: "Hence, while the" mother is capable of bearing more sons, and the father is still attached to worldly matters, partition of wealth" which was inherited from the grandfather may take place by the choice of his sons, even against his will. He considers the phrase, "when the mother is too aged to bear more sons", as relating to wealth acquired by the father himself.

It is unnecessary to consider the various decision on this aspect and it is enough to refer to the decision of the Privy Council in *Bhagvati Ram v. Ramji Ram* AIR 1947 P.C. 140, wherein the following principle was laid down:

The rights of a son born after partition often referred to as an after-born son—under the Hindu Law were much discussed by Hindu Jurists. The ancient texts bearing on the question are conflicting but it is not necessary to examine those texts as the law to be applied is now well understood by the Court in India and was also correctly applied in this case. It is enough to state that the law is well settled that a son begotten as well as born after partition, where a share has been allotted to the share of the father, as in the present case, is not entitled to have the partition to be reopened and to claim a redistribution of the shares. He is only entitled to succeed to his father and to the separate or self-acquired property to the exclusion of others.

But it is to be noted that the texts which permit such a reopening of a partition restrict this right to the case of a division of the joint family property by a father amongst his sons and do not cover cases of partition between the father, his brothers and father. Such a right is limited only to the case of partition by the father amongst his sons without retaining for himself a share. It is also well established that the said principle is not applicable to a general partition taking place amongst the branches of the family. In dealing with this principle, the Mayne's Hindu Law says as follows:

But the application of this principle is expressly limited to the case of partition between father and sons, and there is no warrant for its extension to a son born to a separate coparcener, other than the father of the family, after partition.

Therefore, on the facts of the present case, we find that the plaintiffs are not entitled to ask for reopening of other partition.

19. However, the plaintiffs are not basing their claim on the principles of a right of an after-born son to ignore the earlier partition and ask for a fresh partition. The other ground on which the maintainability of the suit is challenged is on the basis of other principles laid down in *Ratnam Chettiar and Others Vs. S.M. Kuppuswami Chettiar and Others*, . Mr. Surana, learned Counsel for the second defendant Trust submitted that even if the plaintiffs are entitled to a share in the properties, the plaintiffs' father, the fourth defendant, was given more than a share to which he was entitled to in the partition of the year 1953. The mere fact that certain shares were omitted to be included in the said partition cannot be a ground for ignoring the said partition by the after-born sons. Even if they are included, it will not tilt the balance between the sharers. According to him, it is the duty of the Court to assess the value and to find out whether the partition was fair and just and whether it was detrimental to the minors. It is significant to note that in this case, the fourth defendant, who was a minor at the time of partition, has not challenged the said partition independently earlier to the present suit filed by the plaintiffs. Reliance was placed on the decision of the Supreme Court reported in *Ratnam Chettiar and Others Vs. S.M. Kuppuswami Chettiar and Others*, , wherein the Supreme Court has laid down the following principles:

(1) A partition effected between the members of a Hindu undivided family by their own volition and with their consent cannot be reopened unless it is shown that it was obtained by fraud, coercion, misrepresentation or undue influence. In an such a case, the Court should require strict proof of facts, because, an act INTER VIVOS cannot be lightly set aside.

(2) When the partition is effected between the members of the Hindu undivided family which consists of minor coparceners, it is binding on the minors also, if it is done in good faith and in a BONA FIDE manner keeping into account the interests of the minors.

(3) But if the partition is proved to be unjust and unfair and is detrimental to the interests of the minors, the partition can be reopened after any length of time. In such a case, it is the duty of the Court to protect and safe-guard the interests of the minors and the onus of proof that the partition was just and fair is on the party supporting the partition.

(4) Where there is a partition of immovable and movable properties, but the two transactions, are distinct and separable, or have taken place at different times, if it is found that only one of these transactions is unjust and unfair, it is open to the Court to maintain the transaction which is just and fair and to reopen the

partition that is unjust and unfair.

20. In reply to the said contentions of the learned Counsel for the second defendant Trust, learned Counsel for the appellants rightly contended that the abovesaid principles have no application to the facts of the present case since the present claim of the plaintiffs stand on an entirely different footing. According to them, the plaintiffs are not questioning the truth or validity of the partition that had taken place in the year 1953 in the family. As a matter of fact, that is their specific case in the plaint also. The plaintiffs have not filed the suit either to set aside the earlier partition or to reopen the said partition. According to them, the shares which are the subject-matter of the present suit, were not taken into account in the earlier partition and the present suit is laid for partition of the said omitted items of properties of the family. It is the case of the first defendant also that the said enaves were not the subject matter of the earlier partition, since the first defendant claimed the same to be his separate properties, in these circumstances, the question of reopening of the partition by after-born sons does not arise at all.

21. The next question that arises for consideration is, whether the suit is maintainable in respect of the suit shares after a regular partition had taken place in the year 1953 between the members of the family. We are going to consider whether the shares are the assets of the joint family or not later on. Assuming for the purpose of the present discussion that the said shares are the joint family properties we have to consider whether the present suit for partition is maintainable. Mr. G. Sub-ramaniam, learned Counsel for one of the appellants submitted that once they are proved to be joint family properties and the same were not taken into consideration at the time of the earlier partition, they continued to be the assets of the joint family and the plaintiffs are entitled to ask for partition of the same. Reliance was placed on the decision of the Supreme Court reported in *Kashinathsa Yamosa Kabadi, etc. Vs. Narsinga Bhaskarsa Kabadi, etc.*, wherein the Supreme Court has held that it is always open to the members of a joint Hindu family to divide some properties of the family and to keep the remaining undivided and that by the earlier partition if the parties ceased to be members of the joint Hindu family and that if thereafter the assets of the family were divided and that division was accepted by the parties, the properties reduced by the parties to their possession must be deemed to be in the individual ownership of the parties to whom they were allotted, and the remaining properties as of their tenancy-in-common. A special Bench of the Kerala High Court has considered this question in the decision reported in *Kumaraswami Mudaliar and Others Vs. Rajamanikkam Udayar and Others*, and held as follows:

Under Hindu Law it is well established that where an item of joint family property was left out in the partition by mistake, fraud or accident, it is not necessary to reopen the partition and that the right of the coparceners in the excluded property will not be lost by the partition entered into and can be enforced by a

fresh partition of that property. So long as there is no infirmity attached to the partition deed in respect of the properties included therein, no question of reopening the same arises.

On a consideration of these principles, we find that a suit by a member of the joint family for partitioning certain properties of the joint family, which were omitted to be taken into consideration in the earlier partition, is maintainable. Therefore, in this case, if the suit B schedule shares originally belonged to the joint family and the same was not partitioned in the earlier partition, it was always open to the fourth defendant to claim a share in the same. On principle, the fourth defendant would have been entitled to a share in the same and in such a case, the plaintiffs, who were subsequently born, will also become entitled to a share in the same not as after-born sons, but as sons of the fourth defendant with whom they form an undivided Hindu joint family. The resultant position would be the plaintiffs will be entitled to a share if it is proved that the B schedule shares belonged to the joint family and continued to be so till the date of the suit subject to the question of limitation.

22. Point No. 2 : - As already discussed earlier, the controversy in these appeals is confined only to the B schedule shares over which the second defendant Trust claims title on the ground that they were gifted to the Trust by the first defendant. On the other hand, the plaintiffs' case is that they were all acquired out of the joint family funds and they were joint family properties on the date of the partition in the year 1953 and they continued to be so thereafter, since they were not the subject matter of the said partition. The first defendant's defence is that the said shares were acquired by him out of his separate earnings and they were always treated as his separate properties and that is the reason why they were not divided in the partition and allotted to the other "members of the family. It is no doubt true that the first defendant has not come forward with a definite stand in the written statement. In paragraph 6 of the plaint, the plaintiffs have come forward with a specific case that the shares were acquired out of the joint family funds. In answer to the said claim the first defendant has vaguely stated in paragraph 5 of the original written statement as follows:

...this defendant states that he had his own separate earnings and that only some shares of the 3rd defendant Company had been purchased from the joint family funds, that such shares were purchased both in the name of this defendant and his father and that the shares that had been purchased with joint family funds were brought into the hotchpot and divided in the partition of 1953.

There is no evidence to show which are the shares in the third defendant Company which were treated as joint family properties at the time of partition. However, in paragraph 7 of the written statement, he has made the following categorical statement:

The shares listed in Schedule-B to the plaint were all purchased by this defendant in 1978 or 1979 for cash. They were not issued in lieu of old shares.

The shares in item 2 of B schedule to the plaint were purchased from VE.-A.VE. Muthia Chettiar of Tiruchy. The further fact that the ledger folios of this defendant in the 3rd defendant Company's books mention several other shares than those listed in Schedules A and B to the plaint will clearly belie the plaintiffs case of fraudulent suppression or omission at the partition.

Again, in paragraph 8 of the written statement, he stated as follows:

The shares listed in Schedule-B to the plaint do not belong to this defendant. They belong to the 2nd defendant trust to whom this defendant gifted them in or about 1963.

During the course of his evidence as D.W. 2, the first defendant has categorically stated that they were his separate properties and that he had gifted the same to the second defendant Trust. He came forward with an explanation in his evidence stating that at the time of partition in the year 1953, his father Aruna-chalam Chettiar had asked him to retain those shares acquired by him for himself stating as follows:

Therefore, he took up the stand at the time of his evidence that the said shares were taken into consideration at the time of partition and since they were acquired by him, his father had permitted him to retain the same in the interest of his grandson the fourth defendant in the suit. In view of such pleading by the parties, we have to find out what is the character of the B schedule shares and whether the gift in favour of the second defendant Trust is true and valid.

23. Before going into the question about the character of the B schedule shares, we have to take note of certain legal presumptions in this connection. Admittedly, there was a partition in the year 1953 wherein almost the entire properties of the joint family were divided between late Arunachalam Chettiar, the first defendant and the fourth defendant. It is nobody's case that the said partition has not been acted upon by the members of the family. They have been in possession and enjoyment of their respective shares without any dispute whatsoever till the present suit came to be filed in the year 1980 nearly 27 years after the said partition. Again there is evidence to show that there was a partition in the family of the fourth defendant and the plaintiffs in the year 1974. Even at that time, there was no attempt to advance a claim to the present suit shares on the ground that they are the joint family properties available for partition. A Hindu joint family is presumed to be joint and undivided until the contrary is proved. Once a partition in the sense of a division of right, title or status is proved or admitted, the presumption is that joint family properties were partitioned or divided. Therefore, the well-established principle is that once it is proved or admitted that a partition had already taken place, the burden lies upon the person who alleges that a portion of the family property is still joint property. In other words, the earlier partition was partial as to property. In the absence of any indication to the contrary, it will be presumed that there was a complete partition of all properties. A similar presumption would arise in respect of the

property in the exclusive possession of any one of the members of the erstwhile joint family as his own property. Therefore, in this case, the plaintiffs having admitted the partition of the year 1953 are bound to prove that the said partition was a partial one and the suit properties were available for partition on that date, but were omitted to be partitioned for some reason or other. They must also show that they continued to possess the character of joint family property even after the said partition in the year 1953. In view of this legal position had taken place in their family, the burden is very heavy on the plaintiffs to establish the said fact. It is in this background we have to proceed to decide the character of the B schedule shares. The normal state of every Hindu family is joint in food, worship and estate. The presumption of jointness is not an absolute one. There is no presumption that a family, because it is joint, possesses joint property or any property. Acquisition of properties in the names of different members is not inconsistent with the theory of jointness. It is well-established principle that the burden of proving that any particular property is joint family property is in the first instance upon the person who claims it as coparcenary property. Where the possession of a nucleus of joint family property is admitted, an acquisition made by a member of the family is presumed to be joint family property provided such a nucleus must be such as with its aid the property in question could have been acquired. Even where the family was possessed of sufficient" ancestral property but at the same time some members of the family had separate funds or acquisitions or dealings of their own, such a position would shift the onus on to those who claim as joint family property particularly acquisitions which have been allowed to be treated by individual; coparceners as their own. Therefore, the question whether the property is joint family property or not has to be decided on the facts of each case.

24. It is not in dispute that the suit B schedule shares were issued in the name of the first defendant and continued to stand in his name until they were transferred in the name of the second defendant Trust. It is also on record that dividends were declared only in the name of the first defendant. The evidence available in this case discloses that apart from the joint family properties and the joint family business, the first defendant had his own independent transactions and he was assessed to Income Tax separately from the year 1928 onwards. He had his own separate income for the purchase of shares every now and then. He was carrying on business at Ceylon and according to him, he was having independent income from his business. The income derived by him was not shown in the joint family accounts. Even though the initial burden is on the first defendant to show that the B schedule shares were acquired out of his own separate funds, it is open to him to prove that those shares were acquired without detriment to the joint family funds. This question has to be decided on the evidence available in this case. As already noticed, the plaintiffs have come forward with a general allegation that the said shares were acquired in the name of the first defendant out of the joint family funds and, therefore, they were the assets of the joint family. In support of the stand taken by the plaintiffs who

have no personal knowledge of anything about the family properties, P.W. 1, who is said to be one of the Panchayatdars in the partition of the year 1953, has been examined. According to him, the properties were divided with the help of the Income Tax accounts of the family. Apart from that, he has no personal knowledge about the manner in which the shares were acquired. If the partition had been effected on the basis of the Income Tax accounts of the family and if the B schedule shares were shown as the assets of the joint family, certainly they would have partitioned those shares also among the sharers,, But it is not the case of P.W. 1 that these shares were shown as the joint family assets anywhere in those accounts. The wife of the first defendant Valliammai Achi, who acted as the guardian of the fourth defendant in the 1953 partition, has been examined as P.W. 2, on behalf of the plaintiffs. She has also no personal knowledge about the source of the funds utilised for the purchase of the suit B schedule shares. According to her, the first defendant had no idea at all to defraud his son the fourth defendant and that the partition was a fair one. In fact, according to her, she was very particular and she took care to see that the fourth defendant was allotted proper shares in the family properties. Therefore, the evidence of P.Ws. 1 and 2 does not help the case of the plaintiffs in any manner and on the other hand it only supports the case of the first defendant. The fourth defendant has been examined as D.W. 1 in this case. According to him, the B schedule shares were allotted in the name of the first defendant; but the income by way of dividend was shown as the income of their joint family in the Income Tax returns before the year 1950-51. After 1950-51, the dividends were not shown in the joint family accounts. He has admitted that the first defendant had purchased shares and that as per Ex. B47 a divided statement from 1940 to 1979, dividends were paid in the name of the first defendant only. From 1953 onwards, Income Tax assessments have been done separately for defendants 1 and 4. He has fairly conceded that he does not know anything about the family affairs before the year 1960 and that he came to know the same from his grandfather only after his marriage. He is not able to say whether his father-the first defendant had self-acquired properties of his own. He has also stated that he has not seen any records to find out how the shares were acquired before the year 1953. He has made the following categorical admissions:

He has further admitted that the first defendant was assessed to Income Tax in his individual capacity from the year 1928 to 1955. He was appointed as a Director -in the year 1958 and as a whole-time Director in the year 1970 in the third defendant trail 1, The mill was under the management of three whole-time Directors including the fourth defendant. He has stated that he knew that there were shares in the name of his father. In so far as the receipt of dividends is concerned, he has stated that he does not know as to who were receiving the dividends payable to his father. His further admission goes to show that as early as in the year 1953, he knew that his father was having shares in the third defendant Company. He says that the B schedule shares are entered in the name of the second defendant Trust in a separate folio in the accounts of the third

defendant Company.

25. As against the evidence of P.Ws. 1 and 2 and D.W. 1, the first defendant has given evidence as D.W. 2. He has come forward with a definite stand that the work was carrying on several businesses separately unconnected with the joint family business, with the help of his separate funds. He was carrying on business in Ceylon and during the period, his father Arunachalam Chettiar was looking after his Income Tax assessments and managing the properties. According to him, even after his return to India, his father was in charge of the payment of Income Tax. He has categorically stated that the shares were purchased by him out of his separate funds and that the joint family had nothing to do with the acquisition of the said shares. The third defendant Company was established in the year 1933 and initially his father was one of the Managing Agents of the mills and later on he became a partner in the managing agency along with one Naidu. According to him, he has invested his separate business and acquired shares in the company and these facts were known to his father Arunachalam Chettiar. He claimed that he was drawing dividends from the Company and his father was looking after his affairs as a power of attorney for him during his business. He has categorically asserted that even though his father was receiving dividends for some time, he was receiving dividends directly from the year 1950-51. He has stated that he has purchased shares in the name of his son-fourth defendant and that the fourth defendant was possessed of more shares than himself. The first defendant has acquired shares separately in other mills apart from the third defendant Company. However, the plaintiffs have not chosen to include those shares in the present suit. He had established the second defendant Trust in the year 1963 under a registered document. According to him, he had transferred the R Schedule shares to the second defendant Trust and thereafter the said shares were shown in a separate folio in the name of the second defendant Trust in the accounts of the third defendant Company. Separate Income Tax assessments are being made in respect of the shares given to the second defendant Trust. He has further stated that apart from the shares transferred by him, he had also purchased other shares in the name of the second defendant Trust. The dividends were declared and distributed to the first defendant in respect of his shares and to the second defendant Trust in respect of (his) the shares standing in its name. For the shares subsequently purchased in the name of the second defendant Trust, payments were made out of the trust funds. In so far as the shares shown as item 1 in the B Schedule are concerned, the first defendant wrote to the third defendant Company under Ex. A43 to transfer the shares in the name of the second defendant Trust by changing the address. No doubt, it does not contain any recital to the effect that they were gifted to the second defendant Trust. But the fact remains that the said shares were treated as the shares of the second defendant Trust and dividends were declared in the name of the Trust. In view of the ignorance pleaded by the witnesses P.Ws. 1 and 2 and D.W. 1 in respect of the source of purchase money for the B schedule shares, the positive evidence of D.W. 2 stands uncontradicted. His evidence

appears to be probable and natural taking into consideration the course of dealings between the parties for a very long time. The plaintiffs have not succeeded in establishing that any part of the joint family funds were utilised by the first defendant for acquiring the said shares.

26. Learned Counsel for the appellants made an attempt to demonstrate that the suit A and B schedule shares belong to the joint family and that they were acquired out of the joint family funds. According to him, the family had 2590 equity shares of Rs. 50 each in the name of the first defendant and 140 preference shares of Rs. 50 each in the name of the first defendant which are omitted in the partition deed of the year 1953. According to the learned Counsel, further shares were acquired out of the dividends derived from the said shares and by way of allotment of bonus shares and right shares in the name of the first defendant in whose names the original shares stood. After the transfer of 1049 shares to S.A. College, Pallathur and change of address in the name of the second defendant Trust in respect of 2000 shares, the balance was 3338 shares to the value of Rs. 1,66,900. In lieu of the said 3338 old equity shares of Rs. 50 each, 16,690 equity shares of Rs. 10 were issued on 3.11.1978. This is shown as item 2 in a schedule in the plaint. According to the learned Counsel, a sum of Rs. 5,35,820.43 was paid as dividends from 1954 to 1968-69 in the name of the first defendant. Therefore, out of this income, other shares were purchased in the name of the first defendant. After the transfer of 2000 equity shares of Rs. 50 each, under Ex. A43, 400 bonus shares were allotted in the name of the first defendant without any payment of 21-9-1967. Again, on 29.9.1973, 290 shares of Rs. 50 each were purchased in the name of the first defendant out of the dividends received from the other shares. Thus there were 2690 equity shares which are converted into 13450 new equity shares of Rs. 10 each on 3.11.1978. This is shown as item Mo.I in the plaint H schedule. According to the learned Counsel for the appellants, all these equity shares were purchased out of the joint family funds and they were the assets of the joint family on the date of partition, namely, 13-4-1953 which were purchased from 1940 to 1952. Apart from showing that the family was receiving substantial dividends from various shares, the plaintiffs have not adduced any evidence in this case that any part of the joint family funds, either out of the dividends or out of other income, was utilised for the acquisition of the said shares. On the other hand, D.W. 2 has given satisfactory evidence to show that they were acquired without any detriment to the joint family funds. According to the plaintiffs, the said 13,450 shares held by the second defendant Trust now have come out of the nucleus of 2000 shares alleged to have been allotted by the first defendant in favour of the Trust. Once it is found that 200 shares belonged to the first defendant as his separate properties, the additions and accretions to the said shares will go along with the said 2000 shares and merge with the same as the properties of the second defendant trust.

27. The position in respect of items 2 to 5 of B schedule shares stands in a different footing. Item 2 consists of 2620 shares of Rs. 10 each which was

acquired on 15.11.1979, the face value of which is Rs. 26,200. They were admittedly purchased in the name of the second defendant Trust. According to the learned Counsel for the appellants, they were purchased out of the dividends received on the shares standing in the name of the first defendant which were originally purchased during the years 1940 to 1952 and relating to bonus shares received for the said sharer. However, it was pointed out by the learned Counsel for the second defendant Trust that the said shares were purchased by the Trust by issuing cheque No. 165269 dated 8.10.1979 for Rs. 27,510 and that the amount was paid directly to the seller Ivluhia Chettiar of Tiruchi. The said shares were transferred from the name of Muthiah Chettiar to the name of the purchaser AR. Adaikappa Chettiar, Sole Trustee, AR. Adaikappa Chettiar Charities Trust, bangalore on 15.11.1979. These shares also stand in the name of AR. Adaikappa Chettiar Sole Trustee AR. Adaikappa Chettiar Charities Trust in the accounts of the third defendant company. Exs. A7 and A16 are the extracts from the Register of Share Ledger Folios of the third defendant Company wherein relevant entries are found. Items 3 to 5 in the B schedule consist of 20,000 shares, 8456 shares and 8310 shares respectively of Rs. 10 each, the total face value being Rs. 3,67,660. From the records, it is seen that they were acquired on 2.11.1978 in the name of AR. Adaikappa Chettiar Sole Trustee, AR. Adaikappa Chettiar Charities Trust and payments were made in the said name by cheque and Demand Drafts. These shares are also shown in Ex. A7 register. It is the case of the appellants that these three items of shares were acquired out of the balance of dividends available in respect of items 2 and 3 of A schedule from 1953-1969, the dividends received from 1967 to 1979 for item 1 of B schedule and the dividends declared and received in respect of items 2 and 3 of A schedule from 1969 to 1978-79, totalling a sum of Rs. 6.64,738.11. It is claimed that a sum of Rs. 3,93,960 was spent for purchase of equity shares relating to item 1 of A schedule and items 2 to 5 of B schedule. On the other hand, Mr. Surana, learned Counsel appearing for the second defendant Trust pointed out that these shares were allotted by the Company from its public issue on 2.11.1978 on full payment made by the Trust. The Trust made the application to the Company for allotment of shares and the Trust" paid its own money to the Company. According to him, the monies towards the first call and the second call were paid by the Trust to the third defendant Company for the said allotted shares. He has shown that the payment for the third item was made by way of cheque No. 045810 dated 19.7.1978 by the Trust for Rs. 1,00,000 towards application money on 20,000 shares of Rs. 5 per share, that for the fourth item, payment was made by the Trust by Demand Draft No. 587865 dated 18.9.1978 of the Indian Bank in favour of the third defendant Company for Rs. 42,280 towards application money on 8456 shares at Rs. 5 per share and that the Trust paid a sum of Rs. 41,550 by cheque No. 360349 dated 20.7.1978 towards application money on 8310 shares at Rs. 5 per share. It was also pointed out by him that a Demand Draft for Rs. 91,915 towards the first call money on the said total shares of 36766 at Rs. 2.50 per share and another Demand Draft No. 502886 dated 29.9.1980 for Rs. 91,915 towards the second and final call money

on the said shares at Rs. 2.50 per share were sent by the second defendant Trust to the third defendant Company. Therefore, the learned Counsel submits that there is no scope for saying that these shares were acquired out of the joint family funds. The details regarding these payments are found in Ex. B95. Learned Counsel for the appellants would submit that there is no evidence to show that the cheque and the Demand Drafts were issued by the Trust and that the Trust has not produced any accounts to prove the said payments. Therefore, there is no acceptable evidence according to to him, to prove that the Trust had actually paid those amounts. It was further claimed by him that these are right shares issued by the third defendant Company because of the fact that the first defendant had other shares in the Company. On the other hand, the first defendant as D.W. 2 has categorically asserted in his evidence that the said payments were made out of the Trust funds. The fact that these shares were acquired in the name of AR. Adaikappa Chettiar Sole Trustee, AR. Adaikappa Chettiar Charities Trust and that the same were separately assessed for all these years, would go to show that the said payments could not have been made out of the joint family funds. No acceptable evidence has been let in by the plaintiffs to establish that any portion of the amount came from the joint family funds at the hands of either the first defendant or the fourth defendant. Ex. B57 is a letter dated 20.11.1978 written by the third defendant Company to Adaikappa Chettiar, Sole Trustee of Adaikappa Chettiar Charities Trust regarding the allotment of 8310 shares and payment of Rs. 41,550 towards application money. Of course, no similar letters are available in respect of the other two items. This letter would indicate that the purchases were made directly for the Trust and not for anybody else.

28. Mr. V.R. Biksneswaran, learned Counsel for the appellants attempted to make strong reliance on the conduct of the parties in dealing with the said shares before the partition in the year 1953. According to him, for the assessment years 1947-1948, 1948-1949, 1949-1950 and 1950-1951, dividends received for the said shares were assessed together in the assessment order of Arunachalam Chettiar, the father of the first defendant with status as Hindu undivided family. (HUF). It was also pointed out that the dividend incomes were not shown in the individual accounts of Adaikappa Chettiar for the said period as is seen from the assessment orders Exs. B1, B6 and H1 9 etc. However, the records of the third defendant Company show otherwise, Ex. B58 is a copy of extract showing the dividend shares declared and paid to Adaikappa Chettiar from 1940 to 1980. According to this, the dividend amounts were paid to the first defendant either through Bank or by crediting the same in the accounts of the first defendant in the company's books and by executing promissory notes in his favour. Therefore, the records available in the third defendant Company do not show that any payments were made to the father of the first defendant in his capacity as the manager of the joint family. From the evidence, it is not clear under what circumstances these incomes were shown by late Aruna-chalam Chettiar in his Income Tax returns as Hindu Undivided Family. It is also necessary to notice that

income taxes were paid at the source by the Company. According to D.W. 2, he had never authorised his father to include the said income in the joint family accounts and that the same was done by his father without his knowledge as he was away from India for most of the time. It is also his case that he had executed deeds of power of attorney to enable his father to manage the properties of the family as well as that of the first defendant. Perhaps, late Arunachalam Chettiar might have adopted this method to gain certain advantage from the Income Tax Department in the matter of payment of Income Tax. There are no other documents or accounts available on the side of the plaintiffs to show that the said incomes were brought in the joint family accounts and treated as joint family income. It is in evidence that after the partition in the year 1953, the assessments were made in the name of the first defendant" and in the name of the second defendant Trust individually and nobody thereafter dealt,, with the said shares as the assets of the joint family.

29. In order to find out how the members of the erstwhile joint family treated the suit shares, it is necessary to consider the conduct of the parties during the partition in the year 1953 and thereafter. Admittedly, late Arunachalam Chettiar and P.W. 1, the mother of the fourth defendant, had knowledge about the said shares standing in the name of the first defendant at the time of partition in the year 1953. It is nobody's case that the first defendant possessed the said shares secretly or that he had, acted fraudulently by suppressing the said shares at the time of partition, it is the case of the plaintiffs now that it is only an accidental omission. If really these shares formed part of the joint family assets, certainly a man like late Arunachalam Chettiar would not have omitted to bring them into the hotch-pot of the joint family and divide the same among the members of the family. Having shown the income from the said shares in the accounts of the HUF before 1953, it cannot be said that he was not aware of the existence of the Said shares at the time of partition. When the said omission was pressed into service during the course of the cross-examination of D.W. 2, he has come forward with an explanation that his father late Arunachalam Chettiar had asked him to retain the share for himself in the interest of his son-"the fourth defendant as the said shares belonged to him. Whether such a version is acceptable or not, is immaterial for the purpose of deciding the present controversy. There is nothing unnatural in late Arunachalam Chettiar asking the first defendant to retain the shares. The only obvious reason why they were not actually divided was because of the fact that the said shares were acquired by the first defendant. Late Arunachalam Chettiar evidently thought it unfair to claim a share in the same. Anyhow, w, the fact remains that the members of the joint family, who were parties to the said partition, treated the said shares as the separate properties of the first defendant and proceeded to partition the other properties on that basis. This is amply proved by the subsequent conduct of the parties. Immediately following Exs. A1 to A4, they had executed a registered partition deed on 4.4.1974 under Ex. A5. There is a clear recital in Ex. A5 to the effect that there are no other joint family properties available for partition. Thereafter, the fourth

defendant as well as late Arunachalam Chettiar never claimed any right in the suit shares as joint family assets. In the year 1974, there was a partition in the family of the fourth defendant between himself and the plaintiffs in which also they did not choose to include these shares as the assets of the joint family. As already noticed, it is not as if the fourth defendant was not aware of the fact that the said shares are standing in the name of the first defendant in the third defendant mills. It is significant to note that he was a Director and thereafter a whole-time Director for a long time in the third defendant mills before 1974. Therefore, the omission to include the said items in this family partition assumes great importance in deciding the question whether the said shares were the assets of the joint family. Following the said partition in the year 1974, the fourth defendant has made a statement before the Income Tax authorities, Karaikkudi for the assessment year 1974-1975 on 13.3.1975 under Ex. A17. In the said statement, the fourth defendant has answered number of questions. The fourth question found in the statement is as follows: - "Do you affirm that there are no other movable or immovable properties or assets anywhere apart from those mentioned in answer to question No. 3 above?" He has answered the said question as "No movables." Question No. 3 required the fourth defendant to give full description, particulars of all movable and immovable properties of the family which are claimed to have been partitioned, their estimated value and the name of the member to whom they were allocated. In answering the said question, the suit shares "were not shown as the assets of the family. This is the positive statement made before the statutory authorities at a time when there were no disputes between the parties. Therefore, it is clear that till the year 1974, nobody including the fourth defendant claimed any right in the suit shares. Again, there is one other clinching evidence to show that the case set up by the plaintiffs at the instance of the fourth defendant must be false. After the death of late Arunachalam Chettiar, the fourth defendant appears to have advanced a claim to his properties under a Will alleged to have been executed by late Arunachalam Chettiar. On that basis, he was served with a notice from the Estate Duty Authorities directing him to submit a return and pay the estate duty. Admittedly, the fourth defendant did not include the suit shares as belonging to late Arunachalam Chettiar as an item of joint family assets. It is also in evidence that during the life time of late Arunachalam Chettiar, he had not shown these shares as his assets in any of his wealth returns for the period from 1958 to 1974. There is yet another clinching document which would go to disprove the claim of the plaintiffs. Ex. B42 is a written statement filed by Arunachalam Chettiar, first defendant and the fourth defendant before the Income Tax Officer, Karaikkudi on 21-2-1956 wherein they have affirmed the division of the properties on 13.4.1953 and confirmed the fact that the assets and liabilities of the joint family had been divided by metes and bounds and Plotted to the respective divided members mentioned therein. Here again, there was no reference to the plaintiff mentioned shares as being available as the assets of the joint family. This consistent course of conduct on the part of late Arunachalam Chettiar, first defendant and the fourth defendant for a very long time without claiming any

rights in the said shares of the third defendant Company is a very strong circumstance which would militate against the claim now made by the plaintiffs.

30. Mr. G. Subramaniam, learned Counsel for the fourth defendant/appellant in A.S. No. 707 of 1981 contended that whatever might be the method of acquisition of the said shares from the fact that the dividend from the said shares was treated as income of the joint family in the Income Tax returns submitted by late Arunachalam Chettiar, it must be presumed that the shares were impressed with the character of the assets of the joint family. According to him, the first defendant must be deemed to have given up his individual right and thrown the said shares into the hotch-pot of the joint family thereby allowing them to be enjoyed by the other members of the family. In support of this proposition, reliance was placed on the decision reported in R. Subramania Iyer Vs. The Commissioner of Income Tax, Madras, , wherein it was held that there was nothing to prevent the assessee from impressing upon any self-acquired property belonging to him the character of Joint family property and that no formalities are necessary in order to bring this about and the only question is one of intention on the part of the owner of the separate property to abandon his separate rights and impress it with the character of joint family property. We are unable to see how the principles laid down in the said decision are applicable to the facts of the present case. In that case, there was a declaration which was unambiguous in its terms and it was to the effect that the assessee was entering into the partnership as the manager of the undivided Hindu family. It was only in those circumstances this Court held on facts that the said declaration was enough to impress upon the assessee's share of the business the character of joint family property. It is not the case here. The evidence on record shows that for a short period late Arunachalam Chettiar, the father of the first defendant was submitting returns to the Income Tax Department on behalf of the Hindu joint family in which certain incomes from the dividends of the first defendant were also included therein. According to the first defendant, he was away from India on most of the days, and, therefore, he had authorised his father to deal with his properties in his absence. He was not aware of the fact that his dividend incomes were also shown in the joint family accounts by his father. It is also in evidence that the said shares stood in the name of the first defendant and dividends were declared and received by the first defendant. There is no evidence to show that under what circumstances late Arunachalam Chettiar thought it fit to include the said income in the accounts of the joint family. Therefore, it is not a case where the first defendant had made any declaration at any point of time to the effect that the said shares were the assets of the joint family or that the income derived from the same formed part of the income of the joint family. The unilateral act on the part of the late Arunachalam Chettiar cannot certainly bind the first defendant and impress upon the shares the character of joint family property. Since the Income Tax payable on the dividends was deducted the source they were not shown in the separate accounts of the first defendant. In any event, during the partition in the year 1953, late

Arunachalam Chettiar and the fourth defendant had categorically recognised the separate title of the first defendant over the said shares. There is no dispute as to the fact that subsequent to 1953 they were treated only as the properties of the first defendant until his death.

31. One other serious contention raised by the learned Counsels appearing in both the appeals was that the B schedule shares always stood in the name of the first defendant and they were never gifted to the second defendant Trust and in any event they were not transferred in the name of the second defendant Trust. According to them, there was no valid transfer in favour of the second defendant Trust. A mere intention to transfer the shares in favour of the Trust is not enough to transfer the title in favour of the Trust. It is seen that under Ex. A43 letter dated 6.4.1967, addressed to the third defendant Company, the first defendant requested them to transfer 2000 shares in the name of the second defendant Trust. The letter reads as follows:

I am sending herewith the following share certificates of the Sri. Venkatesa Mills Limited for endorsement thereon change of address as regards the shares covered by the share scripts. Please arrange to change the address as given here below in the certificates and return them to me at the earliest. These shares with the following address may please be entered in a separate folio in the Share Register.

New Address: - "Sole Trustee, A.R. Adaikkappa Chettiar Charities Trust, 15/5 Primrose Road, Bangalore-25." (The details of the shares are omitted in this judgment).

What is now sought to be contended by the learned Counsels for the appellants is that the first defendant had simply requested the third defendant Company to change the address and not to transfer the shares in favour of the Trust. According to them, there is nothing to show that they were given to the Trust and the Trust had been enjoying the income from the said shares. The dividends were received only by the first defendant and, therefore, there is no evidence to show that there was actual transfer of the shares in favour of the trust. We are unable to accept the said contentions. The object of Ex. A43 letter was not merely to change the address of the first defendant, since he continued to reside in the same address. What was sought to be done under Ex. A43 letter was to transfer the beneficial interest of the shares in the name of the second defendant Trust and that is the reason why the first defendant had requested the Company to enter the said shares in a separate folio in the share register and change the address as follows: "Sole Trustee, A.R. Adaikkappa Chettiar Charities, 15/5, Primrose Road, Bangalore-25. Therefore, a careful analysis of Ex. A43 leaves no doubt that the first defendant had requested the third defendant Company to transfer the beneficial interest of the share in favour of the second defendant Trust. In order to show that the intention of the first defendant was not to transfer the share in favour of the second defendant Trust, learned Counsels drew our attention to two other letters Exs. A44 and A45 written by the first

defendant to the third defendant Company requesting them to transfer 1049 shares to Seethalakshmi Achi College. These letters explain in detail about the reasons for changing the address. They state that the first defendant has gifted certain shares to Arunachalam Chettiar Charities Trust, and therefore, the first defendant wanted the address to be changed. The reason for changing the address alone is stated in Ex. A44 itself to the effect that as per the provisions of the Companies Act, the shares cannot be transferred in favour of a Trust. By comparing the language of these letters with Ex. A43 letter, it was submitted that there is no similar recital as to the gift of the shares to the second defendant Trust.

We do not find that the mere omission to include the same language as found in Exs. A44 and A45 does not detract from the intention of the first defendant in requesting the third defendant Company to transfer the shares in favour of the second defendant Trust. It is significant to note that the third defendant Company has acted upon the request of the first defendant and effected the change as requested. It is found that the shares, the beneficial interests of which were transferred in favour of the second defendant Trust, were entered separately in the accounts of the third defendant Company and dividends were also paid separately. The third defendant Company has always treated the B schedule shares as that of the second defendant Trust. Even though the fourth defendant was the Director of the third defendant Company for a long time, he did not object to such a transfer being effected in favour of the Trust at any point of time. The reason for retaining the name of the first defendant as the sole Trustee of the Trust is indicated in Ex. A44 itself.

32. According to the learned Counsel for the appellants, the shares have not been transferred in the name of the second defendant Trust according to the provisions of the Companies Act. They referred to the provisions contained in Section 187-C of the Companies Act which came into force only in 1974. According to the said section, it is incumbent upon a person who is a holder of a share in a company but who does not hold the beneficial interest in such share and a person who holds a beneficial interest in a share or a class of shares of a Company, should make a declaration to the Company specifying the nature of such beneficial interest within the prescribed time. On the basis of the said provision, it was argued that since no such declaration was made even after 1974, there cannot be a valid transfer of title in favour of the second defendant Trust. Again reliance was placed on the provision in Sub-section (6) of Section 187-C of the Companies Act which reads as follows:

Any charge, promissory note or any other collateral agreement, created, executed or entered into in relation to any share, by the ostensible owner thereof, or any hypothecation by the ostensible owner of any share, in respect of which a declaration is required to be made under the foregoing provisions of this section, but not so declared, shall not be enforceable by the beneficial owner or any person claiming through him.

It was submitted that in the absence of such a declaration, no legal rights would accrue to the second defendant Trust and, therefore, they cannot claim any right over the said shares. Again we are unable to appreciate the said contentions. It is no doubt true that a declaration is contemplated under Sec-187-C of the Companies Act. But we do not find any provision under which it can be said that by mere omission to make a declaration, the transfer itself would become invalid. The reason why the transfer was effected by the first defendant in the manner it has been done in this case is that there is a prohibition u/s 153 of the Companies Act for making such a transfer. Section 153 of the said Act reads as follows:

No notice of any trust, express, implied or constructive, shall be entered on the register Of members or of debenture-holders.

Clause 6 of Table A-Articles of Association prohibits the entering of the name of the trust. The object of this provision appears to be to relieve the company from any obligation to take note of equitable interests in its shares and also to preclude, any person claiming an equitable interest in shares from treating the company as a trustee in respect thereof. On the other hand, there is no prohibition for creating beneficial interests over the shares of the company in favour of a Trust. Even though the company may not be strictly bound by the creation of such a Trust, the relationship between the ostensible owner and the beneficial owner is not affected in any manner. If a trustee is on the company's register as a holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company has nothing whatever to do. *ivlr.G. Subramaniam*, learned Counsel appearing for the appellant in A.S. No. 707 of 1981 relied on the decision reported in *Howrah Trading Co. Ltd. Vs. Commissioner of Income Tax, Central, Calcutta.*, , and contended that the procedure contemplated under the Act should be followed for purpose of transfer of the shares. In the very same decision, we find the following observation:

The Company recognises no person except one whose name is on the register of members, upon whom alone calls for unpaid capital can be made and to whom only the dividend declared by the company, is legally payable. Of course, between the transferor and the transferee, certain equities arise even on the execution and handing over on "a blank transfer", and among these equities is the right of the transferee to claim the dividend declared and paid to the transferor who is treated as a trustee on behalf of the transferee. These equities, however, do not touch the company, and no claim by the transferee whose name is not in the register of members can be made against the company, if the transferor retains the money in his own hands and fails to pay it to him.

These observations make it amply clear that in spite of the failure to make a declaration "Under Section 187-C of the Companies Act or to follow the other procedure for transfer of shares, the equitable interest created on the shares would be binding on the transferor, namely, the first defendant in this case, it is not open to the plaintiffs and the fourth defendant now to contend that there is

no valid transfer in favour of the second defendant Trust. As already noticed the first defendant himself had made a categorical declaration about the transfer of interest in the shares in favour of the Trust and the same has been acted upon by all the parties concerned for all these years. Therefore, is it not too late in the day to raise such a flimsy objection at this stage. Section 153-A and B of the Companies Act makes it clear that creation of such beneficial interests is permissible in law and that is the reason why the provision has been made for appointing a person as public trustee to discharge certain functions relating to the shares in a company held in trust by any person. Moreover, we find that these objections have not been raised either in the pleadings or during the trial before the lower Court. On the other hand, in paragraph 7 of the plaint, the plaintiffs have stated that the first defendant had put some of the said shares (B schedule) of the third defendant Company in the name of "AR. Adaikappa Chettiar Charities Trust" nominally and that he is also in control of the same. It is further stated that it would neither affect the rights of the plaintiffs and that of the fourth defendant nor would any transfer of the same to the 2nd defendant bind the plaintiffs and the fourth defendant. Therefore, they have taken up the stand that there was a transfer in favour of the second defendant Trust, but it is not binding on them. Nowhere, they have stated that there was no transfer at all and therefore this defence appears to have been raised only as an after-thought. It was further contended by the learned Counsels for the appellants that mere entries in a book of account cannot amount to dedication of the shares in favour of the Trust and in support of the said contention, he relied on the decision reported in Rao Bahadur S.A.S. Rm. Ramanathan Chettiar Vs. M.P. Palaniappa Chettiar and Others, . We find that the said decision is not applicable to the facts of the present case, since in this case there is ample evidence to show that the dedication of shares in favour of the second defendant Trust has been acted upon all along and there is no evidence to show that the first defendant derived any beneficial interest from the shares after such a dedication in favour of the Trust.

33. Learned Counsel for the second defendant Trust elaborately argued raising a contention that the plaintiffs are estopped from claiming a share in the suit properties, since they have been estopped from doing so by their conduct and by the execution of documents. According to him, the declaration in the partition deed Ex. A5 to the effect that there were no other properties available for partition would operate as estoppel. Reliance is placed on the decision of the Supreme Court reported in Bennett Coleman and Co. (P) Ltd. Vs. Punya Priya Das Gupta, , in support of this proposition. It was further contended that when a recital is intended to be a statement which all parties to the deed have mutually agreed to admit as true it is an estoppel as against all as held in Lachman Lal Vs. Munshi Mahton and Others, . Learned Counsel further submitted that the conduct of the parties clearly shows that they have recognised the partition of the year 1953 as a complete partition and they have never claimed any share in the suit properties and this amounts to estoppel by conduct. As already noticed, the fourth defendant has not chosen to include the suit shares as one of the items of

the properties which belonged to late Aruna-chalam Chettiar, in the estate duty returns filed by him of Arunachalam Chettiar. It was further contended that by Regulation 22 of Table A under the Companies Act, it is provided that the Board is entitled to decline to transfer shares if it was of the view that the transferor has no right to transfer. As already pointed out, the fourth defendant was the Director and Managing Director in the third defendant Company and if really he had any rights in the said shares, he would have certainly refused to transfer the shares in the name of the second defendant Trust. From the above said conduct, learned Counsel submitted that the members of the erstwhile joint family are not entitled to claim any shares in the said shares. It is no doubt true that as far as the fourth defendant is concerned, his conduct would operate as estoppel and thereby he is estopped from claiming a share in the said properties. However, the plaintiffs, who are now claiming on their own individual rights and who are not parties to any of the documents referred to above, cannot be said to be estopped from claiming a share. However, the above-said circumstance would be a very strong piece of evidence to show that the suit shares are not the joint family properties and that they are not available for partition.

34. Apart from the various circumstances considered above, there is one other circumstance which would clinchingly show that the plaintiffs are not entitled to claim a share now. As already discussed, the suit B schedule shares were acquired in the name of the first defendant and they continued to stand in his name till they were transferred in the name of the second defendant Trust. Dividends were paid only to him and after the transfer in favour of the second defendant Trust, dividends are being paid to the Trust. There is absolutely no evidence to show that the first defendant had given up his right and thrown the share into the hotchpot of the joint family and treated the same as the assets of the family. Therefore, as far as the first defendant is concerned, he continued to possess shares as his own and he had never given up his claim over the same. It was open to the members of the joint family, who were parties to the partition of the year 1953, to decide which were the properties which belonged to the joint family. At the time of the 1953 partition, all the sharers had chosen to treat the said shares as the property of the first defendant and had never chosen to claim any right or title over the same for a very long time till the present suit was filed in the year 1980. Therefore, the partition was complete and it is not open to the after-born sons to claim a share in the said shares at this distant point of time, as they were not available as the assets of the joint family on the date of their birth. For all these reasons, we hold that the plaintiffs and the fourth defendant are not entitled to any share in the suit B schedule shares and this point is answered accordingly.

35. POINT NO. 3: - On the question of limitation, the first defendant has stated in paragraph 5 of his additional written statement that since there is no question of any co-ownership between the first defendant and the father of the plaintiffs after 1953 partition and that the fourth defendant had full knowledge of their right to the shares now claimed which had been registered in the name of the first

defendant and that even after the fourth defendant attaining majority, he did not choose to advance a claim to the said shares, the rights of the fourth defendant became barred as against the first defendant three years after he attained the age of majority. Consequently, the plaintiffs' claim is also barred by limitation. According to the learned Counsel for the second defendant Trust, Article 120 of the old Limitation Act corresponding to Article 113 of the present Limitation Act would apply to the facts of the present case. Article 113 of present Limitation Act provides three years for filing a suit for which no period of limitation is provided from the date when the right to sue accrues. According to him, the fourth defendant should have filed the suit within three years after his attaining majority. According to the learned Counsel appearing for the appellants, it is only Article 127 of the old Act corresponding to Article 110 of the present Act which applies to the present suit. The period of limitation begins to run, in so far as a person excluded from a joint family property to enforce the right to share therein, from the date when the exclusion becomes known to the plaintiff. It is the admitted case that the fourth defendant became a major in 1956 and, therefore, according to the plaintiffs, he had time till 1962 even if the old Article 120 applied. It is argued that though the fourth defendant did not file a suit till 1962, since the plaintiffs were born by that time, they were entitled to take advantage of the cause of action that was available to the fourth defendant by the principles of "overlapping". Even assuming that this Article of the Limitation Act applies to the facts of the case, we do not find that the present suit is within time. In this case, there is evidence to show that the fourth defendant became a major in 1956 itself and according to the defendants 1 and 2, he should have filed the suit in 1959. It has also been proved that he was a Director in the third defendant Company since 1958 and he was aware of the possession of the shares by the first defendant in his own name and the transfer of the said shares to the second defendant Trust and payment of dividends to them. He was also a full-time Director from 1.1. 1970. There are various letters and particularly under Ex. B-61 dated 23.10. 1973 the fourth defendant has written to the first defendant in respect of the transfer of equity shares. Therefore, it cannot be stated that he had no knowledge about the exclusion from a joint family property. What is sought to be argued by Mr.G. Subraminam, learned Counsel for the fourth defendant supporting the case of the plaintiffs is, that the fourth defendant himself was a minor and became a major in the year 1956, that he had 12 years time from the date of his majority, that when the plaintiffs were born, the fourth defendant had time, to claim a share in the suit properties and, therefore, by the principles of overlapping, the plaintiffs became entitled to make a claim for the same and that the period of limitation was available to them till they attained majority. In support of this submission, learned Counsel relies on the decision of the Privy Council reported in AIR 1945 1 (Privy Council) , wherein it has been held as follows:

... that a member of a joint family must be content with the family estate as he finds it at his birth or at any rate he cannot complain of anything done before the

period of gestation. Upon this rule, it is admitted, there is engrafted an exception to the effect that if the child who objects to the alienation of the property comes into existence or is conceived after the alienation, but during the life of a child born or conceived before alienation, then that overlapping of the two lives enables the later-born child to contest the validity of the father's act.

Their Lordships do not think it necessary to determine whether this limitation upon the right of an after-born child to resist the claim of an encumbrance upon the family estate correctly expresses the law in all respects. They are content to assume its accuracy since they agree with the High Court in thinking it sufficiently established by the evidence that there was overlapping of lives in the present case.

The same view has been expressed in Mayne's Hindu Law-11th Edition paragraph 398 as follows:

Where an alienation was made by father or other manager, without necessity, and without the consent of sons or other coparceners then living, it would not only be invalid against them, but also against any son or coparcener born before they had ratified the transaction; and no consent given by them after his birth would render it binding upon him. The reason of the thing is not of course that the unborn son had any right in the family property at the time of the alienation, but that on his birth he acquires a share in the family property as it then stands. If a previous alienation of any portion of the family property was validated by consent or failure to set it aside in time on the part of the other members of the family then in existence, the property in which he acquires a share at birth is diminished to the extent of the portion thus alienated. If the alienation was invalid, he acquires a share in the whole property including the portion purported to be alienated because it was bad at its inception and did not in law diminish the corpus of the joint family property. Doubts with regard to his rights must be taken to have been set at rest by the recent decision of the Privy Council in AIR 1945 1 (Privy Council) .

The resultant position is that an improper alienation of the joint family property by a father or manager can be set aside at the instance of an after-born coparcener, provided there was in existence at the date of the alienation some coparcener who could challenge it and he had not consented to the alienation or ratified it before the after-born son was begotten, as held in *Seshamma v. Venkayya* 1956 An.W.R. 1067 : AIR 1957 A.P.386. In this case, we have already seen that the fourth defendant had impliedly consented for the first defendant retaining the share as his separate properties. Therefore, if the fourth defendant is not entitled to claim a share, the plaintiffs are also not entitled to do so. Apart from that, there is one other difficulty for the plaintiffs in claiming such a right. If the plaintiffs are filing the suit claiming benefit? under the principles of overlapping above referred to, they do not acquire any interest in any right to sue. They are not entitled to rely on a new cause of action as no new cause of action accrues upon the subsequent birth of a son in the family. Therefore, it

follows that fresh period of limitation does not start from the date of their birth. When they were not born on the date when the right to sue accrued to the fourth defendant, they could not be said to suffering from any disability on that date and, therefore, they cannot take advantage of Section 6 of the Limitation Act. It is only a person, who has a right to sue at the time from which the period of limitation is to be reckoned, who can seek the aid of Section 6 of the Limitation Act. It will not apply to a person who is not entitled to sue at the commencement of the period of limitation. The persons not in existence at the time when limitation began to run cannot invoke Section 6 of the Limitation Act. These principles have been upheld in *Seshamma v. Venkayya* AIR 1957 A.P. 386 : 1956 An.W.R 1067 and *Sri Venugopalaswamy Varu Temple Vs. Visweswara Prasad and Another*, , with which we are in respectful agreement. Therefore, in any event, the present suit filed by the plaintiffs is barred by limitation.

36. Mr. V.R. Biksheswaran, learned Counsel appearing for the appellants in A.S. No. 700 of 1981 was highly critical of the judgment of the lower Court and he submitted that the learned Judge has given inconsistent findings on various matters and the same are not supported by any evidence. We feel it unnecessary to go into that question for the purpose of the disposal of the present appeals. However, we are not happy about the manner in which the learned Judge has disposed of the matter.

37. For all these reasons discussed above, we find that there are no merits in these appeals and that they are liable to be dismissed. Accordingly, they are dismissed with costs.