
(1994) 12 MAD CK 0016
In the Madras High Court

K. Sengodan

APPELLANT

Vs

K. Dharmalingam and Others

RESPONDENT

Date of Decision : 22-12-1994

Acts Referred:

Citation : (1995) 2 LW 74 : (1995) 1 MLJ 336

Hon'ble Judges : A.R. Lakshmanan, J

Bench : Division Bench

Judgement

A.R. Lakshmanan, J.—The unsuccessful plaintiff in O.S. No. 156 of 1983 on the file of Sub Court, Namakkal, is the appellant in the above

appeal. He died during the pendency of the appeal and his legal representatives have come on record. The plaintiff as also defendants 1 to 5, are

the children of one Kali Gounder, who died on 4.7.1981. The 6th defendant is the son of the 1st defendant and was a minor at the date on which

he was impleaded. He is represented by a court guardian. The plaintiff and 1st defendant are brothers and defendants 2, 3 and 4 are sisters. The

5th defendant is their step sister of Kaliappa through his second wife. The plaintiff's mother is said to have passed away, quite early and the 5th

defendant's mother, Kali Gounder's second wife and her three other children as also a daughter of the plaintiff are stated to have died in a car

accident on 26.5.1967.

2. The appellant/ plaintiff laid the suit for partition and award of separate possession of a 7/18th share in plaint A Schedule properties which were

claimed by the plaintiff to be the properties belonging to a Hindu undivided family of which his father, late Kali Gounder was Kartha, besides

making adequate provision for certain debts of the Kartha, which the plaintiff

claimed to have himself discharged, amounting in the aggregate to Rs.

73,000 and also to provide for the discharge of certain other debts of the Kartha, amounting to Rs. 1,32,500 in the aggregate, which sums, it was

claimed, were due to certain named persons, as seen from the C Schedule.

3. The case of the plaintiff was that the properties listed by him in the plaint A Schedule belonged to an undivided Hindu family, consisting of the

Kartha late Kali Gounder, the father and his undivided sons namely the plaintiff and 1st defendant. It is stated in paragraph 5 of the plaint that Kali

Gounder had ancestral properties and he utilised the income therefrom for acquiring the properties mentioned in the A Schedule. Thus the

properties purchased in his name also are joint family properties and in any event all the properties were treated by him as joint family properties

only. The plaintiff in paragraph 7 of the plaint, averred that Kali Gounder, as already stated, had sufficient means and income from the joint family

nucleus. He augmented the income by utilising it for taking on lease profitable rice mill business and other businesses. Joint family income was used

for acquiring properties and constructing buildings. In para. 6 of the plaint, the plaintiff has averred as follows:

Kali Gounder while alive appears to have executed three gift settlement deeds. One such gift deed was made by him to the first defendant another

was to the 3rd defendant. While yet another gift was made to 5th defendant. Plaintiff submits that the gifts are not valid and they are not

enforceable against plaintiff or the other sharers. Also they have not been given effect to. Plaintiff is entitled to a 7/18th share in these items also.

Plaintiff is not a party to these deeds. He is entitled to ignore them. He need not sue to set them aside. These are items 8 and 9 in the A Schedule.

Since the plaintiffs demand for partition was turned down by the 1st defendant, the plaintiff filed the above suit for partition of all assets and

liabilities of the family.

4. Defendants 1, 5 and 6 filed their separate written statements and the 1st defendant filed an additional written statement as well. The 1st

defendant contested the claim in the main that the A Schedule properties belonged to an undivided Hindu family. According to him, all the

properties were the self-acquisitions of late Kali Gounder and that the settlements referred to in the 6th paragraph of the plaint were beyond

challenge. He also disputed the claim that the father late Kali Gounder left, any debts to be discharged, as also the claim that the plaintiff had

discharged any such debts. It was also contended that there was a car, MDA. 5216, which belonged to the father, which should be brought in for

division. The plaintiffs claim to a 7/18th share was denied and it was contended that each one of the six surviving descendants of Kali Gounder was

entitled to an 1/6th share in the divisible properties. With regard to the properties covered by the settlement deed dated 5.2.1968 executed by late

Kali Gounder in his favour, the 1st defendant further contended that he alone was in possession of the same in his own right as owner ever since

the date of the settlement openly, exclusively, continuously and adverse to the interest of the plaintiff to his knowledge and has thus acquired title by

adverse possession to the properties concerned in the settlement deed dated 5.2.1968 and in any event, the settlement deed dated 5.2.1968 is

binding on the plaintiff and he has not taken any steps to set aside, the same or question the same all these years, and that the claim of the plaintiff

to the settled properties, is also barred by limitation. The 1st defendant also claimed that he had effected improvements costing Rs. 3,85,000 to the

properties settled in his favour. There appears to have been a release deed executed in favour of the plaintiff by late Kali Gounder and the 1st

defendant. The 1st defendant pleaded that this release deed came to be executed only in pursuance of a family arrangement, whereunder the

plaintiff had accepted the validity of the settlement of 1968 in his favour by late Kali Gounder. The contention was that if the plaintiff were to go

back on the same and insisting on having a pound of flesh, he was bound to throw the properties got by him under the release deed into the

hotchpot. There was also a further plea that the release included only the lands referred to therein and it did not cover the buildings etc., erected

thereon and that they should also be brought into the hotchpot. The registration certificate for the Ambassador Car MDA.5216 belonged to Kali

Gounder, stood in his name. The plaintiff after Kali Gounder's death, forging the signature of the 1st defendant, had the registry transferred to the

name of the 3rd defendant. According to the defendants, the plaintiff had not discharged any debt contracted by Kali Gounder and the debts

shown in Schedule "C" are not true, and were not discharged by the plaintiff. There are no joint family debts as detailed in B Schedule, and the 1st

defendant is not bound to pay B Schedule debts or any portion thereof. The plaintiff has no cause of action to maintain the suit.

5. The 5th defendant asserted the validity of the settlement deeds dated. 12.3.1973 and 7.10.1973 executed in her favour by her father. She

disputed all the claims of the plaintiff for 7/18th share.

6. On behalf of the plaintiff, P.Ws. 1 to 4 were examined and on behalf of the defendants, the 1st defendant was examined as D.W.I. Exs. A-1

and A-2 were marked on behalf of the plaintiff and Exs.B-1 to 34 were marked on behalf of the defendants.

7. The lower court framed 16 issues to be tried in the first instance. Later, it framed two more issues on 18.10.1985 and another issue on

4.2.1986. In its detailed judgment dated 24.3.1986, the trial court negatived the plaintiffs case. It ruled that all the properties of Kali Gounder were

his self-acquisitions and upheld the validity of the settlement deeds executed by him. It negatived the plaintiff s claim as regards the alleged debts

left by Kali Gounder. It upheld the plea of adverse possession set up by the 1st defendant in regard to the properties covered by the settlement

deed dated 5.2.1968. The trial court had also accepted the claim of the 1st defendant to have improved the properties settled on him by his father.

But the court observed that in view of its conclusion on other issues, it was not necessary to determine the cost and value of the improvements

made by the 1st defendant. The plea of family arrangement in regard to the release deed of 12.2.1973 set up by the 1st defendant was also

upheld. As regards the court-fee, the trial court held that the Court-fee paid by the plaintiff on the basis of Section 37(2) of the Court-fees Act was

not correct and that the court fee ought to have been paid u/s 37(1) of the Act.

8. In the result, the lower court passed a preliminary decree for partition and separate possession of a 1/ 6th share each to the plaintiff and the 1st

defendant, in respect of the properties in the plaint, A Schedule, excepting those that had been settled on his children viz., defendants 1, 3 and 5 by

late Kali Gounder.

9. Aggrieved by the judgment and decree of the trial court, the plaintiff has filed the above appeal, claiming that his suit should have been decreed

as prayed for, while the 1st defendant has filed a memo of cross-objection.

10. We have heard the elaborate arguments in the appeal. Mr. V.K. Muthusamy

addressed us on behalf of the appellant/plaintiff. Mr. S.

Sethuratnam, Senior Advocate, instructed by Mr. Kuppuswamy and Mr. S. Gopalaratnam, Senior Advocate, instructed by Mr. C. Pandian,

addressed us for the contesting respondents.

11. Mr. V.K. Muthuswamy has taken us to the entire records and has sought to establish the truth and tenability of the case of the plaintiff. Mr.

Sethuratnam, learned Senior advocate, urged upon us to uphold the decision of the trial court and Mr. S. Gopalaratnam, learned Senior Advocate,

sought to support the judgment of the trial court in favour of the 1st defendant except in regard to the car MDA. 5216, in regard to which, learned

senior advocate claimed that the trial court has omitted to record a finding, which should have been found in favour of the 1st defendant.

12. Before we proceed to consider the respective submissions of the learned Counsel appearing on either side we deem it appropriate that we set

down the facts which have been brought out in the evidence led by the parties, and as pointed out by the respective counsel at the time of hearing.

According to the plaintiff, late Kali Gounder was possessed of ancestral lands in two villages viz., Ayyampalayam and Thummankurichi. He owned

only 49 cents of dry lands in Ayyampalayam village and 1 acre 07 cents of land in Thummankurichi village. The plaintiff as P.W. 1 admits that the

lands in Ayyampalayam have no well or water facility and that he raised groundnut, cambu, cholam crops on the same and there is no income

therefrom and that the income from those lands, are not much. With respect to the lands in Thummankurichi P.W.I says that it was only manavari

land and there is no well in it. It is seen from the records that these lands were sold by Kali Gounder under the original of Ex.B-1 dated 20.3.1946

for Rs. 1,000 and one Palaniammal, mother of P.W.2, joined in purchase of a land on 15.3.1946 under the original of Ex.B-2 for Rs. 3,850 and

that Kali Gounder utilised the price realised under Ex.B-1 for Rs. 1,000 for meeting his part of the purchase price. Later, under Ex.B-3 on

7.10.1948, Kali Gounder and Palaniammal purchased another property for Rs. 2,000.

13. D.W.I in his evidence deposed that the lands covered under Exs.B-2 and B-3, of an extent of about 6 acres, was also only manavari lands and

they were being enjoyed only by the co-vendee Palaniammal, who was giving

four bags of cholam per year. These lands were later on, transferred by Kali Gounder under Ex.B-4 dated 14.10.1969, to his vendee Palaniammal herself, by way of release, after taking from her Rs. 3,500. The said sum of Rs. 3,500 was paid by Palaniammal some two years or so earlier to Kali Gounder. P.W.I the plaintiff has deposed that his father was doing business from 1945. We also find from Exs.B-5, B-15, B-9, B-11, B.19, B-18, B-12, B-14 and B-13, Kali Gounder has purchased a number of properties during the years 1959 to 1977. There is also a very early purchase by Kali Gounder along with some four other persons on 16.2.1946, for an aggregate price of Rs. 54,000 under Ex.B-7 and these properties appear to have been sold under several sale deeds during the years 1946 to 1954 by Kali Gounder and his co-vendees. Under Exs.B-6 and B-16, Kali Gounder has also sold some of the properties purchased by him. Ex.B-9 stands in the name of Kali Gounder's second wife, since deceased. We have taken the purchase under Ex.B-9, as a purchase by Kali Gounder, in view of Ex.B-10 dated 2.2.1972 executed by the 5th defendant in favour of Kali Gounder, releasing her rights in the properties covered by Ex.B-9. We may also observe here that a perusal of the several exhibits filed in the case, brings out that Kali Gounder continued to live in Ayyampalayam until May-June, 1965 vide Ex.B-19, dated 26.5.1965 and Ex.B-18 dated 14.6.1965. In this case, the plaintiff is challenging the validity of the settlements Ex.B-17 dated 5.2.1968 in favour of the 1st defendant and Exs.B-33 and B-34 in favour of the 5th defendant.

14. We may, as well, record the fact that the scope of the appeal is very limited and is only confined to the question whether the properties items 8 and 9 of the plaint A schedule are the self acquisitions of late Kali Gounder or do they belong to an undivided family of which late Kali Gounder was the Kartha.

15. The plaintiff, who is the appellant before us, has to establish his case that they are the properties of an undivided family. Mr. V.K. Muthusamy, learned Counsel, appearing on behalf of the appellant contends that they are the properties of an undivided family, while Mr. S. Gopalaratnam, learned Senior Advocate, contends to the contrary. Before we analyse the evidence let in by both parties, a look at the various decisions cited by counsel, may be useful.

16. We shall now extract the passages relied on by Mr. V.K. Muthusami in the following decisions:

Mallesappa Bandeppa Desai and Others Vs. Desai Mallappa and Others, :

Where a member of a joint Hindu family blends his self-acquired property with property of the joint family, either by bringing his self acquired property into a joint family account, or by bringing joint family property into his separate account, the effect is that all the property so blended becomes a joint family property.

Where a manager claims that any immovable property has been acquired by him with his own separate funds and not with the help of the joint family funds of which he was in possession and charge, it is for him to prove by clear and satisfactory evidence his plea that the purchase money proceeded from his separate fund. The onus of proof must in such a case be placed on the manager and not on his coparceners.

Ramiah and Anr. v. Pechi Animal and Ors. 1977 T.L.N.J. 7:

The burden of proof is on manager of a Hindu joint family to prove that the property standing in his name, is his property.

M. Krishnan v. Ramaswami and Ors. 97 L.W. 406:

Though the father had purchased the property in his individual name, the fact remains that he was the manager of a joint family at the time of the purchase. Therefore, this is not a case where the property has been purchased by a junior member of a Hindu joint family in his name or by a female member of a joint family in her name. That is an important facts which has to be taken note of, even though the respondents have not proved what was the income derived from the joint family property and what amount would have remained as surplus after the expenses of the joint family had been met, there is a high degree of possibility that there must have been some surplus and that the properties must have been yielding adequate income for supporting all the members of the family. In such circumstances, there is certainly scope for inferring that there should have been certain amount of surplus and from out of the surplus, the suit property might have been purchased.

Rathnasabapathi Pillai v. Saraswathi Animal (1953) 2 M.L.J. 459:

It is now well-established that a Hindu father has no power to gift away ancestral and joint family property in part or in whole except for the special

purposes laid down in the text, which are limited and circumscribed and that too of small portions of movable property, mostly to discharge a

necessary moral obligation case on a Hindu father or manager of the family. A gift otherwise, is void in its inception and a document evidencing

such a gift does not convey any interest to the donee.

Though a gift of coparcenary property is not as such recognised even if it is by the entire body of coparceners, a transaction evidencing the gift of

ancestral property to which all the coparceners were parties cannot, however, be attacked as void in toto as all the coparceners that claim to have

an interest in the property must be deemed to be parties to the gift and the gift does not become invalid as the interest of any other person is not

affected by such a transaction. Hence a gift made with the consent of all the coparceners, where there is no minor or child in the womb, could not

be attacked as being void in toto. The question whether such an alienation is open to interdiction by a person affected by such a gift, as for

instance, a wife or other maintenance holder depends on the nature of interest of the maintenance holder. A widow under the Hindu law, even as

modified by the Hindu Women's Rights to Property Act, 1937, is not a coparcener though she is entitled to claim the interest of her deceased

husband in the joint family property. Hence she cannot question an alienation by way of gift of joint family property by the entire body of

coparceners.

Sankaranarayanan and Another Vs. The Official Receiver, Tirunelveli and Others, , was a judgment rendered by Sethuraman, J. The said decision

was cited for the proposition that the onus is on the kartha to prove that the property was acquired by separate funds.

K.V. Duraisamy and Another Vs. D. Perumalsamy and Another, .

It is quite evident that there was seen some family nucleus with the aid of which the first appellant started arecanut trade and derived income

therefrom. Since he was the manager of the family at the time of acquisition of the lands, as it has been laid down by the Supreme Court in

Mallesappa Bandeppa Desai and Others Vs. Desai Mallappa and Others, , it is for him to prove by clear and satisfactory evidence that the lands

were acquired by him with his own separate funds and not with the help of joint family funds of which he was in possession and charge. The onus

of proof must, in such a case, be placed on the manager and not on the coparceners.

Sonnappa Iyer Vs. K.R. Ramuthaiammal and Others, .

When the burden is on the plaintiff to prove clearly in order to get the equitable relief of specific performance, he ought to have produced the best

evidence available with him and his failure to do so would enjoin the court to draw an adverse inference against him

The mere fact that the trial court had seen the witnesses in the box and watched their demeanour and chosen to accept their evidence will not

prevent the High Court from appreciating the evidence and holding that their evidence is not believable particularly when all the circumstances

relevant are available on record.

The evidence on record conclusively shows that the first defendant had ancestral properties comprising of houses and was running a business

which was also ancestral. He had no other source of income with which he could have purchased properties of his own. When there is no evidence

as to his independent source of income and when he admittedly was the manager of the undivided family consisting of himself and his sons, the

presumption under Hindu Law has to be drawn and the property should be presumed to be joint family property.

Commissioner of Income Tax, Madras Vs. M.K. Stremann, Madras, :

The assessee along with the two minor sons and a minor daughter constituted a joint Hindu family. The assessee executed on 19.12.1952 a deed

of partition on the basis of which he claimed an order u/s 25(A) Income Tax Act. In the first clause of the deed it was recited that the assessee had

been blending his self-earned money with the inherited assets till this date as joint family property, without making any distinction. The Income Tax

Officer disallowed the application holding that the deed amounted to transfer of assets to minor children with Section 16 (3)(a)(iv) Income Tax

Act.

Held that the partition proceeded on the basis that the self acquired properties were made available for partition along with the only item of joint

family property. That itself constituted proof that antecedent to the partition, however short the interval, there was blending of the self acquired

properties of the assessee with his ancestral joint family property. Whether the

avermment in relation to the blending of properties in the past was supported by other evidence or not, it certainly was unequivocal that the properties dealt with at the partition were treated by the volition of the assessee as the properties available for partition between the members of the joint family. The genuineness of the transaction itself was never in issue. The result was that atleast on 19th December, 1952, antecedent to the partition the properties become impressed with the character of joint family property.

S. Chinnayyan and Others Vs. C. Chithambaram and Others, :

Even in Mudi Gowda Gowdappa Sankh Vs. Ram Chandra Ravagowda Sankh, , it has been held that only when adequate nucleus is shown, the burden shifts on to the member in whose name the property stands, so that he could show that he acquired the property without any aid from the joint family assets. Even in the above referred to Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, , it has been held that the proof of existence of a joint family does not lead to the presumption that the property held by any member of the family was joint and the burden rests upon any one asserting that any item of property was joint, to establish the fact. It has been further held that only where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property. In view of the fact that there is no evidence in the present case regarding the income from the nucleus, the abovesaid item No. 8 cannot be held to be the joint family property.

Periambillai and Others Vs. Somayan, :

It is settled law that there is no presumption that any property standing in the name of a Kartha or a member of the joint family is a joint family property. The person who wants to set up the case that the property purchased in the name of a coparcener is that of the family must plead and prove the existence of a joint family nucleus with sufficient surplus income on the date of purchase.

17. One of us (Abdul Hadi, J.) had occasion to consider this aspect of the matter in a decision reported in S. Chinnayyan and Others Vs. C.

Chithambaram and Others, and another decision reported in page 275 of the same volume Periambillai and Others Vs. Somayan, .

18. We may now refer to the decision reported in G. Narayana Raju Vs. G. Chamaraju and Others, to which strong reliance was placed by Mr.

S. Gopalarathnam. The Head-Notes (A) and (B) of this decision read as follows:

It is well established that there is no presumption under Hindu Law that a business standing in the name of any member of the joint family is a joint

family business even if that member is the manager of the joint family. Unless it could be shown that the business in the hands of the coparcener

grew up with the assistance of the joint family property or joint family funds or that the earnings of the business were blended with the joint family

estate, the business remains free and separate

It is a well-established doctrine of Hindu Law that property which was originally self acquired may become joint property if it has been voluntarily

thrown by the coparcener into the joint stock with the intention of abandoning all separate claims upto it. But the question whether the coparcener

has done so or not is entirely a question of fact to be decided in the light of all the circumstances of the case. It must be established that there was a

clear intention on the part of the coparcener to waive his separate rights and such an intention will not be inferred from acts which may have been

done from kindness or affection. The important point to keep in mind is that the separate property of a Hindu coparcener ceases to be his separate

property and acquires the characteristics of his joint family or ancestral property, not by mere act of physical mixing with his joint family or

ancestral property, but by his own volition and intention, by his waiving or surrendering his special right in it as separate property: Such intention

can be discovered only from his words or from his acts and conduct.

We may also notice another decision to which Mr. S. Gopalaratnam invited our attention. The said decision is reported in Ranganayaki Ammal and

Others Vs. S.R. Srinivasan and Others, which reads as follows:

The burden is very heavy on the plaintiff to establish the existence of joint family nucleus the mere lapse of time will not relieve him from discharging

his obligation. The march and passage of time cannot be taken advantage of by the challenging coparcener and this by itself would not enable him

to relieve himself of his legal duty to prove the obvious, namely, that the family

was possessed of funds and there was sufficient joint family nucleus from which the further accretions were made by the member managing the same. The learned Senior Advocate drew our attention to the observations occurring in paragraph 5 at page 60, paragraph 8 at page 63 and paragraph 13 at page 65 and has pointed out as to how the decision of the Supreme Court reported in Mallesappa Bandeppa Desai and Others Vs. Desai Mallappa and Others, cited by Mr. V.K. Muthusamy, should be understood.

19. Mr. V.K. Muthusami's attempt has been to shift the burden of proving that the properties involved are the self-acquisitions to the defence. It can, however, not be denied that the initial burden is only on the one who contends that the property belongs to an undivided Hindu Family, and only where the initial burden is discharged by the one who is setting up such a claim, then the other side who contends to the contrary, be called upon to establish his case. The law on the subject has never been in doubt. Mr. Muthusamy's attempt was that his client has discharged the initial onus which lies on him and to that submission Mr. Gopalaratnam took exception. According to Mr. V.K. Muthusamy, he relies on the existence of the admitted joint family property in Ayyampalayam and Thummankurichi villages. According to him, the income from these lands, as also, from those purchased by late Kali Gounder under Exs.B-2 and B-3, after selling the lands at Thummankurichi, is the source for all the later purchases of Kali Gounder. Once the existence of the source is made out, or admitted, according to Mr. Muthusamy's argument, the onus on the claim-antis discharged. But, in our opinion, Mr. Muthusamy has failed to prove the existence of the ancestral nucleus which by itself, is not sufficient but availability of the ancestral nucleus or its adequacy of the same to fund the later acquisitions, are also essential requisites for an answer in favour of his contention. As we have noticed earlier, the plaintiff and his witnesses have not deposed anything about the income from Thummankurichi lands or of the share of Kali Gounder in the properties purchased by him along with his co-vendee Palani Ammal, under Exs.B-2 and B-3. We have to remember that P.W.2 is none other than a son of the co-vendee Palani Ammal, besides being related to Kali Gounder by marriage. We have, therefore, to hold that the plaintiff has not established the necessary basis for the onus to shift to the defendants.

20. Next we consider the arguments of Mr. V.K. Muthusami based on the concept of "blending". In this context he placed reliance on the

averments in paragraph 5 of the plaint. He very strongly relied on the language of Ex.B-10, a release deed executed on 2.2.1972 by the 5th

defendant in this case in favour of late Kali Gounder, her father, renouncing her claims in the property purchased on 4.4.1962 under Ex.B-9 in the

name of her mother, since deceased. Mr. Muthusami placed reliance also on the recitals contained in Ex. A-1 dated 12.3.1973. We are unable to

accept this contention. In our opinion, the argument based on ""blending"" presupposes that the property under consideration is only the self

acquisition of the acquirer. The concept of ""blending"" is this:

What is one's own self-acquisition is willingly thrown by the acquirer into the common hotchpot of the family by his own voluntary act and

thereafter, he cannot assert any individual title to the same.

In this case, we are concerned with the items included by the plaintiff in A Schedule to his plaint and in particular with items 8 and 9 thereof. We

have to remember that in regard to that part of items 8 and 9 in which the contesting 1st respondent is interested. Under Ex.B-17, the property

was settled in his favour on 5.2.1968 while Ex.B-10 release deed was executed on 2.2.1972 by the 5th defendant in favour of late Kali Gounder.

We shall presently consider whether the contents of these two documents disclose any act of Kali Gounder blending his own self-acquisitions with

properties of an undivided family. Even if we are to take such a view, it can be of no help regarding properties settled on the 1st defendant by Kali

Gounder on 5.2.1968 under Ex.B-17. We are, therefore, not able to agree with Mr. V.K. Muthusami that Ex.B-10 dated 2.2.1972 can be used

by him in any manner to advance the case of blending. In the first place, it is a document executed in favour of Kali Gounder by his daughter by his

second wife who is the 5th defendant in this litigation. The said Ex.B-10 only recites that the prior purchase of the properties covered by Ex .B-10

were, even in the first instance, purchased only by the father utilising his own funds but were put in the name of her mother, since deceased. In our

opinion, it constitutes a mere admission of the benami nature of the title that had stood in her mother's name, from the date of Ex.B-9. The

daughter as it was her father's title to the properties purchased in her mother's

name benami, therefore, renounced herself of any claim thereto as her mother's heir. Ex.B-10 recites that the father paid her a substantial sum of money for executing that document. We are not persuaded to view the conduct as an act of Kali Gounder at all. Only then, the further enquiry, as to if the same is an act of voluntary giving up by him of his exclusive interest in his self-acquired property, in favour of an undivided Hindu family, will arise. So also is the case when we come to Ex.A-1 dated 12.3.1973. We have to remember here that both Kali Gounder and the 1st defendant are co-executants of the document and they have conveyed to plaintiff their respective individual interests in three sets of properties. One set of properties are the admitted joint family ancestral lands in Ayyampalayam village. There can be no question as to them and their inclusion in Ex.A-1, can lend no support to the case of "blending" put forth by Mr. V.K. Muthusami, learned Counsel for the appellant. There are some items of properties which had come to the plaintiff and 1st defendant from the estate of their maternal grandfather, in execution of the decree obtained in O.S. No. 139 of 1944, on the file of District Munsif, Namakkal. There are a third set of properties included in Ex.A-1 in regard to which it is the claim that they were those purchased by Kali Gounder. We have to observe that no purchase documents in regard to these items, have been exhibited in the suit. But, even assuming that some properties of Kali Gounder, have been included by him in the settlement document Ex .A-1 executed by him in favour of his first son and in the said document, there are recitals stating that the properties dealt with thereunder, belonged to the father by reason of purchase and ancestrally and to the 1st defendant by virtue of inheritance which had been already left in the possession of the plaintiff and that the plaintiff paid the father a sum of Rs. 3,000 and similarly paid to the 1st defendant a sum of Rs. 6,000 in cash for their interest in the same, can, in our view, in no way support the contention that Kali Gounder has blended the properties under consideration in this proceeding.

21. We have already referred to the decision reported in G. Narayana Raju Vs. G. Chamaraju and Others, . We now refer to the judgment of the

Full Bench of our High Court in Commissioner of Gift Tax v. P. Rangasami Naidu, 76 ILR 315, in which it is stated as follows:

When a Mitakshara father decides to treat his self-acquired property as the property of the family, in whatever form he manifests his intention, the conversion is admittedly voluntary and without consideration in money or money's worth. Such conversion of separate property into joint family property by blending or throwing it in the hotchpot of the joint family does not involve any transfer or disposition of property under the main part of the definition of "transfer of property" in Section 2(xxiv) of the Gift-Tax Act, 1958.

22. Mr. V.K. Muthusami also stressed that the income from the properties which became available to the plaintiff and the 1st defendant as a result of their inheriting the same as daughter's sons of their maternal grandfather, should have also gone into the acquisition by Kali Gounder of the properties with which we are concerned in these proceedings. While rejecting the said contention, we have to point out that this is an entirely new case put forward at the time of hearing and not raised in the pleadings in the lower court, nor even in the grounds of appeal before this Court. This apart, we have to point out that there is no evidence let in before this Court of the income from these properties, nor as to when they were reduced to possession in pursuance of the decree in O.S. No. 139 of 1994. We have noticed earlier that they came into the possession of the plaintiff under Ex.A-1, as early as on 12.3.1973, and the plaintiff gave evidence at the time of trial only on 10.4.1983 and on subsequent dates. When a person who has been in possession of the properties for a period of more than ten years prior to his deposition in this case, has not chosen to speak about the income realised by him therefrom, we cannot lend our ears to any submissions made on the basis of speculation.

23. Mr. S. Gopalaratnam, learned Senior Advocate, pointed out the evidence of P. W. 1 in the trial court which, in our opinion, appears to have much importance and relevance. P.W.1 in the trial court says as follows:

My father was conducting Chitra Finance with 15 partners. It is not right to say that it is my father's property. On his death in 1981, a sum of Rs. 30,000 was obtained from that company. I, my brother and sisters divided that amount equally.

24. This admission of P. W. 1, according to the learned senior advocate Mr. S. Gopalaratnam, for the contesting 1st respondent, is destructive of

the claim of an undivided Hindu family, set up by the plaintiff. We are inclined to agree with this submission of the learned Senior Counsel.

24-A. In paragraphs 20 to 22 of its judgment, the trial court has dealt with issue No. 5 and an additional issue framed by it on 4.2.1984, These

arise on the averment of the 1st defendant in paragraph 9 of his written statement. These issues have been decided in his favour by the trial court.

The trial court, in our opinion, has rightly, pointed out that the claim of the plaintiff will be barred in view of Article 110 of the Limitation Act, 1963.

Mr. V.K. Muthusami contended that this conclusion of the trial Court placing reliance of the decisions reported in Kumarappa Chettiar v.

Saminatha Chettiar, ILR Mad. 431 and Marudanayagam Pillai v. Sola Pillai, 77 L.W. 697, is incorrect. In ILR Mad. 431, it is observed as

follows:

Where a member of a Hindu family who is divided in status from others is in enjoyment of some portion of the family properties, while others enjoy

other portions, he is not in law excluded or ousted from those other portions, so as to disentitle him to his share of those portions however long

their enjoyment by others.

In Marudanayagam Pillai v. Sola Pillai, 77 L. W. 697, it is observed as follows:

The exclusion that is contemplated under Article 127. is a conscious and deliberate act amounting to denial of the right of the particular member

concerned to a share in the property analogous to ouster, and it must also have been brought home to him. To bar the plaintiff under Article 127,

three questions will have to be considered, namely, (i) whether the claimant to a share was excluded from the joint family property; (ii) if so

excluded when the exclusion took place; and (iii) when the exclusion if any, became known to the claimant. The point to be noticed is that time will

not begin to run against the plaintiff until he became aware that he was excluded from claiming a right to a share in the properties.

To constitute exclusion under Article 127, there must be an awareness or acknowledgment of the existence of the right and the claimant must be

kept out of it. Clear and strong evidence would be required to hold that a person assented to his own exclusion and acquiesced in the continuance

of the exclusion without asserting his right.

It has to be noticed that these decisions arose under the repealed Limitation Act

of 1908 when old Article 127 of the first schedule was applicable

to such suits. There is an elaborate discussion about this Article in Rustomji's Limitation Act, 1908, 6th (1958) edition at pages 673 to 687. It

cannot be denied that Article 110 of the first schedule to Limitation Act, 1963, which is the governing provision is worded differently. We would

like to set down Article 127 of the 1908 Act and Article 110 of the present Act, for a comparative study.

Article 127 of 1908 Act.

By a person excluded from joint
Twelve years
When the exclusion becomes
family property to enforce a right known to the plaintiff.
to share therein.

Article 110 of 1963 Act

By a person excluded from a
Twelve years
When the exclusion becomes
joint family property to enforce a known to the plaintiff.
right to a share therein.

It will at once be noticed that the word (letter) "a" which we have underlined has been introduced by the legislature at two places in the first

column, when enacting the 1963 Act. The learned senior advocate for the contesting respondent drew our attention to the commentaries in volume

3 of the ninth edition of U.N. Mitra's "Law of Limitation and Prescription ", edited by late Professor Dr. S. Venkataraman, appearing at pages

2065 and 2082. At page 2065, the addition of the word (letter) "a" in the first column of the present Article is referred to. Legislative history and

changes have been traced in para 1 at page 2065.

Legislative history and changes: The present Article corresponds fully to Article 127 of the Act of 1908 save that the Article "a" has been inserted

now in the first column before the words "joint family property". The earlier provisions were Section 1 Clause (13) of Act XIV of 1859, Article

127 of Act IX of 187 Land Article 127 of Act XV of 1877. Under Act XIV of 1859 (Section 1, Clause 13) in respect of suits to enforce the right

to a share in any property, movable or immovable on the ground that it was joint family property, time ran "from the death of the person from

whom the property alleged to be joint was said to have descended or from the date of the last payment to the plaintiff or any person through whom

he claimed by the person in the possession or management of such property on account of such alleged share." The period of limitation was twelve years.

At page 2082:

The language of the first column of the present Article 110 reads differently from what it was under Article 127 of the earlier Acts. It runs" from a joint family property". The pre-fixing of the Article "a" before the words joint family property" is significant and enlarges the scope of the article by covering cases of exclusion from even an item of joint family property and giving a right to sue to the person excluded. In view of this change in the language much of the discussion supra has become academic.

Mr. S. Gopalaratnam, learned Senior Advocate would submit that the discussion referred to supra, is to the discussion in the text at page 2080 of the book, under heading "13. Should exclusion be from the entirety of family property?" The learned senior advocate points out that it is in this page 2080 the decision in *Kumarappa v. Saminatha*, ILR Mad. 431, is referred to as holding, "the plaintiff would not be barred unless there was exclusion from the whole of the joint family property and that exclusion from only a portion of the joint family property would not do.

25. Mr. S. Gopalarathnam learned Senior Advocate then drew our attention to the page 982 of the 19th Edition of B.B. Mitra's Limitation Act, reading:

So if the plaintiff was not totally excluded the cause of action did not arise for the plaintiff to sue to enforce his right to a share therein. So the question of suit for partition being barred by limitation would not arise. However, in the new Limitation Act, there is a change in the language. In the first column of the Article 110, the words are", by a person excluded from a joint family property". In Article 127, the Article "a" was not there.

So the use of the article, "a" before the words "joint family property", enlarges the scope of the article and view can be taken, that where there is exclusion from an item of joint family property, the (a) right to sue arises to the person so excluded.

According to Mr. S. Gopalaratnam, we have to take note of the deliberate change made by the legislature in the relevant provision and cannot treat the same as a mere cosmetic changes. In this connection, Mr. S.

Gopalaratnam, learned senior advocate, drew our attention to the deposition of the plaintiff to the following effect:

From 1968, this property is only in the possession of my younger brother. At present the value of items 8 and 9 will be Rs. 75,00,000-00. The monthly income from the same will be Rs. 7,000 to 8,000. My younger brother alone is enjoying this income from the beginning. I have not asked him for my share. I knew in 1968 at the time of the settlement Ex.B-17, I did not file a suit to set aside the same.

We, therefore, do not agree with the contention of Mr. V.K. Muthusami that the conclusion of the trial court expressed in paragraphs 20 to 22 of its judgment, is incorrect. We agree with the submission of Mr. S. Gopalaratnam, learned Senior Advocate for the contesting 1st respondent, that

even on the view, the properties belonged to a Hindu undivided family of which the plaintiff was a member, he will be out of court in view of the present Article 110 of the Limitation Act, 1963, on his own evidence, extracted above.

26. Mr. S. Sethuratnam, learned senior advocate appearing for the 5th defendant Manonmani, besides adopting the arguments advanced by Mr.

S. Gopalaratnam, learned senior advocate, submits that even on the plaint case of existence of an undivided Hindu family, the settlements made by

Kali Gounder in his client's favour, could well be sustained as upheld on the well known principle of Hindu Law, that a father can make a gift of

small extents of joint family properties to a daughter born in the family. We are in complete agreement with Mr. Sethuratnam, learned senior advocate.

27. We may now refer to the two decisions cited By Mr. Sethuratnam. The first one is reported in Guramma Bhratar Chanbasappa Deshmukh and

Another Vs. Malappa, , in which it reads thus:

The Hindu Law texts conferred a right upon a daughter or a sister, as the case may be, to have a share in the family property at the time of

partition. That right was lost by efflux of time. But it became crystallized into a moral obligation. The father or his representative can make a valid

gift, by way of reasonable provision for the maintenance of the daughter, regard being had to the financial and other relevant circumstances of the

family. By custom or by convenience, such gifts are made at the time of

marriage, but the right of the father or his representative to make such a gift is not confined to the marriage occasion. It is a moral obligation and it continues to subsist till it is discharged. Marriage is only a customary occasion for such a gift. But the obligation can be discharged at any time, either during the lifetime of the father or thereafter. It is not possible to lay down a hard and fast rule, prescribing the quantitative limits of such a gift as that would depend on the facts of each case and it can only be decided by courts, regard being had to the overall picture of the extent of the family estate, the number of daughters to be provided for and other paramount charges and other similar circumstances. If the father is within his rights to make a gift, of a reasonable extent of the family property for the maintenance of a daughter, it cannot be said that the said gift must be made only by one document or only at a single point of time. The validity or the reasonableness of a gift does not depend upon the plurality of documents but on the power of the father to make a gift and the reasonableness of the gift so made. If once the power is granted and the reasonableness of the gift is not disputed, the fact that two gift deeds were executed instead of one, cannot make the gift any the less a valid one. Applying the above principles it was held that in the instant case the gift of only a life-estate in a small extent of land made by the father in favour of his daughter in addition to what had already been given for her maintenance was within his right and certainly reasonable as the family had extensive properties. The gift was therefore valid.

The next decision is reported in *Annamalai Ammal Vs. Sundarathammal and Others*, . It reads thus:

A gift of immovable properties by a Hindu father to his daughter, if within reasonable limits, is valid and cannot be questioned by the sons even though such a gift was made before the marriage.

It is continuing moral obligation on the part of the father to make a marriage provision to the daughter. There is not much difference between a gift

after the marriage and a gift before the marriage, the object of such gift being to make a future provision for the bridal couple. The circumstance

that a gift is not described as a marriage provision under the document does not affect the validity of the gift. When a father makes a gift of a

reasonable portion of the property to an unmarried daughter it may be assumed

that it was meant to be for a marriage provision.

Ex.A-2 was produced when D.W. 1 was in the box. D.W.I was asked if the entries contained in Ex.A-2 were in the hand-writing of his father.

D.W.I has said "yes". When one looks at Ex.A-2, one finds it to be some sort of a statement of account and not an account book. Apparently, the

father was noting down some expenses relating to Dharmalingam, the 1st defendant. There is a credit for Rs. 7,750. The name "Dharman" is found

written at the top of two of the four pages. If the plaintiff did not think much of this document when he gave evidence, and has satisfied himself with

getting an answer about the identity of the writer thereof from the defendant his case goes no further. In AIR 1945 174 (Privy Council) Lord

Goddard, has stated...

The letter is no evidence of the facts therein stated. The girl herself (the writer of the letter), gave evidence and the only legitimate use to which the

letter could be put could be to use it in cross-examination for the purpose of discrediting her if what she had written was inconsistent with her

evidence.

The Supreme Court has in (1981) 1 S.C.C. 81 , pointed out,

Undoubtedly mere proof of the handwriting of a document would not tantamount to proof of all the contents or the facts stated in the document. If

the truth of the facts stated in a document is in issue mere proof of the handwriting and execution of the document would not furnish evidence of the

truth of the facts or contents of the document. The truth or otherwise of the facts or contents so stated would have to be proved by admissible

evidence, i.e. by the evidence of those persons who can vouchsafe for the truth of the facts in issue.

28. The submission is that Ex.A-2 cannot advance the case of the plaintiff and he cannot go back on his admission that he had been excluded from

the properties covered under Ex.B-17, from the date of its execution, and that it was only the defendant that was exclusively enjoying the monthly

income therefrom of Rs. 7 to 8,000 from the beginning. Even if the father had written, the accounts of the son for the improvements, it would not

affect the title of the defendant is the submission by the learned Counsel for the respondents. Items 8 and 9 of the plaint A Schedule were part of

the properties purchased by the father under Ex.B-15 on 16.10.1961. After the

settlement in favour of the 1st defendant on 5.2.1968, the father retained 2 acres and 12 cents of land from that purchased under Ex.B-15 and sold the same under Ex.B-16, on 30.6.1972. At page 18 of his deposition, P.W.I says, "I have no rights in the property sold by my father under Ex.B-16. If he accepts Ex.B. 16, how can he object to the earlier B-17. As regards the argument based on alleged," blending", the submission is that the same is not open for the appellant to urge and that in any event no such plea can be made out in his case. We have already referred to the Full Bench decision of our High Court reported in The Commissioner of Gift Tax, Madras Vs. P. Rangasami Naidu, Natesan, J. at 321 and 325.

29. Mr. S. Gopalaratnam submitted that even though the 1st defendant had shown in Schedule III to his written statement, the Ambassador car bearing No. MDA. 5216, as an item to be included in the division and the plaintiff as P.W.I, has admitted the existence of the same, the lower court has left out that item from its determination. V.K. Muthusamy on the other hand contends that the claim of the 1st defendant in this regard, is thoroughly untenable and trivial. According to the defendants, the plaintiff had forged the signature of the 1st defendant and had the registry transferred in the name of the 3rd defendant who is colluding with the plaintiff, and the 1st defendant had lodged a criminal complaint in respect of the said transaction. The plaintiff contends as P. W. 1 that the Ambassador Car also belonged to the joint family, that he had a share in that and that the car was sold and the sale consideration realised by the said sale, was spent for the funeral expenses of their father. We cannot agree with the contention of the learned Counsel for the plaintiff- appellant. We direct that this item be also included in the preliminary decree under appeal as an item to be divided among the heirs. With this modification, we dismiss the appeal and allow the memo of cross-objection in part. The appellant is directed to pay the costs of the appeal to the respondents.