
(2001) 03 MAD CK 0011
In the Madras High Court
Case No : Appeal No. 1234 of 1988

Murugan rep. by his mother and next friend, Kamakkal Gounder APPELLANT

Vs

Thirupathi Gounder and Others RESPONDENT

Date of Decision : 13-03-2001

Acts Referred:

Evidence Act, 1872 — Section 112

Citation : (2001) 03 MAD CK 0011

Hon'ble Judges : E. Padmanabhan, J

Bench : Single Bench

Advocate : V. Natarajan, for the Appellant; R. Nandakumar for RR1 to 3, Mr. M.V. Krishnan for RR4 and 5, for the Respondent

Judgement

E. Padmanabhan, J.—The present appeal has been preferred by the plaintiff in O.S. No. 94/1984 on the file of the Sub Court, Dindigul,

being aggrieved by the dismissal of his suit seeking the relief of partition and separate possession of his 1/4-th share and for mesne profits. Heard

Mr. V. Natarajan, learned counsel appearing for the appellant and Mr. R. Nandakumar, learned counsel appearing for respondents 1 to 3 and Mr.

M.V. Krishnan, learned counsel appearing for respondents 4 & 5. For convenience, the parties will be referred as arrayed before the trial Court.

2. It is the case of the minor plaintiff that he is the son of the first defendant and defendants 2 and 3 are his grandfather and grandmother.

Defendants 4 and 5 are the alienees of some of the suit items. The first defendant married Kamakkal. Due to the lawful wedlock between the first

defendant and Kamakkal, the plaintiff and his four sisters were born. On instigation of the 2nd defendant, the plaintiffs mother and sisters were

driven out of the matrimonial home. The plaintiffs mother instituted O.S. No. 414/1973 for maintenance against the first defendant. The said suit was decreed granting the decree for maintenance and as per the decree properties were given to the mother, Kamakkal and minor daughters for their maintenance and they are in possession of the same. When the maintenance suit was pending the plaintiff herein was in the womb of his mother, Kamakkal. The plaintiff is the legitimate son of the first defendant and Kamakkal. The defendants are in possession and enjoyment of the extensive lands measuring 25 acres of Nanja with five wells, two wells fitted with electric connection besides number of houses. The properties are ancestral properties and the plaintiff is entitled to 1/4-th share in the entire suit properties as a coparcener. Hence the suit for partition of his 1/4-th share.

3. The first defendant filed a written statement pleading that when the earlier suit O.S. No. 414/73 was pending, Kamakkal was pregnant and she had given birth to a female child by name Jaya and it is not correct to state that the plaintiff was in his mothers womb. Kamakkal left the matrimonial house during 1972 with three children and thereafter there had been no relationship between Kamakkal and the first defendant. There was a compromise between Kamakkal and the first defendant in the maintenance suit during the year 1977. In the light of the said compromise, the plaintiff is not entitled to claim any share. The plaintiff was not born to the first defendant and the plaintiff is not the first defendants son. The plaintiff was born to Kamakkal and her sisters husband. The plaintiff is not entitled to any share. The first defendant had married one, Ponnammal, and through her he has two sons, Srinivasan and Kannan and a daughter Hamsavalli. The suit is bad for non-joinder of the said Srinivasan and Kannan, without prejudice and even assuming the plaintiff is entitled to a share he will not be entitled to 1/4-th share but he will be entitled to only 1/8-th share. The suit items 1 to 25 do not belong to the family. The suit items 1 to 3 are ancestral properties and as per the compromise decree passed in O.S. No. 414/73, they are in enjoyment of Kamakkal for her life and her three daughters. The suit items 7,9,10,11,16,17 and 21 are the separate properties of the 2nd defendant which items the 2nd defendant on 3.2.1971, 20.5.72,26.5.72 and 10.5.80 had alienated for valid

consideration to Ramasamy Gounder and Amman @ Veerathimammal, who are in possession of the same. The alienees are necessary parties.

Apart from that the family is indebted and these debts are binding on the family. The plaintiff had boosted the income from the joint family

properties. The first defendant had further pleaded that he is entitled to one well in the particular survey number and item No. 1 of the suit property

do not belong to the joint family.

4. Defendants 2 and 3 filed a joint written statement adopting the written statement filed by the first defendant besides contending that the 3rd

defendant is not the owner of the three items of the suit property and she is not a necessary party. Kammakkal, the mother of the plaintiff, after

leaving the matrimonial home is living with her sisters husband and the plaintiff was born out of the illegitimate relationship. The suit is not

maintainable. The suit properties are the separate properties of the defendants 2 and 3 and the first defendant has no right. Even before the birth of

the plaintiff, the first defendant had alienated his properties for binding necessities and the alienees are in occupation. The suit is therefore liable to

be dismissed.

5. Defendants 4 and 5 filed a written statement pleading that the minor plaintiff was born during the year 1977 when the earlier suit O.S. No.

414/73 was pending. The 4th defendant had purchased the land comprised in survey No. 443/1-B measuring 60 cents, 443/4 measuring 60 cents,

443/1-B measuring 78 cents, 443/2 measuring 66 cents, in all admeasuring 1 acre 44 cents and in this he is entitled to 78 cents. The 4th defendant

is also entitled to the land comprised in survey No. 442/6 37 cents out of 74 cents, in all aggregating to 2 acres 35 cents. The said purchase by the

4th defendant is for valid consideration and is binding on the family. There has been mutation of patta in favour of the 4th defendant and he is

paying kist. The 4th defendant after purchase had sunk a well, secured electricity connection and had developed the lands at a cost of Rs.

25,000/-. The sale in favour of the 4th defendant is binding on the family. The 4th defendant has been indemnified by defendants 1 and 2. The 5th

defendant had also purchased for valid consideration part of the land on 3.2.1971 and he had developed the same. The plaint 1st schedule items

4,5,6 and 7 were purchased by the 5th defendant. Items 16 and 17 belong to the

4th defendant Item 22 is the property over which the 4th

defendant has a charge. The properties purchased by the 4th and 5th defendant are not liable for partition and they have to be excluded from the

suit for partition. The first defendant had purchased ! 2 acres of land and the suit item had not been included as a suit item and the suit is bad for

partial partition.

6. On the said pleadings, the trial Court framed the following issues:-

1) Whether the plaintiff is entitled to a judgment and decree as prayed for?

2) Whether the suit is bad for non-joinder of necessary parties?

3) Whether the 3rd defendant is not a necessary party?

4) To what relief the plaintiff is entitled to?

5) Whether the 4th and 5th defendant have developed the properties purchased by them?

6) Whether the 4th and the 5th defendants are entitled to equities, if any?

7. The plaintiff marked Exs. A-1 to A-6 while the defendants marked Exs. B-1 to B-19. The plaintiffs mother was examined as P.W.1 besides

one Pasupathi Gounder as P.W.2. The first defendant examined himself as D.W. 1 besides four other witnesses including the 5th defendant were

examined on the side of the defendants.

8. Issues 1 and 2 were answered against the plaintiffs, the 3rd issue was answered in favour of the plaintiff. The additional issues 4 and 5 were

answered in favour of the defendants holding that defendants 4 and 5 are entitled to equity. The trial court also held that defendants 4 and 5 have

effected improvements, but the trial court had not rendered a finding as to the details of the improvements effected by the said defendants in the

lands purchased by them from defendants 1 and 2.

9. In this appeal, the following points are framed for consideration:-

1) Whether the plaintiff Murugan is the legitimate son born to first defendant and Kamakkal out of lawful wedlock?

2) Whether the plaintiff is entitled to claim 1/4-th share in the suit properties?

3) Whether the suit properties are the joint family ancestral properties in which the plaintiff is entitled to 1/4-th share?

4) Whether the alienations in favour of defendants 4 and 5 are binding on the

plaintiff?

5) Whether the defendants 4 and 5 are entitled to equities, if any ?

6) Whether the suit is bad for non-joinder of necessary parties?

7) Whether the suit is bad for partial partition?

10. The substantial point that arises for consideration is whether the plaintiff is the legitimate son of the first defendant. It is admitted by all the

parties to the suit that the plaintiff's mother, Kamakkal, was validly married and is the wife of the first defendant. The marital relationship between

the 1st defendant and the plaintiff's mother, Kamakkal, had not been terminated in a manner known to law even as on date and right through the

marital relationship continued. Kamakkal is the wife of the first defendant and even according to defendants 1 to 3, the marital relationship between

Kamakkal and the first defendant still subsists.

11. However, it is contended on behalf of defendants 1 to 3 that the plaintiff was not born to the first defendant, but he was born to Kamakkal and

her sister's husband. In other words, the plaintiff was not born to the first defendant and therefore he cannot maintain the suit for partition. It is

further pleaded by defendants 1 to 3 that after Kamakkal leaving the matrimonial home, there had been no marital relationship between the plaintiff

mother Kamakkal and the first defendant. It is also the plea of the first defendant as well as defendants 2 and 3 that during the pendency of the

earlier suit for maintenance, mother, Kamakkal, had conceived and delivered a female child. Had the plaintiff been born as pleaded by the

plaintiff during the pendency of the earlier suit for maintenance, it is pointed out that the earlier suit for maintenance, there is no reason at all for the

mother not to disclose the birth or to implead the minor as a party to the suit and she should have at least raised necessary pleas in the earlier suit

and the failure to put forth such a plea in the earlier suit is fatal to the plaintiff's claim. All these points are though attractive, they have to be scanned

carefully in the light of the oral evidence and the conduct of the parties as the paternity of the plaintiff has to be decided, else the plaintiff will be

branded as an illegitimate son of Kamakkal.

12. Though the defendants 1 to 3 pleaded that there had been no relationship between the plaintiff's mother, Kamakkal, and the first defendant

after her leaving the matrimonial home, the evidence adduced on the side of the plaintiff and the admission of D.W.I in the witness stand would

show that there was not only access between the plaintiffs mother, Kamakkal and the first defendant, but they were living in close proximity and in

fact, D.W. 1 had been supervising the land and assisting Kamakkal even with respect to the items given to her under the maintenance decree.

13. It is nobodys case that Kamakkal had been residing at a far off place and the first defendant had no access at all or it is impossible for the first

defendant to have access to the plaintiffs mother, Kamakkal. Kamakkal and the first defendant are living apart at a distance of two Kilometers or

thereabout. Kamakkal who had been examined as P.W. 1 had deposed about the relationship between her and the first defendant and the first

defendants visit to her place of residence and living as husband and wife. The same would go to show that there had not only been access between

the first defendant and Kamakkal, but also there had been marital relationship between the two. As such it cannot be ruled out that there was no

access at all between the father and mother.

14. P.W.1 had deposed that after the compromise under the maintenance suit instituted by her, the first defendant was living with her. In fact in

respect of one of the daughters, the marriage was admittedly arranged by the first defendant even after the compromise decree by spending Rs.

20,000 /-. P.W.1 had specifically deposed that the minor plaintiff was born out of marital relationship between her and the first defendant and she

had flatly denied the suggestion put to her. P.W.1 had further deposed that till the maintenance case, all of them have been living together. The

family lands are located in Jambuliapatti. P.W. 1 had deposed that her husband/ first defendant and her children were living in the farmhouse.

P.W.1 had deposed that even though she had been living separately during the pendency of the maintenance suit, the first defendant had visited

her, they had marital relationship and first defendant even after the maintenance suit was looking after her.

15. As against the evidence of P.W. 1, who had deposed about the first defendant living with her, and out of the said marital relationship, minor

Murugan was born, there is no other acceptable evidence to disbelieve the evidence of P.W. 1. In fact D.W. 1 though in chief examination

deposed that he did not have further marital relationship with the plaintiffs mother, Kamakkal, he had admitted about the compromise in the maintenance suit and giving out landed properties with a well and motor and a house and also his conducting the marriage of his first daughter.

D.W. 1 further deposed that Kamakkal was residing at the village while he was residing in the farmhouse. D.W. 1 had admitted that he had not secured a decree for divorce against his first wife Kamakkal nor he had instituted such a proceeding alleging that she is living in adultery. A specific suggestion has been made to D.W. 1 while he was in the witness stand that he had been looking after the lands given for maintenance to Kamakkal and her children.

16. D.W. 1 has also admitted that under sale deed, Ex. A-6, executed by defendants 1 and 2, the plaintiff had been described as one of the sons

and as the guardian of the plaintiff, the sale deed had been executed in favour of a third party. The sale deed, Ex. A-6 is dated 21.2.1979 and in

the light of the said recital that the plaintiff is the son of the first defendant even according to the sale deed executed by defendants 1 and 2, it is not

at all open to the defendants to contend that the plaintiff is not the legitimate son or he was not born out of a lawful wedlock between the first

defendant and Kamakkal. The execution of Ex. A-6, sale deed has been admitted by D.W. 1 and he is unable to give any explanation in this

respect. Therefore it is clear that the defendant had not only admitted but also accepted the plaintiff as his son and to bind him under Ex. A-6 he

had shown the minor plaintiff as an nominee party in the sale deed. As already pointed out, the marital relationship between the first defendant and

Kamakkal still subsists and the plaintiff was born during the subsistence of valid marriage.

17. It is admitted that the plaintiffs mother and the defendant were living even after the maintenance decree and it is not as if they could not reach

each other or it is impossible for the two to have contact. D.W. 1 had admitted that he had not only celebrated the marriage of his daughter after

the maintenance suit, but he had also been managing the lands and looking after the lands allotted to Kamakkal and her children besides attended them.

18. u/s 112 of the Evidence Act, any person born during the continuance of a

valid marriage between his mother and man, shall be conclusive

proof that he is the legitimate son of that man unless it could be shown that the parties to the marriage had no access to each other at any time

when he could have been begotten. When the wife gave birth to a child during the subsistence of a valid marriage with the husband, and when the

husband failed to prove that he had no access to his wife at any time when the child could have been begotten, the presumption as to legitimacy of

the child is conclusive. It could be rebutted only by sufficient and satisfactory evidence. Admittedly the marital relationship between Kamakkal and

the first defendant had been terminated in a manner known to law.

19. The legal presumption as to the paternity u/s 112 of The Evidence Act squarely applies to the facts of the present case. It is the first defendant

who claims that the plaintiff is the illegitimate son, and he was born out of extra-marital relationship of mother Kamakkal, must establish that there

was no access at all between the plaintiffs mother and the first defendant and that there had been a severance of marital status between the two. In

terms of Section 112 of The Evidence Act, there is a very strong, though rebuttable presumption, that the child born in a lawful wedlock is a

legitimate child of its mothers husband.

20. In the present case, access had been established and P.W. 1 had also deposed about the relationship being continued between herself and the

first defendant even after the maintenance proceedings and the same would establish that the plaintiff is a legitimate child of her with the first

defendant and the paternity of the plaintiff is established. There is no cogent evidence to disbelieve the presumption of legitimacy in favour of the

plaintiff who was born in wedlock. Once access to or intercourse by husband is proved, no evidence will be allowed to show that it is not the child

of the first defendant.

21. In Goutam Kundu v State of West Bengal & another reported in AIR 1993 SC 2295, the Apex Court held that a consideration prima facie

against, the husband must establish no access to dispel the presumption arising u/s 112. In that context, it has been held thus:-

22 It is a rebuttable presumption of law that a child born during the lawful wedlock is legitimate, and that access occurred between the parents.

This presumption can only be displaced by a strong preponderance of evidence,

and not by a mere balance of probabilities.

22. In *Smt. Dukhtar Jahan v Mohammed Farooq*, AIR 1987 SC 1049 this Court held (Para 12):-

Section 112 lays down that if a person was born during the continuance of a valid marriage between his mother and any man or within two

hundred and eighty days after its dissolution and the mother remains unmarried, it shall be taken as conclusive proof that he is the legitimate son of

that man, unless it can be shown that the parties to the marriage had no access to each other at anytime when he could have been begotten. This

rule of law based on the dictates of justice has always made the courts incline towards upholding the legitimacy of a child unless the facts are so

compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimating

of the child would result in rank injustice to the father. Courts have always desisted from lightly or hastily rendering a verdict and that too, on the

basis of slender materials, which will have the effect of branding a child as a bastard and its mother as unchaste woman.

24. This section requires the party disputing the paternity to prove non-access in order to dispel the presumption. Access and non-access mean the

existence or non-existence of opportunities of sexual intercourse; it does not mean actual cohabitation.

22. Access has been established on the facts of the case as well as spoken to by P.W. 1, the plaintiffs mother, and admitted by D.W. 1, the first

defendant. Hence, the burden is on the first defendant to prove no access which he has miserably failed. In *Perumal Nadar (Dead) by Legal*

Representative v Ponnammami Nadar (Minor) reported in AIR 1971 SC 2352 (2355), it has been held thus:-

""12. Nor can we accept the contention that the plaintiff, Ponnuswami is an illegitimate child. If it be accepted that there was a valid marriage

between Perumal and Annapazham and during the subsistence of the marriage the plaintiff was born, a conclusive presumption arises that he was

the son of Perumal, unless it be established that at the time when the plaintiff was conceived, Perumal had no access to Annapazham. There is

evidence on the record that there were in 1957 some disputes between Annapazham and Perumal. Annapazham had lodged a complaint before

the Magistrates Court that Perumal had contracted marriage with one Bhagavathi. That complaint was dismissed and the order was confirmed by

the High Court of Madras. Because of this complaint, the relations between the parties were strained and they were living apart. But it is still

common ground that Perumal and Annapazham were living in the same village, and unless Perumal was able to establish absence of access, the

presumption raised by Section 112 of the Indian Evidence Act will not be displaced.

13. In *Chilukuri Venkateswarlu v. Chilukuri Venkatanarayana*, 1954 SCR 424 = (AIR 1954 SC 176) in a suit filed by a Hindu son against his

father for partition it was contended that the plaintiff was not the legitimate child of the defendant. The defendant relied upon certain documents by

which he had agreed to pay maintenance to the plaintiff's mother, and upon a deed gifting a house to her and assertions made in previous suit that

he had no intercourse with her after he married a second wife. The Court in that case observed, following the judgment of the Privy Council in

Karapaya v Mayandi ILR 12 Rang 243 = (AIR 1934 PC 49), that "non access could be established not merely by positive or direct evidence; it

can be proved undoubtedly like any other physical fact by evidence, either direct or circumstantial, which is relevant to the issue under the

provisions of the Indian Evidence Act, though as the presumption of legitimacy is highly favoured by law it is necessary that proof of non-access

must be clear and satisfactory, and since on the basis of that proof there was evidence on the record that the plaintiff's mother lived in the house

gifted to her by her husband and there was no impossibility of cohabitation between the parties, there was no acceptable evidence of non-access.

14. In *Ammathayee v Kumaresain* (1967) 1 SCR 353 - (AIR 1967 SC 569) this Court held that the conclusive presumption under Sec.112 of the

Indian Evidence Act can only be displaced if it is shown that the parties to the marriage had no access at any time when the child could have been

begotten.

23. Apart from the above evidence and legal position, the very fact that in Ex. A-6, sale deed executed on 21.2.1979, defendants 1 and 2 had

described the present plaintiff as the son of defendant and as one of the vendors, he is being represented by the father and natural guardian, the first

defendant. The said sale was effected in favour of another Kamakkamal and Ex. A-6 has been marked through P.W. 2, one Pasupathi, who was

the witness to the execution by D.W. 1 as well as the 2nd defendant. The cumulative effect of the oral evidence as well as the above documentary

evidence and when the marital relationship is subsisting and access having been established, it follows that the plaintiff is the legitimate son born to

the first defendant and Kamakkal and the point is answered accordingly in favour of the plaintiff.

24. Admittedly the family of defendants 1 and 2 own extensive ancestral properties, agricultural lands and all the lands are ancestral properties or

properties purchased out of ancestral nucleus. Therefore the plaintiff is entitled to 1/4-th share as claimed by him has to be sustained. Though the

first defendant contended that the suit is bad for non-joinder of Srinivasan and Kannan, as according to him he had entered into a second marriage

with Ponnammal and out of that wedlock he had begotten Srinivasan, Kannan as his two sons and Hamsavalli, a female child.

25. It is well settled in law that so long as the marital relationship between Kamakkal, the plaintiffs mother and the first defendant subsists, the first

defendant cannot enter into or contract a valid marriage much less with Ponnammal, nor the said Srinivasan and Kannan can claim themselves to be

the legitimate sons of the first defendant, nor they are coparceners as they were not born out of a valid marriage. It may be that they may be

entitled to maintenance, but they are not entitled to a share. Neither Srinivasan nor Kannan nor Hamsavalli nor Ponnammal could claim any share in

the joint family ancestral properties consisting of the second defendant, the grandfather and the first defendant, the father of the plaintiff.

26. Therefore the said two sons, namely, Srinivasan and Kannan are not necessary parties to the suit nor they are proper parties as they are not

entitled to any share. The Court below held that the suit is bad for non-joinder of the said two persons on the assumption that the said two persons

are the sons of the first defendant born out of a valid marriage. This view of the Court below cannot be sustained and this Court holds that the suit

is not bad for non-joinder of these three persons. Hence issue No. 6 is answered in favour of the plaintiff and against the defendants.

27. Taking up the 3rd issue, it is to be pointed out that neither defendants I and 2 nor the alienees have substantiated that the family was indebted

and for binding necessities the alienations have been effected. It is admitted by P.W. 1 as well as the other witnesses that the family had substantial

properties and they are income yielding properties. The lands are nanja lands with five wells fitted with electric motor and they do have copious

supply of water.

28. This would show that the joint family of defendants 1 and 2 and the plaintiff owned substantial properties and they have been deriving good

income and there was no warrant nor necessity for them to incur any debt nor there was any necessity to alienate the said properties. It is the case

of defendants 4 and 5 that the first defendant alienated the properties and they have subsequently purchased larger extent and the said item had not

been included in the partition. In other words, it is the evidence of D.Ws. 2 to 5 that the first defendant had alienated some of the properties for the

purpose of purchasing exclusive properties by way of consolidation. This would show that the family had good income and there was no binding

necessity to sell. However, even otherwise the items purchased out of such sale proceeds also form part of the joint family property and it is

available for partition.

29. Further it has to be pointed out that alienations, if any, effected by defendants 1 and 2 before the birth of the plaintiff, he cannot claim the same

and such of those items alienated before the birth of the plaintiff have to be excluded from partition. The purchasers of the joint family property

after the birth of the plaintiff are entitled to equities as according to them they have effected improvements. Ex. A-6, the sale deed would show not

only the first defendant had included the plaintiff as eo nomine party to bind the first defendant, but also sold the items. It is true that the item sold

under Ex. A-6 had not been included as one of the items. However that would not mean that Ex. A-6 is false or fictitious.

30. It is also pointed out that the plaintiff had omitted to include the items purchased by the first defendant. The plaintiff, being a minor and her

mother the guardian an illiterate woman, is not aware of the details of the properties nor she had the assistance of others. In the circumstances, this

Court to render substantial justice, the properties owned by defendants 1, and 2 and the property purchased by defendants 1 and 2 pending the

suit though they have not been included as suit items, this Court on admission

holds that they are available for partition. Hence, liberty is given to the plaintiff to apply for amendment to include those items by way of amendment, as admittedly the items have been purchased by the first defendant out of the joint family nucleus and he has no separate income of his own nor it is his case that this is his separate property. Instead of remanding the matter and keeping the matter pending, in the interest of justice such a course should be adopted as the plaintiff was a minor and his interests shall not be defeated by the negligence on the part of the mother, the guardian.

31. In the circumstances, this Court directs that it is open to the plaintiff to apply for amendment of the plaint schedule as well as for the inclusion of other admitted items as pointed out by the defendants by filing necessary application before the court below and the court below shall, after examining, even pending the final decree proceedings, consider the plaintiffs claim in this respect for addition of these items which have not been included in the plaint schedule. Though this direction is extraordinary, to render substantial justice, this Court is issuing such a direction.

32. The defendants 4 and 5 are the purchasers of the suit property pending the suit and therefore these alienations are not binding on the plaintiff though the said defendants have effected improvements, but there is no evidence to show the value of improvements or cost of the improvements. However on that score, this Court would be justified in holding that the alienations in favour of the alienees, namely, defendants 4 and 5 is binding to the extent of their vendors and it is not binding on the share of the plaintiff. In the final decree proceedings, as far as possible, the items alienated by defendants 1 and 2 in favour of defendants 4 and 5 could be allotted to the share of defendants 1 and 2.

33. As regards the plea of partial partition, the plaintiff had included number of items in the suit schedule. It is only from the defendants plea, it is seen that some of the items have been purchased just prior to the suit or pending the suit and this Court, while considering the other issues had issued a direction that it is open to the plaintiff to seek for amendment of the plaint schedule and for inclusion of items which have been omitted as there are specific admissions by the defendants though belong to the family but the particular items have been omitted to be included in the plaint.

34. In the circumstances, this Court holds that the suit is not bad for partial partition as the items omitted to be included which were acquired by

the first defendant either just before the suit or after the suit will be very well included as they were admittedly purchased either out of joint family

nucleus or alienations of joint family property to purchase, by taking out an application for amendment. Hence, this issue is answered accordingly.

It is to be pointed out that neither the 2nd defendant nor the 3rd defendant have gone into the box to sustain their claim that some of the items are

their separate properties. In the absence of such evidence, the evidence of defendants 2 and 3, this Court holds that they have not substantiated

their plea. Hence, it follows that the plaintiffs claim has to be sustained even though the properties stand in the name of defendants 2 and 3.

35. In the result, the appeal is allowed and there will be a preliminary decree for partition of the suit items and separate possession of the plaintiffs

1/4-th share in the said items with mesne profits. Taking into consideration of the close relationship between the parties, this Court directs that the

parties shall bear their respective costs throughout.