

(2003) 08 MAD CK 0141
In the Madras High Court
Case No : A.S. No. 911 of 1988

P. Lalitha and S. Mahalakshmi

APPELLANT

Vs

Kalimuthu and Others

RESPONDENT

Date of Decision : 08-08-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Tamil Nadu Court Fees and Suits Valuation Act, 1955 — Section 37(1)

Citation : (2003) 3 MLJ 469

Hon'ble Judges : R. Banumathi, J; P. Shanmugam, J

Bench : Division Bench

Advocate : T.V. Ramanujam, for T. Susindran, for the Appellant; Jeenasenan, for K. Sundareswaran, for RR-1 to 5, K. Yamunan, for RR-6 and 15, T.R. Rajaraman, for R-7 and N. Damodaran, for LRs. of R-4, for the Respondent

Final Decision : Dismissed

Judgement

P. Shanmugam, J.

Plaintiffs 2 and 3 are the appellants. The suit filed by the appellants along with their mother, since dead, was for a decree for partition of their half share in the plaint schedule properties.

2. To appreciate the claims of the parties, the following genealogy tree can usefully be looked into :

3. The parties are described as per their ranking in the court below.

4. The case of the plaintiffs is that the first plaintiff is the widow of Late Maruthi Rao, plaintiffs 2 and 3 are their daughters and the first defendant is the brother of Maruthi Rao. The brothers were members of a Joint Hindu Family. A partition deed between the brothers was entered into on 30.9.1947. However, they allege that this partition deed was fraudulent, besides contending that Maruthi Rao was leading an immoral and wasteful life, incurring Aviavaharika debts not binding on the family and therefore, the debts incurred by their father and the proceedings

taken against the properties are not binding on them. According to the plaintiffs, they are the co-owners in joint possession of the plaint mentioned properties and are in joint possession and hence, the said claim for partition and separate possession of their half share.

5. Defendants 2, 4, 7 to 12 and the 15th, 17th and 18th defendants have filed separate written statements. Defendants, 6, 7, 8, 9 and 11 claim to have purchased specified items of the plaint schedule properties in court auction. The 15th and 16th defendants claim to have purchased items 3 to 7 of the plaint schedule properties and the 17th defendant claims to have purchased item 9 of the plaint schedule properties. The following are their claims:

Defendants Items of Plaint Schedule Properties

6 2, 3 and in 12th item, R.S. Nos.77 and 99/4 7 11 8 1 9 10 11 1, Shop No. 2362 15 3 to 7 16 3 to 7 17 9 18 S/o. D-11 8, Shop No. 2362 (Item No. 1)

The defendants have pleaded that the suit is not maintainable since admittedly there was a partition between the brothers which took place on 30.9.1947 and that the plaintiffs have to prove that this partition has been brought about by fraud and that in respect of the debts incurred by Maruthi Rao, all the items mentioned in the plaint schedule properties have been either sold by the heirs of Maruthi Rao or sold in court auction towards the debts incurred by Maruthi Rao.

6. The court below, on these pleadings, framed 19 issues. On the issue whether the prior partition was unequal and not binding, the court below found that Ex.A. 1 dated 30.9.1947 was fair, equitable and binding on the plaintiffs. On the issue whether the debts were incurred for the benefit of the family and are binding on the plaintiffs, it was found that there is no evidence to show that Maruthi Rao was leading an immoral life and that P.W.1, the grand daughter of Maruthi Rao had no occasion to know about the activities of her grand father and that the plaintiffs, being female heirs, are not entitled to question the alleged debts incurred by Maruthi Rao, especially when the suit O.S. No. 185 of 1975 filed by Srinivasan, the son of Maruthi Rao, had been dismissed.

7. On the question whether Maruthi Rao has released his rights in reference to item 11 of the suit properties, the finding is that the plaintiffs cannot claim any right on the item 11 of the suit properties inasmuch as the 7th defendant has purchased the property from Nagammal and two sisters by a registered sale deed dated 5.12.1949. As far as item 1 of the suit properties is concerned, in paragraph 34 of the judgment, the learned trial judge has found that one Chellappa Chettiar had obtained a decree in O.S. NO. 58 of 1955 and brought this property for sale, which was taken in public auction by the 8th defendant subject to encumbrance and the same was confirmed as per Ex.B. 72 and therefore, the plaintiffs have no title or right to claim his property.

8. On the additional Issue No. 7 in reference to item 10, the court below found that item 10 of the suit properties was purchased by the 9th defendant's father

in court auction in O.S. No. 58 of 1955, which was confirmed on 10.9.1958. On Issue No. 3, it was found that the title to items 1, 10 and 11 of the suit properties had been transferred to defendants 18, 9 and 7 and the same cannot be a subject matter of partition. Similarly, the sub-items, except two to the main item 12 of the suit properties, had been allotted to the first defendant and the other two sub-items of item 12 have been in possession of the 6th defendant and hence, though it was pleaded that there was no dispute with reference to these two items, the claim for partition was rejected. The case of the 6th defendant is that he could not file a statement, and though he wanted to file a written statement, he was not allowed to do so and the decree for partition having been dismissed and the finding not being in his favour, he submits that item 2 and the two sub-items of properties in item 12 are the properties purchased from the 10th defendant Bank, which had earlier purchased it in the court auction as per the decree in O.S. No. 37 of 1948. The 6th defendant has purchased it from the bank on 28.9.1950 and the said possession has been admitted in the plaint as well as per the evidence of D.W. 1. The trial court found that the suit is not barred by res judicata or by limitation. On the issue with regard to the court fees, the trial court found that except for items 2, 12, 9 and 10 of the suit properties, the plaintiffs have to pay court fees on the market value of the properties. The court below ultimately dismissed the suit. The appeal is against this judgment and decree.

9. Learned senior counsel Mr. T.V. Ramanujam appearing on behalf of the appellants confined his submissions in respect of items 2 and the two sub-items in item 12 of the suit properties and though he had raised serious contentions with regard to the same, he has not pursued his argument till the end. Insofar as these three items are concerned, they are claimed by the 6th defendant. The 6th defendant has not filed his statement. The pleading in reference to this property is found in paragraph 4 wherein they have stated that the 10th defendant Bank obtained a decree and purchased half share in items 1, 2, 3 of the suit properties, i.e. half of T.S. No. 2359 (Item 3) and in R.S. Nos.77 and 99 in R.S. No. 94/4 (wet - 18 cents) which is referable to R.S. No. 99/4 in item 12 of the suit properties. However, P.W.1, in her evidence, has stated that her mother had informed her that she had obtained loan from the 10th defendant Bank and that since nobody came forward to take the property in auction in the decree, the 10th defendant Bank took the same and that thereafter, the 6th defendant purchased items 1 and 2 of the suit properties. Though she had changed her version when she was examined a month thereafter stating though the 6th defendant did not buy the property from the bank, she admits that the 6th defendant was enjoying some of the properties and that he had assured her that he will leave the property when asked to do so. The 8th and the 11th defendants, in their written statements, have clearly stated that in execution of the decree in O.S. No. 37 of 1948, three shops were purchased by the 10th defendant Bank and in turn, the Bank sold the same to the 6th defendant under a sale deed dated 28.9.1950.

10. The learned judge, while dealing with this aspect, has found in paragraph 42 of the judgment that sub-items 1 to 8 of item 12 of the suit properties have been left to the first defendant in the partition and the remaining sub-items are now in possession of the 6th defendant. According to the learned judge, the plaintiffs had not applied their mind before seeking such a relief. The learned judge states that though as per Ex.A. 1 partition of the year 1947 the whole of the properties have to go to Maruthi Rao, it is understandable as to why they seek only for half share. According to the learned judge, they have not stated as to how this remaining half share should be given to them. The learned judge, therefore, accepts the fact that in reference to the properties covered under items 1, 3 to 11 and sub-items 1 to 8 of item 12, the plaintiffs cannot seek partition and that the properties covered under the items 2 and the two sub-items of item 12 of the need not be partitioned. However, the learned judge has found that items 1, 10 and 11 have already been acquired by defendants 18, 9 and 7 and hence, they cannot be partitioned. Items 3 to 9 and 10 of the suit properties have been alienated by the first defendant to the 15th and 17th defendants. However, the plaintiffs, knowing fully well, did not implead the parties at the initial stage.

11. Contending that there is fallacy in the said argument, though the relief of partition has been rejected on various other grounds, the counsel for the 6th defendant submitted that when the plaintiffs have admitted in the plaint as well as in the evidence that these three items of properties, viz. item 2 and the last of the two sub-items in item 12, have been taken into possession by the virtue of a decree obtained by the 10th defendant Bank and later on, sold by the bank to the 6th defendant on 28.9.1950, the trial court ought to have dismissed the suit. Relying on the judgment of the Supreme Court in *Shri Ravinder Kumar Sharma Vs. The State of Assam and Others*, , learned counsel contended that even if no cross appeal had been filed and a suit is dismissed when the findings are against him, the said findings can be challenged, he being a party in this appeal. In the said judgment, their lordships held that under Order 41, Rule 22, C.P.C., the respondent/defendant, in an appeal can, without filing cross-objections, attack an adverse finding upon which a decree in part has been passed against him for the purpose of sustaining the decree to the extent the lower court dismissed the suit against the respondent/defendant. Order 41, Rule 36, C.P.C. enables the appellate court to pass any decree and make any order which ought to have been passed or order, as the case may require, notwithstanding that the respondent had not filed any objection or cross-appeal. This is a fit case, in our view, to exercise the power in favour of the 6th defendant.

12. Again, referring to the judgment rendered by the Apex Court in *Balraj Taneja and Another Vs. Sunil Madan and Another*, , it is contended by the learned counsel for the 6th defendant that even though he did not file a written statement, the suit cannot be decreed without the plaintiffs proving their case. The Supreme Court, in the above case, after looking into the provisions of Order 12, Rule 6 and Order 5, Rule 8, C.P.C. as well as Section 58 of the Indian Evidence Act, held that the court has not to act blindly merely because a written

statement has not been filed. Before passing the judgment, the court must see to it that even if the facts set out in the plaint have been treated to have been admitted, it must be satisfied that a judgment could be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. The ratio laid down in the words of their lordships is as follows :

"As pointed out earlier, the Court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor the Court should proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a written statement has not been filed by the defendant, the Court should be a little cautious in proceeding under Order 8, Rule 10, CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of Court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the Court may, in its discretion, require any such fact to be proved" used in sub-rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order 8."

Applying these tests to the instant case, the plaint itself admits that Maruthi Rao became surety for a debtor of the 10th defendant Bank and that the said Bank, for the amounts borrowed by the principal debtors, by filing the suit, proceeded against the properties of Maruthi Rao and purchased half share in court auction. The plaint also refers to the decree obtained by one Chellappa Chettiar and K.J. Nathan. It is for the plaintiffs to prove that the admitted liability of Maruthi Rao, the decree that was passed and the court auction that took place nearly about 30 years prior to the filing of the written statement are all fraudulent and not binding on the legal heirs of Maruthi Rao.

13. Besides, it is seen that defendants 7, 8, 9 and 10 have clearly and categorically contested the claim of the plaintiffs and have pleaded in their written statements and given evidence as to how the suit was filed by the Bank, the passing of the decree, the sale and the consequent purchase of the property. Therefore, it cannot be a case of no defence and will squarely come under the proviso to sub-rule (2) to Rule 5 of Order 8, C.P.C. The court is entitled to require the facts set out in the plaint to be proved and may make such order in reference to the suit as it thinks fit as per Rule 10 of Order 8, C.P.C. The trial court, in our

view, has rightly considered these aspects and ultimately found in paragraph 51 of the judgment as follows :

"Though the plaintiffs were aware of the fact that some of the defendants have purchased the property in court auction and taken possession and that they are enjoying the same, the plaintiffs, setting out contrary facts, with an ulterior motive to get at the properties somehow, by suppressing the truth, even though the earlier suit filed through Srinivasan was pending and even though there was a partition between the first defendant and Maruthi Rao, by setting aside the said partition and by deceiving the debtors, for the second time, filed the present suit on a wrong legal advice."

14. It is further stated that the persons who have taken the sale and are in possession of the property, have been unnecessarily dragged to the court, causing cost, expenditure and burden. It is further pointed out that during the course of the trial, suddenly, the plaintiffs have come forward to state that Ex.A. 1, partition, is true and though earlier it was pleaded that Maruthi Rao was leading an immoral and wasteful career and that the debt created by him will not bind the family and that the alienations are not binding on them, it is now stated that they are in joint possession of the property and a court fee of Rs. 200/- is paid u/s 37(2) of the Tamil Nadu Court Fees and Suits Valuation Act, 1955. The defendants, who have obtained the sale and are in possession of the property, had been enjoying the same by making improvements and the suit has been filed beyond the period of limitation. Therefore, we find that even in reference to item 2 and the sub-items of item 12, the plaintiffs have failed to prove their case to the satisfaction of the court and the court ought to have passed an order dismissing the suit in reference to the properties of the 6th defendant also. Therefore, the claim of the 6th defendant is sustained and the plaintiffs cannot assail the right accrued in favour of the 6th defendant in item 2 and the last of the two sub-items, viz. R.S. Nos.77 and 99/4, in item 12 of the plaint schedule of properties.

15. Item 3 of the plaint schedule properties is referable to item 1 of "B" Schedule to Ex.A. 1, partition deed, which is described as a shop in T.S. No. 2359. This property having been allotted to the first defendant, the plaintiffs cannot have any right over the same. The plea of the counsel for the plaintiffs that he may be permitted to amend the plaint Schedule in consonance with item 3 of "A" Schedule to Ex.A. 1 cannot be accepted since item 3 under Ex.A. 1 is a vacant land and the claim is for half share in the Municipal Re-Survey No. 2359. We do not find any correlation nor any ground to permit the claim of the plaintiffs as such.

16. Insofar as item 11 of the suit properties, which has been purchased by the 7th defendant in the suit, is concerned, it is seen that the property, viz. the house and ground in T.S. No. 1321 in Thanjavur Town is referred to in the "C" Schedule to Ex.A. 1 and according to the recitals in Ex.A. 1, the "C" Schedule of property has been kept common till the suit pending in the Sub-court is decided.

However, no particulars are given by the plaintiffs as to the pendency of the suit or the disposal of the same. On the other hand, the defendants have furnished sufficient materials to show that this property was purchased by Chandrabaga Bai under Ex.B. 2 dated 11.6.1943 from A.K. Natesa Pillai and that afterwards, under Ex.B. 6 dated 1.12.1943, Chandrabaga Bai gave a lease of this property as per the rental agreement dated 1.12.1943. There was a registered agreement of sale between the 7th defendant and the three sisters under Ex.B. 4 dated 20.11.1947, followed by a sale deed, Ex.B. 29 dated 5.12.1949. Thus, it could be seen that the 7th defendant is in possession of the property as a tenant from the year 1943, as an agreement holder from the year 1947 and as a purchaser from the year 1949. It is also submitted that as per Exs.B. 30 and 31 dated 9.11.1949 and 10.11.1949 respectively, Maruthi Rao as well as S.V. Parthasarathy Rao have executed release deeds to Sakunthala and sisters in reference to this property. In spite of all this, one Chellappa brought this property for sale to satisfy the decree in O.S. No. 58 of 1955 and the property was purchased by one P. Natarajan under Ex.B. 33 dated 10.9.1958 and the 7th defendant, in order to buy peace, purchased the property from the said Natarajan. According to the 7th defendant, he had made improvements and put up three floors in the said property and the property is now worth more than thirty lakh rupees and this property was exonerated in all the prior proceedings by the creditors in recognition of his right and possession.

17. Learned counsel for the 7th defendant also referred to Sections 125 and 147 of Mulla's Hindu Law and contended that the properties purchased by Chandrabaga Bai in the year 1943 partakes the character of Stridhana property and that her daughters alone are entitled to succeed to those properties. He further submitted that Exs.B. 30 and B.31 are release deeds executed by the brothers, including Maruthi Rao and hence, it is not open to the plaintiffs now to contend that the signature found in Ex.B. 30 is not proved to be that of Maruthi Rao, since u/s 90 of the Indian Evidence Act, the presumption of valid execution of the said document is available to the 7th defendant. In any event, according to him, the 7th defendant had purchased the property from the court auction purchaser and the same is not in dispute. Even after the demise of Maruthi Rao in the year 1973, nobody questioned as to his right and enjoyment of the suit properties. We find much force in the said submission.

18. Insofar as item 1 of the plaint schedule properties, viz. T.S. No. 2362, Manojiappa Street, Thanjavur Town, is concerned, the same is claimed by the 8th defendant, he having purchased it in a court auction in the year 1972. It is seen that the property which belonged to Maruthi Rao was the subject matter of three mortgages, the first one being in favour of one K.J. Nathan on 5.4.1947, the second one in favour of Chellappa Chettiar and the third one in favour of the Kumbakonam City Union Bank Limited.

19. The 10th defendant Bank filed a suit in O.S. No. 37 of 1948 on the file of the Mayavaram Sub-Court and obtained a decree and in execution of that decree,

three shops, including item of the suit properties, were purchased by the 10th defendant Bank. The 10th defendant Bank sold the same to the 6th defendant under sale deed dated 28.9.1950. In the meanwhile, Chellappa Chettiar filed O.S. No. 58 of 1955 on the file of the Sub-Court, Thanjavur and obtained a mortgage decree in his favour and in execution of that decree, the 8th defendant purchased the shop in T.S. No. 2362 under a court sale on 4.8.1958 and the said sale was confirmed on 10.9.1958. One K.J. Nathan filed O.S. No. 45 of 1951 on the file of the Sub-Court, Thanjavur against Maruthi Rao and obtained a mortgage decree in his favour. He brought the very same properties, viz. the shop in T.S. No. 2362, for sale and the 8th defendant's father, by paying Rs. 6,000/- to the decree holder K.J. Nathan, got the property released from him. It is thereafter, in their family partition, the shop in T.S. No. 2362 was allotted to the 8th defendant's father and it was in his possession ever since the year 1950. According to him, the said property was in possession of the 6th defendant from 28.9.1950 to 10.9.1958 and afterwards, with the 8th defendant. The said property, i.e. T.S. No. 2362, was brought to sale and the 8th defendant was declared as the auction purchaser as per Ex.B. 72 dated 10.9.1958. Of course, the sale was subject to encumbrance, if any. The 8th defendant had taken possession of the properties as per the Possession Certificate, Ex.B. 73 dated 25.10.1958. It is further seen that as per Ex.B. 74 dated 16.3.1962, the said property was subjected to partition between the 8th defendant and his father. When this property was again brought for sale under E.P. No. 51 of 1971 in O.S. No. 45 of 1951 by K.J. Nathan, he filed a memo, Ex.B. 75 dated 19.6.1972, seeking to exclude Plot No. 1, viz. T.S. No. 2362, Manojiappa Street, Thanjavur Town, from the execution proceedings in the suit on 18.6.1972 and the learned judge ordered the exclusion of this plot from execution the proceedings. From the evidence of D.W. 4, it is clear that the 8th defendant is in possession and enjoyment of this property ever since his coming into possession thereof through court sale. In other words, the right of Maruthi Rao to redeem the property was lost. Therefore, according to him, it cannot be contended now that Maruthi Rao is entitled to certain relief from indebtedness as per Act 49 of 1979 and therefore, by virtue of the scaling down, the decree and the sale cannot be ignored. There is no substance and we do not find any merit in the said submission.

20. Learned counsel for the 9th defendant, Mr. Vedarathnam, claims item 10 of the suit property, he having purchased the same in court auction on 10.9.1958 and ever since he had been in possession and enjoyment of the same. According to the learned counsel, one Chellappa Chettiar filed a suit against Maruthi Rao in O.S. No. 58 of 1955 and the 9th defendant purchased the property in court auction and was in possession and enjoyment of the same for over thirty years. According to her, the property belongs to Maruthi Rao and it was lawfully sold to the 9th defendant's father and the plaintiffs have now admitted the partition between Maruthi Rao as true and that it has been acted upon during the life time of Maruthi Rao. It is further submitted that one K.J. Nathan claimed first charge over item 10 of the suit properties against Chellappa Chettiar and the Supreme

Court held that K.J. Nathan had first charge and the said K.J. Nathan brought the suit in reference to item 10 along with other properties and item 10 of the suit properties has been exonerated by the Assignee/deed holder and as such, he is in absolute possession of item 10 of the suit properties. It is further pleaded that Act 40 of 1979 does not apply to the properties held long before the act in court auction and has no application for scaling down of the debts within the time allowed under the Act. The said submission is not seriously controverted and we find that the 9th defendant is in possession and enjoyment of the property by virtue of the purchase in the court auction. As D.W. 3, he had deposed that his father T.R. Natesa Pillai took item 10 in court auction in O.S. No. 58 of 1955 and has produced the Sale Certificate, Ex.B. 34 and Possession Certificate, Ex.B. 35. The defendants have filed exhibits like property tax and water tax receipts in their favour to prove their possession and enjoyment.

21. The learned judge has found that the suit is barred by res judicata since the partition suit, O.S. No. 185 of 1975 filed by Srinivasan, son of Maruthi Rao, represented by the first plaintiff, has been dismissed for default and the revision filed by the first plaintiff was pending. However, the present suit came to be filed during the pendency of the said proceedings, which shows that the plaintiffs have been filing one suit after another and that they are barred by the prohibition under Order 2, Rule 2, C.P.C. from doing so. In opposition, the counsel for the appellants submitted that there can be no res judicata if the former suit was dismissed without any adjudication on the matter in issue merely on a technical ground. In support of this submission, he referred to the judgment of the Supreme Court in State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another, . We find much force in the said submission. The earlier suit having been dismissed for default, it cannot be stated that there was adjudication on the matter in issue and the suit cannot be held to have been barred u/s 11, C.P.C.

22. The trial court, on the additional Issue No. 3, viz. whether the court fee paid is correct, held that the plaintiffs could have valued the property on the market value except for item 2 and the sub-items under item 12. The learned judge found that though since the filing of the plaint the question could not be decided, it is now found that the plaintiffs themselves have admitted that they are not in possession and enjoyment of any of the items of the suit property and that in items 1, 3 to 11 and sub-items 1 to 8 in item 12, the plaintiffs have no right to claim partition. Those properties have already been alienated, transferred and are in possession of different parties. The plaintiffs, knowing fully well of this transfer and possession, had valued the suit u/s 37(2) of the Tamil Nadu Court Fees and Suits Valuation Act, 1955 by misusing the said provision only to defraud the court. The court below found that Maruthi Rao was never in possession of the properties after they had been auctioned.

23. We have considered this question and found that even in the pleadings, the plaintiffs have admitted that they are not in possession of the suit properties.

The small room which is said to be in their possession is also based on a letter which has been rightly rejected by the court and found that the said letter addressed to Maruthi Rao would not mean that he was in possession and enjoyment of that room. Therefore, since we have already seen that Maruthi Rao has parted with his right and that the defendants, on their own right, are in possession and enjoyment of these properties, it cannot be construed at any stretch of imagination that they are in constructive possession as co-owners. The defendants have established that even long prior to the plaint, they were in possession of all the suit properties on their own right exclusively and had denied the plaintiffs' right to have a share in them. The plaintiffs had been excluded from possession of the property and they have no right to have a share in the property. It cannot be considered that the plaintiffs had been excluded from possession of the property and that the properties were owned jointly. We have found that the plaintiffs were neither in possession nor they can be said to be in constructive possession of the properties since the defendants have set up hostile and exclusive right and on their own showing in the plaint and in the evidence, it has been rightly found by the trial court that the court fee ought to have been paid on the market value u/s 37(1) of the Tamil Nadu Court Fees and Suits Valuation Act, 1955. Therefore, the finding and the conclusion of the court below in this regard is hereby confirmed. We also hold that consequent to our finding in reference to item 2 and the sub-items in item 12 of the suit properties, though the 6th defendant was in possession and enjoyment, the plaintiffs are liable to pay court fee for all the said items.

24. Counsel for the appellants submitted that it is settled law that the question of court fee must be raised in the light of the allegations made in the plaint and its decision cannot be influenced by either the plea in the written statement or all the material allegations in the plaint should be construed and taken as a whole. In support of this contention, he has referred to the judgment of the Supreme Court in *Neelavathi v. Natarajan* 1980 (II) M.L.J. 21. In the pleadings as well as in the evidence of P.W.1, it is stated as follows :

"11th brhj;J fle;j 25 Mz;Lfshf v";fs; mDgtj;jpy; , y;iy/

thlifa[k; tN:ypf;ftpy;iy/"

"jthh brhj;Jf;fs; vJt[k; v";fs; trk; , y;iy/"

"brd;idapy; vd; fztUld; 20 Mz;Lfshf cs;nshk;/"

From her evidence, it is seen that she had admitted that none of the properties are in their possession and that she is living in Madras for the past twenty years and that item 11 of the property is not in their possession for over 25 years, that they have not paid the property tax in reference to T.S. No. 2269 and that Natesa Pillai was doing business in that place. Therefore, it is crystal clear that the plaintiffs have admitted that they have not been in possession either actually or constructively in any of the properties and therefore, they should have paid court fee only u/s 37(1) and not u/s 37(2) of the Act.

25. In the above circumstances, we find that the plaintiffs have not come forward with a true case and the brothers, having partitioned the properties under a family partition under Ex.A. 1, are not entitled to seek for partition and in that manner, get possession of the properties which have already been alienated. In effect, they are seeking for a declaration of their title to the properties in this suit for partition. The only item that was left out in the partition deed is the item in the "C" Schedule which is referable to item 11 of the plaint schedule properties, which we have already held is no longer available for partition. Besides, we find that all the other items, viz. Item Nos.2, 3, 10, 11 and the sub-items in R.S. Nos.77 and 99/4 under item 12 of the suit properties, have been sold and are in possession of the purchasers of the properties. Admittedly, items 4 to 9 of the suit properties belong to the first defendant and have already been divided between the brothers.

26. For all the above reasons, we find that the judgment and decree of the court below, including the property in reference to Item No. 2 and two sub-items, viz. R.S. Nos.77 and 99/4 in Item No. 12, as valid and sustainable. The judgment and decree of the court below is hereby confirmed. The appeal is accordingly dismissed with costs.