

**(2010) 08 MAD CK 0280**

**Madras High Court**

**Case No:** C.S. No. 301 of 1996

Mrs. Hamsa

APPELLANT

Vs

Chinnakutty and Others

RESPONDENT

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**Date of Decision:** Aug. 16, 2010

**Hon'ble Judges:** P.R. Shivakumar, J

**Bench:** Single Bench

**Advocate:** Sarojini Govindan, for the Appellant; P.B. Balaji, for (D1, D33 to D37) and Ishtiaq Ahmed, for (D2 to D5), for the Respondent

**Final Decision:** Allowed

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### **Judgement**

P.R. Shivakumar, J.

The Plaintiff has filed the suit on the original side of this Court for the relief of partition, separate possession and other reliefs as this Court may deem fit.

2. The averments in the plaint, in brief, are as follows:

i) The Plaintiff, the first Defendant Chinnakutty (deceased) and the second Defendant Neelakandan are the daughter and sons of late Subramania Naicker. The third, fourth and fifth Defendants, namely Kalavathy, Dhanasekar and Vanaja, are respectively the wife, son and daughter of the said Neelakandan. The sixth Defendant is the wife of late Munusamy and the Defendants 7 to 9 are the sons of late Munusamy. Defendants 10 to 32 are the purchasers of the suit properties described in plaint "E" schedule and they have been added as parties for proper, effective and comprehensive adjudication. Defendants 33 to 37 are the legal representatives of the deceased first Defendant Chinnakutty. The properties described as item Nos. 1 to 13 in the plaint "A" schedule and other properties originally belonged to and were possessed by the Plaintiff's grandfather Anaikutty Naicker. The said Anaikutty Naicker died intestate leaving his properties to be inherited by 1) Duraisamy Naicker (son), 2) Govindasamy Naicker (son), 3) Neelammal, 4) Selvaraj, 5) Balaraman (3 to 5 being the heirs of Natesa Naicker, a

predeceased son of Anaikutty Naicker) and 6) Munusamy (son), 7) Chinnakutty (first Defendant), 8) Neelakandan (second Defendant) and 9) Hamsa, the Plaintiff (Nos. 7 to 9 being the legal heirs of another predeceased son of Anaikutty Naicker by name Subramania Naicker) as his class 1 heirs. In a partition, the properties described in plaint "A" schedule fell to the share of the heirs of Subramania Naicker and the same were described in schedule "D" to the partition deed. The said partition took place in the year 1964 and at that point of time the Plaintiff and the second Defendant were minors and they were represented by their brother Munusamy as their guardian.

ii) After the partition, the properties described in plaint "A" schedule have been in the joint possession and enjoyment of all the legal heirs of late Subramania Naicker. During his life time, Subramania Naicker, the father of the Plaintiff, out of his self-earnings, purchased the properties described as items 1 to 3 in plaint "B" schedule under registered sale deeds dated 15.01.1951, 29.07.1953 and 29.08.1953 respectively. Item No. 4 of schedule "B" was also owned and possessed by the Plaintiff's father Subramania Naicker, which later on came to the legal heirs of Subramania Naicker (father of the Plaintiff) under a decree of court made in O.S. No. 394/1955 on the file of the District Munsif Court, Poonamallee and possession of which was obtained in E.P. No. 136/1957. As such the properties described in plaint "A" and "B" schedules are the common properties of Plaintiff and her three brothers and hence she is entitled to 1/4 share in the said properties. Despite the demands made by the Plaintiff to her brothers, they did not come forward to effect an amicable partition. Meanwhile, the Plaintiff along with her brothers jointly alienated properties described as item Nos. 2, 3, 5 and 10 of plaint schedule "A". The Plaintiff also sold her undivided 1/4 share in item No. 4 of Schedule "A" to one Sri Jaisankar. Plaintiff also sold item 9 of plaint "A" schedule. The properties thus sold by the Plaintiff alone are shown as items 1 and 2 in plaint "D" schedule. The Plaintiff is in possession and enjoyment of the properties described as item No. 5 of plaint "F" schedule, which is part of item 11 in plaint "A" schedule. Thus the Plaintiff's possession of a portion of the property would prove her joint possession and enjoyment of the suit properties along with the other co-sharers. When she got the knowledge that the Defendants 1 to 9 were making attempts to sell the properties, the Plaintiff filed two suits O.S. No. 3207/1992 and O.S. No. 5462/1992 on the file of the City Civil Court, Chennai for permanent injunction and the suits are pending. Meanwhile, the second Defendant, with an intention to defraud the Plaintiff, went on dealing with "A" and "B" schedule properties to the detriment of the Plaintiff without allotting her 1/4 share in them. The second Defendant also, in the year 1990, settled an extent of 23 cents in the property described as item No. 1 of plaint Schedule "A" to his wife Kalavathy, the third Defendant and the same is shown in item 1 of plaint "E" schedule. The said settlement deed is a sham and nominal one and hence void in law. Such settlement will not take away the right of the Plaintiff to her undivided share in the said property which was also under acquisition

proceedings. The second Defendant also alienated portions of item Nos. 6 and 8 of the properties described in plaintiff Schedule "A" without the consent and knowledge of the Plaintiff. In all an extent of 4789 sq.ft. in item No. 6 of Schedule "A" was sold by the second Defendant on his behalf and on behalf of the minor Defendants 4 and 5 and the same is shown as item 2 in Schedule "E". The second Defendant, as guardian of his minor children and for himself sold an extent of 3220 sq.ft. in item 8 of Schedule "A", which is shown as item No. 3 of the "E" schedule, under a sale deed dated 13.05.1991. Similarly, an extent of 13-5/8 cents of item No. 4 and 21.5 cents of item No. 9 of Schedule "A" were sold by the Plaintiff and the same are shown as "D" schedule in the plaint. The other sharers sold the remaining extent in item 4 of "A" schedule and the same is shown as item No. 4 in Schedule "E". Defendants 1, 2 and 7 to 9 also alienated a total extent of 24.5 cents in item No. 2 and 3 of plaintiff "B" schedule under document Nos. 1118/1988, 1120/09, 397/1985, 598/98 and 598/89 to Defendants 16 to 23. The same is shown as item 5 of plaintiff "E" schedule. The said alienation and encumbrances made by them are not binding upon the Plaintiff or her 1/4 share. Such alienations made by the other legal heirs of Subramania Naicker and the portions alienated by the Plaintiff should be set off against their respective shares. The properties sold by all the co-sharers which are not available in partition are shown in plaintiff Schedule "C". The properties sold by Plaintiff alone are shown in plaintiff "D" schedule. The properties sold by other sharers alone are shown in plaintiff "E" schedule. The properties described in Schedules "A" and "B" minus the properties described in Schedules "C", "D" and "E" are shown in Schedule "F" in which the Plaintiff has got an undivided 1/4 share. Hence the suit is filed for partition of the plaintiff "F" schedule properties by declaring Plaintiff's 1/4 share, directing division of the same from the rest of the "F" schedule properties by metes and bounds and for putting her in possession of the share to be allotted to her.

3. Defendants 10 to 16, 18, 23 to 32 have been exonerated. Defendants 6 to 9, 17 and 19 to 22 were set ex-parte. Defendants 1, 3 and 4 are no more. Their legal representatives are on record. Defendants 1 and 2 alone filed written statements. Other Defendants did not file any written statement. The averments found in the written statement of D1 are as follows:

i) The plaint allegations are false and baseless. There is no cause of action for filing the suit. Suit has not been properly valued and court fee paid is incorrect. Plaintiff does not have any right, title or interest in the suit properties. Suit, as framed is not maintainable. Relationship of the parties described in the plaint is admitted. It is true that there was a partition on 14.09.1964 effected under a registered deed bearing document No. 4033/1964. But, it is incorrect to state that the properties described in plaintiff "A" schedule had been in joint possession and enjoyment of the heirs of late Subramania Naicker. It is also not correct to state that the properties described as items 1 to 3 in plaintiff "B" schedule were purchased by Subramania Naicker. Item No. 4 of "B" schedule was purchased by Munusamy and others and not by Subramania Naicker. Defendants 1 and 2, one Munusamy and the Plaintiff

are the sons and daughter of late Subramania Naicker. The plaint averment that the paternal grandfather Anaikutty Naicker purchased a lot of properties in and around Velacherry is false. He had purchased only a few properties in and around Velacherry village. He had four sons, namely Duraisamy Naicker, Govindasamy Naicker, Natesa Naicker and Subramania Naicker. It is also true that late Subramania Naicker was the last son of Anaikutty Naicker. The above said partition deed dated 14.09.1964 was entered into between Duraisamy Naicker as party of the first part, Govindasamy Naicker as party of the second part, Neelambal, Selvaraj and Balaraman (being the legal heirs of Natesa Naicker) as parties of the third part and Munusamy, first Defendant Chinnakutti, second Defendant Neelakandan and the Plaintiff Hamsa (all legal heirs of Subramania Naicker) as parties of the fourth part in respect of the properties left by Anaikutty Naicker in Velacherry village. Munusamy, the elder brother of the first Defendant and father of the seventh Defendant sold certain properties towards expenses for conducting the marriages of first and second Defendants and the Plaintiff. In 1997, the land situated in S. No. 245/1 which fell to the share of the heirs of Subramania Naicker was sold by the heirs of Munusamy, the first Defendant and the second Defendant. However, the Plaintiff was given an extent of 3/4 ground of land in the said survey No. 245/1 in Velacherry village. The said fact has been deliberately suppressed by the Plaintiff. One Govindammal, the maternal grandmother of the first Defendant had two daughters by name Pachaiyammal (mother of the first Defendant) and Kullammal. The said Kullammal did not have any issues. Subramania Naicker predeceased Govindammal. Thereafter, a family arrangement was made between the Plaintiff, Defendants 1 and 2 and their elder brother Munusamy, in which the lands that had been allotted to the share of Subramania Naicker in Velacherry village were allotted to the male heirs of Subramania Naicker, namely the Defendants 1 and 2 and Munusamy Naicker. In the said family arrangement, it was also decided that the lands belonging to Govindammal in Surapettai village, Chengalpeta district would be taken by the Plaintiff. In accordance with the said family arrangement, the maternal grandmother had executed a will in respect of the said lands in favour of the Plaintiff. After the death of the maternal grandmother, by virtue of the said will, the Plaintiff got those lands and in fact she sold various properties, which came to her by virtue of the said will. The Plaintiff has suppressed the above said fact and is guilty of suppression of a material fact.

ii) In the year 1997, there was an oral partition among the Defendants 1 and 2 and the legal heirs of Munusamy in which the properties comprised in S. No. 406, Velacherry village were partitioned into six parts, namely 406/3, 406/4, 406/5, 406/6 (2 parts) and 406/7 with the extents as indicated below:

Survey Nos.	Extent (Cents)
406/3	20-3/4
406/4	20-1/4
406/5	3-1/2

iii) Subramania Naicker died on 21.05.1957. At that point of time, the Plaintiff was aged only 7 1/2 years. Pachaiyammal, the mother of the Plaintiff left the family. Hence the Defendants 1 and 2 and the Plaintiff were under the care and custody of Munusamy, their elder brother. The Plaintiff attained puberty at the age of 15 years and her marriage was performed on 02.09.1966. The expenses for her marriage, jewels and household articles were met by the said Munusamy. The Plaintiff was made a party to the partition deed bearing document No. 4033/1964 only to see that her marriage expenses and other expenses had to be meted out, as she was then a minor. In 1964, legally the Plaintiff had no right in the properties set out in Schedule "D" to the partition deed. There is no bonafide in the claim of the Plaintiff, otherwise she would not have kept quiet from 1977 till 1996, the date of filing of the suit for partition. That apart, a sum of Rs. 31,000/- was spent for her marriage by selling properties in 1966 and the value of her 1/4 share in the suit properties was thus given to her. The Plaintiff had also lost her right by adverse possession and the suit is barred by limitation. The Plaintiff is not entitled to 1/4 share in plaint "A" and "B" schedule properties. It is incumbent on the Plaintiff to prove that she was entitled to 1/4 share in plaint "A" schedule property in the year 1987. Plaintiff was not in possession and enjoyment of item 5 of the plaint "F" schedule ( it is shown as item 11 of "A" schedule). On the other hand, in 1992, the Plaintiff had filed O.S. No. 5462/1992 on the file of VI Assistant Judge, City Civil Court, Madras against the Defendants 1, 2, 3, 7, 8 and 9 for permanent injunction in respect of properties comprised in Survey Nos. 406, 688/3, 438/1 which are shown to be item Nos. 1, 3, 6 and 7 of the present plaint "A" schedule. The said suit was allowed to be dismissed for default on 05.12.1996 and no steps were taken to restore it. Similarly, the other suit O.S. No. 3207/1992 is also not pending. The Plaintiff is not in joint possession and enjoyment of the suit properties along with other co-sharers as alleged by her in the plaint. All the other allegations in support of the Plaintiff's claim made in the plaint are concocted and false. In respect of the land allotted to the first Defendant comprised in Survey No. 406/3 he has put up construction in a portion of it in the front side facing 100 feet road and the said building has been let out on rental basis for running a wine shop. The land comprised in Survey No. 406/7 has been kept vacant, around which a fencing has been put up by the first Defendant. There is also a hut in the land comprised in Survey No. 406/7. Patta has been issued in favour of the first Defendant for the lands comprised in Survey No. 406/3 and 406/7 and the first Defendant has been paying property tax and land tax in respect of the said property.

iv) Raja, the son of the first Defendant has put up two shops facing the 100 feet road in the land comprised in Survey No. 406/3 with a view to let out the same on rental basis. The Plaintiff has filed a suit in O.S. No. 4425/2004 on the file of the XIII

Assistant Judge, City Civil Court, Chennai against the first and second Defendants, Santha, the wife of the first Defendant and Defendants 6 to 9 for mandatory injunction to remove the constructions made in Survey No. 406 bearing door No. 109-A, Velacherry and for a permanent injunction to restrain them from putting up further construction or dealing with or transferring the said properties. It is not correct to state that the possession of "F" schedule properties by the first Defendant shall be construed as a possession on behalf of the Plaintiff also since the Plaintiff has got no right, title or interest in the same. For the said reasons, the Plaintiff's suit should be dismissed.

4. The second Defendant also filed a written statement containing almost similar allegations made in the written statement of D1.

5. In the light of the above said pleadings, the following issues have been framed.

1)Whether the Plaintiff is entitled to a preliminary decree for partition of 1/4 share in the plaint "F" schedule property?

2)Whether the family arrangement dated 19.04.1977 entered among the sons of Subramania Naicker excluding the Plaintiff is valid in law?

3)Whether the Plaintiff has lost her right over the plaint "F" Schedule property by way of long continuous possession over the statutory period by the Defendant?

4)Whether the settlement of 23 cents by the 2nd Defendant in favour of his wife Kalavathy, the 3rd Defendant is sham, nominal and void in law?

5)Whether the suit is barred by limitation?

6)Whether the Plaintiff was given 4.04 acres of land in Surapedu village as per the family arrangement towards her share in the family properties?

7)To what relief the Plaintiff is entitled?

6. The parties went for trial in which the Plaintiff figured as the sole witness, namely P.W.1 and marked Exs.P1 to P3 on her side and the second Defendant figured as the sole witness, namely D.W.1 and marked Exs.D1 to D4 on the side of the Defendants.

7. The arguments advanced by Mrs. Sarojini Govindan, learned Counsel for the Plaintiff, by Mr. P.B. Balaji, learned Counsel representing the Defendants 1, 33 to 37 and by Mr. Ishtiaq Ahmed, learned Counsel representing the Defendants 2 to 5 were heard. The materials available on record were also perused.

Issues 2, 3, 5 and 6

8. The Plaintiff Hamsa is the sister of the deceased first Defendant Chinnakutty and the second Defendant Neelakandan. Their another brother is late Munusamy. They are the children of late Subramania Naicker. The paternal grandfather of the Plaintiff and the Defendants 1 and 2 was one Anaikutty Naicker. He had four sons,

namely Duraisamy Naicker, Govindasamy Naicker, Natesa Naicker and Subramania Naicker. The properties described in plaint "A" schedule and other properties originally belonged to the paternal grandfather of the Plaintiff and the Defendants 1 and 2, by name Anaikutty Naicker. He died before 1964 and there was a partition regarding the properties of Anaikutty Naicker among his sons who were alive, namely Duraisamy Naicker and Govindasamy Naicker and the legal heirs of Natesa Naicker and Subramania Naicker, who had predeceased Anaikutty Naicker. The said partition was effected by a registered partition deed dated 14.09.1964 registered as document No. 4033/1964 on the file of the Sub-Registrar, Velacherry. On the death of Anaikutty Naicker, his property became divisible among his sons, who were alive and the legal heirs of the predeceased sons and thus Duraisamy Naicker and Govindasamy Naicker became entitled to 1/4 share each. The legal heirs of Natesa Naicker became entitled to 1/4 share and the legal heirs of late Subramania Naicker (Plaintiff, Defendants 1 and 2 and Munusamy) became entitled to 1/4 share. In the above said partition, the properties that are described in plaint "A" schedule were allotted to the share of the Plaintiff, Defendants 1 and 2 and their brother Munusamy, as the legal heirs of Subramania Naicker towards their 1/4 share. The said properties are shown in Schedule "D" in the partition deed, a certified copy of which has been marked as Ex.P1. The above said facts are not disputed and on the other hand the contesting parties have admitted the same. Therefore the Plaintiff's contention that the Plaintiff and the Defendants 1 and 2 and the deceased Munusamy became co-owners of the plaint "A" schedule properties corresponding to schedule "D" in Ex.P1 is well founded and substantiated.

9. Four other items have been shown as plaint "B" schedule properties. So far as items 1 to 3 of plaint "B" schedule properties are concerned, it is the contention of the Plaintiff that her father late Subramania Naicker purchased them as his self-acquisition under three registered sale deeds dated 5.11.1951, 29.4.1953 and 29.8.1953 respectively. According to the plaint allegations, the fourth item of plaint "B" schedule was also owned and possessed by Subramania Naicker, the father of the Plaintiff, which came to the Plaintiff and her brothers in execution of the decree passed in O.S. No. 394/1955 on the file of the District Munsif Court, Poonamallee in E.P. No. 136/1957. Though the same has been disputed in the written statement, D.W.1 has admitted it. There is also absence of contra evidence whereas the Plaintiff adduced proper evidence in this regard. Thus all the four items of properties described in plaint "B" schedule were the self-acquired properties of her father late Subramania Naicker and hence she is entitled to 1/4 share in it also as a class 1 legal heir of her father Subramania Naicker.

10. Plaint "A" and "B" schedules consist of  $13 + 4 = 17$  items of properties. Out of the said 17 items of properties, according to the Plaintiff, the Plaintiff and her brothers jointly alienated four items of properties, namely items 2, 3, 5 and 10 of plaint "A" schedule which are shown in a separate schedule as plaint "C" schedule. The Plaintiff is not claiming any relief in the said properties since she also joined in the

alienation of the said properties and hence they are not available for partition.

11. Similarly, the common undivided 1/4 share of the Plaintiff in item 4 of plaintiff "A" schedule was sold by the Plaintiff alone and the entire 21.5 cents in item 9 of plaintiff "A" schedule was also sold by the Plaintiff herself. Those two properties sold by the Plaintiff alone are shown in plaintiff "D" schedule. Similarly, portions of land alienated by the other sharers alone in respect of items 1, 6, 8 and 4 of plaintiff "A" schedule properties and items 1 to 3 of plaintiff "B" schedule properties are shown as items 1 to 5 of plaintiff "E" schedule. Thus the entire properties in items 2, 3, 4, 5, 9 and 10 of plaintiff "A" schedule properties and portions of items 1 to 3 of plaintiff "B" schedule properties have been alienated, either jointly by the Plaintiff and her brothers or by the Plaintiff herself or by the other sharers alone. Properties shown in plaintiff "C" schedule have been rightly excluded as they were alienated by the Plaintiff and the other co-sharers. Portions of the properties sold in other items of plaintiff "A" schedule by other sharers are shown in items 1 to 5 in plaintiff "E" schedule. Similarly, properties sold by the Plaintiff alone have been shown in plaintiff "D" schedule and they have also been excluded and the remaining items alone have been shown to be the plaintiff "F" schedule in which the Plaintiff claims 1/4 share.

12. The Plaintiff's claim is resisted by the contesting Defendants on the following contentions:

i) On the death of Anaikutty Naicker, the Defendants 1 and 2 and Munusamy, all brothers of the Plaintiff alone became entitled to a share in the properties of Anaikutty Naicker as the legal heirs of his predeceased son Subramania Naicker and the Plaintiff did not have a share in the properties left by Anaikutty Naicker. However, in order to make an arrangement regarding the expenditure to be made for the marriage of the Plaintiff, she was also shown as one of the parties to the partition deed dated 14.09.1964 marked as Ex.P1.

ii) There was a family arrangement on 19.04.1977 under which the sons of Subramania Naicker alone took the properties that came to the legal heirs of Subramania Naicker excluding the Plaintiff and on the other hand, it was agreed that the Plaintiff should keep the entire property of 4.04 acres of land left by her maternal grandmother at Surapettai village.

iii) The Plaintiff was excluded by ouster and adverse possession and the brothers of Plaintiff and their legal heirs perfected title by adverse possession in respect of the Plaintiff's share in the suit properties.

13. It is quite obvious from Ex.P1, namely the certified copy of the registered partition deed dated 15.09.1964, that the properties of Anaikutty Naicker, after his death, were divided among his legal heirs including the Plaintiff and her brothers. Plaintiff and her brothers were allotted the properties described in schedule "D" to the said partition deed towards their share representing the 1/4 share of late Subramania Naicker, one of the sons of Anaikutty Naicker, who predeceased him. It



is also not in dispute that the properties which were the subject matter of the above said partition were the self-acquired absolute properties of Anaikutty Naicker and the division was made in accordance with the rule of succession provided in the Hindu Succession Act, 1956. The properties thus allotted to the Plaintiff and her brothers are the properties described in plaint "A" schedule. In addition to the properties described in plaint "A" schedule, the properties described as items 1 to 3 in plaint "B" schedule are the self-acquisitions of Subramania Naicker made during his life time under three sale deeds dated 15.11.1951, 27.09.1953 and 28.09.1953. The fourth item of "B" schedule property was also one owned and possessed by the Plaintiff's father Subramania Naicker and by virtue of a decree passed in O.S. No. 394/1955 on the file of the District Munsif Court, Poonamallee, the legal heirs of Subramania Naicker got the property by executing the said decree and thus all the legal heirs of Subramania Naicker became co-owners of the properties described in items 1 to 4 of plaint "B" schedule also. The said facts are not disputed and on the other hand are admitted by the contesting Defendants. Therefore, the contention of the Plaintiff that she was entitled to 1/4 share in the properties described in Schedules "A" and "B" of the plaint is well founded.

14. However, the contesting Defendants in their written statement, had taken a novel stand that as per the law prevailing at the time succession to the properties of Anaikutty Naicker opened, the Plaintiff was not entitled to any share, but, she was also made a party to the partition deed, as the brothers of the Plaintiff wanted to make an arrangement as to how the funds for the marriage of the Plaintiff had to be arranged. Such a contention is not borne out by the recitals found in Ex.P1. Even in the evidence of D.W.1, the only witness examined on the side of the Defendants, there is no such clear-cut assertion. On the other hand, he would state that their elder brother Munusamy performed marriages of his brothers and sister by selling some of the properties which were purchased out of the income derived from the properties allotted to the share of the lineal descendants of Subramania Naicker in the properties left by their grandfather Anaikutty Naicker. It is his further statement that a sum of Rs. 31,000/- was spent on the marriage of the Plaintiff and the said amount would be equal to her share in the properties and hence she is not entitled to claim any share. It is also his statement that there was a family arrangement in 1977 in which the Plaintiff was given properties that had been owned by her maternal grandmother and situated in Surapettai village, whereas the entire properties described in "A" and "B" schedule to the plaint were divided among all the three brothers to the exclusion of the Plaintiff.

15. The said contentions of the contesting Defendants have been stoutly denied and disputed by the Plaintiff. Of course there are documents produced on the side of the Defendants as Exs.D1 to D3 to show that the Plaintiff, after the institution of the suit, chose to dispose of some of the properties in Surapettai village, which according to them, were the properties of the maternal grandmother of the Plaintiff. But this is a suit in which the Plaintiff has claimed division and separation of her share in the

properties jointly allotted to her and her brothers as the lineal descendants of their father in the properties left by their paternal grandfather Anaikutty Naicker and also the self acquired properties of their father, namely late Subramania Naicker. Nothing has been canvassed by the Plaintiff in respect of the properties left by her maternal grandmother, which later on came to be dealt with by the Plaintiff under Exs.D1 to D3.

16. Of course it is an admitted fact that Govindammal was the maternal grandmother of the Plaintiff" and she had properties at Surapettai village; that Pachaiyammal, the mother of the Plaintiff and Kullammal were the daughters of Govindammal; that Kullammal died issueless and that Pachaiyammal, mother of the Plaintiff had left the family years back and thereafter, was not heard of. According to the contention of the contesting Defendants, Govindammal executed a will in favour of the Plaintiff giving her properties situated at Surapettai village in accordance with the understanding that the Plaintiff would be content with that and should not claim any share in the suit "A" and "B" schedule properties. For the above said plea of the contesting Defendants, there is no reliable evidence. P.W.1, namely the Plaintiff has denied the said contention of the contesting Defendants. As such it is incumbent on the contesting Defendants to prove the said family arrangement and the execution of the Will as one done pursuant to the family arrangement. Except the ipse dixit of D.W.1, there is no other evidence available in support of their contention. No independent witness testifying the fact that there was such a family arrangement and that the Plaintiff was excluded from getting a share in the suit "A" and "B" schedule properties and was left to take the entire properties of her maternal grandmother situated at Surapettai village and that pursuant to such family arrangement only a will was executed by Govindammal in favour of the Plaintiff. It is pertinent to note that no will or copy of the will in support of the above said contention of the contesting Defendants has been produced. There is also no evidence to show that any probate has been obtained.

17. On the other hand, there is evidence adduced on the side of the Plaintiff to show that in respect of some of the items of properties shown in Schedule "A" and "B" were dealt with by her, which provides evidence of the fact that she did not give up her claim in respect of those properties and that she dealt with those properties as a co-owner. Those are shown as items 1 to 5 of plaint "C" schedule properties and items 1 and 2 of plaint "D" schedule. It should be pertinent to note that out of the total extent of 54  $\frac{3}{4}$  cents in item "4" of plaint "A" schedule, the Plaintiff sold an extent of 13- $\frac{5}{8}$  cents alone representing her  $\frac{1}{4}$  share. Similarly, in the said item the other sharers have alienated only the remaining portion representing their  $\frac{3}{4}$  share. Therefore, it is quite obvious from the said facts that there could not have been any family arrangement and consequent exclusion of the Plaintiff from enjoyment of the common properties which are described in Schedules "A" and "B" of the plaint as contended by the contesting Defendants.

18. There is no evidence to show the date on which their paternal grandfather Anaikutty Naicker died. Even the partition deed dated 14.09.1964, a certified copy of which has been marked as Ex.P1, does not contain any reference to the date on which Anaikutty Naicker died. The documents produced by the contesting Defendants also do not contain any reference to the date of death of Anaikutty Naicker. However, it is quite obvious from Ex.P1 that before 14.09.1964, Anaikutty Naicker died. The plaint contains an averment that the father of the Plaintiff, namely Subramania Naicker predeceased Anaikutty Naicker. Therefore, the branch of Subramania Naicker among the sons of Anaikutty Naicker got 1/4 share on the death of Anaikutty Naicker and as such the properties described in plaint "A" schedule (shown in "D" schedule to Ex.P1) were allotted towards their 1/4 share. The said fact has also been reiterated by the Plaintiff in her proof affidavit as P.W.1. The said plaint averment has not been denied by the contesting Defendants in their written statements. D.W.1, the only witness examined on the side of the Defendants also does not advert to the said question. Nor he chose to deny the averment that Subramania Naicker predeceased his grandfather Anaikutty Naicker. On the other hand, there is an averment in the written statement of D1 at paragraph 15 that Subramania Naicker died on 21.05.1957. When the said averment is read in conjunction with the plaint averment, which is not disputed, that Subramania Naicker predeceased Anaikutty Naicker, then it should be necessarily inferred that Anaikutty Naicker died subsequent to 21.05.1957, more particularly after the Hindu Succession Act, 1956 came into force. As such, as per the rule of succession provided in Hindu Succession Act, 1956, when the succession to the property of Anaikutty Naicker opened, the Plaintiff became one of the legal heirs and she became entitled along with her brothers in common to 1/4 share of the properties left by Anaikutty Naicker. That is the reason why first and second Defendants, another brother of Plaintiff viz. Munusamy and the Plaintiff were jointly allotted the properties described in plaint "A" schedule towards their share in the properties left by Anaikutty Naicker, under the partition deed (Ex.P1). Therefore, it is quite obvious that the Plaintiff was entitled to a common undivided 1/4 share of plaint "A" schedule properties.

19. Similarly, the contention of the Plaintiff that items 1 to 3 of the plaint "B" schedule properties were self-acquisitions of her father Subramania Naicker remains undisputed. It is also not in dispute that regarding the fourth item of plaint "B" schedule property Subramania Naicker claimed title and possession and filed the suit O.S. No. 394/1955 on the file of District Munsif Court, Poonamallee and got a decree, which was subsequently executed in E.P. No. 136/1957 and the execution was levied by the legal heirs of Subramania Naicker, since subsequent to the decree, Subramania Naicker died. Therefore, it is quite obvious that the Plaintiff, Defendants 1 and 2 and their other brother Munusamy became co-owners of the plaint "B" schedule property also in which each one of them had a common undivided 1/4 share. As such the claim of the Plaintiff for division of the said properties into four

shares and allotment of one such share to the Plaintiff cannot be defeated, unless the Defendants are able to prove that there was either partition, family arrangement, ouster or adverse possession by which the Plaintiff was divested of her joint title to the plaint "A" and "B" schedule properties. That is the reason why the contesting Defendants have taken a stand that there was a family arrangement in 1977, in which it was agreed that the entire "A" and "B" schedule properties should be taken by her brothers and the Plaintiff would be given the properties of her maternal grandmother located at Surapettai village extending to 4.04 acres in its entirety. The very fact that such a family arrangement is pleaded, will show the fallacy of their contention that the Plaintiff was not entitled to any share in the property of Anaikutty Naicker and that only for the purpose of making an arrangement as to how the expenditure of her marriage to be incurred, she was shown a party to the partition deed dated 14.09.1964, a certified copy of which has been marked as Ex.P1. Therefore, as pointed out supra, the said contention of the contesting Defendants is legally unsustainable, besides being self-contradictory.

20. Regarding the other contention of the Defendants on which they deny a share in the plaint "A" and "B" schedule properties to the Plaintiff, upon perusing the pleadings and the evidence adduced, both oral and documentary, this Court is of the considered view that the contesting Defendants' contention that there was a family arrangement in 1977 in which the suit "A" and "B" schedule properties were divided among the brothers of the Plaintiff alone and the Plaintiff was given the entire property of her maternal grandmother, does not stand substantiated. The Plaintiff, while deposing as P.W.1, has stoutly denied and refuted such a contention raised by the contesting Defendants. On the other hand, Neelakandan, the second Defendant, who deposed as the sole witness (D.W.1) on the side of the Defendants, would try to show that there was a partition in respect of the suit properties dividing the properties among the brothers of the Plaintiff alone and that the same would give rise to a necessary inference that a family arrangement preceded the said partition among the brothers of the Plaintiff excluding the Plaintiff. But, during the course of the cross-examination, D.W.1, has made an admission to the effect that he has not stated in his written statement that the Plaintiff was not entitled to partition, since there was already a partition during 1977 and that if he had stated so in the written statement, such a statement was not correct. On the other hand, he would simply state since the property of Govindammal was given to the Plaintiff, she was not entitled to demand partition of the suit properties.

21. At this juncture, it is helpful to recite the fact as to the enjoyment of the property of Govindammal by the Plaintiff. Govindammal is the maternal grandmother of the Plaintiff. Her husband predeceased her. She had two daughters, namely Pachaiyammal and Kullammal. Pachaiyammal is the mother of the Plaintiff. But she disappeared from the family. Kullammal died without any issues. Under such circumstances alone, it is contended by the contesting Defendants that the properties of Govindammal were given to the Plaintiff and in lieu of the same, she

gave up her right in the suit properties; that the said decision was taken in one of the family functions and that only pursuant to the said family arrangement, Govindammal executed a will in favour of the Plaintiff in respect of her properties. Though D.W.1 in his evidence has stated that in one of the family functions he and his brothers told the Plaintiff that she could take the property belonging to Govindammal and her brothers would take the properties belonging to their father, he would further state that he did not remember what was the said family function and in whose presence such discussion was made. He has also pleaded absence of knowledge as to whether any Release deed was obtained from the Plaintiff to the effect that she would not claim any share in her father's property. But, in the very next line, he would state that such a Release deed was not obtained. A consideration of the said evidence of D.W.1 will make it clear that the family arrangement pleaded by the contesting Defendants is not substantiated by reliable evidence and on the other hand, there is an admission that there is no proof to show that the Plaintiff agreed for the suggestions made by D.W.1 and his brothers. Above all, though there are documents to show that the Plaintiff was and is dealing with the properties situated at Surapettai village, but denied having dealt with such properties, copy of the will of Govindammal has not been produced. The documents produced by the Defendants do not refer to any will of Govindammal. The mere fact that the Plaintiff was dealing with the entire property situated at Surapettai village which belonged to her maternal grandmother, will not lend any support to the contention of the contesting Defendants that there was a family arrangement, in which she agreed to be content with the said properties and not to claim a share in her father's property. For all the reasons stated above, this Court comes to the conclusion that the contention of the contesting Defendants that there was a family arrangement in 1977, in which she agreed to get the properties of Govindammal and not to claim any share in the properties of her father is unsustainable.

22. The above discussions and the finding will take us to the consideration of the next contention that since the eldest brother of Plaintiff, namely Munusamy, who represented the Plaintiff in the partition deed, as she was then a minor, sold some of the properties of their father and spent a sum of Rs. 31,000/-towards the expenses of the marriage of the Plaintiff; that the said amount shall be equal to her 1/4 share in the suit properties and that hence she is not entitled to claim any share in the suit properties. It is pertinent to note that it is an admitted case of the parties that not only the Plaintiff, but also the other brothers of the Plaintiff, except Munusamy, were minors on the date when Ex.P1-Partition deed was executed and as guardian of his minor brothers and sister Munusamy sold some of the properties and conducted the marriages of his brothers and sister. The Plaintiff does not claim that such an alienation made for the said purposes are not binding on her. She is also not claiming any share in the properties thus alienated for such purposes. On the other hand, she claims her share in the properties which remain in the family even after such alienation. Therefore, the above said contention of the Defendants

that the Plaintiff would not be entitled to a share, since the marriage expenses of the Plaintiff was met with by her elder brother Munusamy and such expenses would be equal to the value of her share in the father's property, is not tenable and the same deserves discountenance.

23. The next contention of the contesting Defendants is that the Plaintiff had been excluded from enjoyment of the suit properties over the period of limitation and the brothers of the Plaintiff and their legal heirs perfected title by adverse possession to the share of the Plaintiff in respect of the suit properties. In the case of joint properties, to claim adverse possession against a co-owner, there must be an open assertion hostile to that of the other co-owner and exclusion of the other co-owner from the enjoyment of the property by virtue of such open assertion. Stronger evidence is needed in case of plea of ouster and adverse possession in respect of joint property against the co-owners. In this case, as already pointed out, except the interested testimony of D.W.1, which is also not in categorical terms supporting the plea of adverse possession, there is no other evidence adduced on the side of the contesting Defendants to prove the said plea of the Defendants. On the other hand, there is evidence adduced by the Plaintiff, besides making a clear plea, that she is in possession of one of the items of the suit properties showing that the possession of the other properties by the other co-sharers was on behalf of the Plaintiff also. The Plaintiff has produced Ex.P2-Patta in respect of survey No. 255/4 at Velacherry village which is shown to be the second item of plaint "D" schedule corresponding to item 9 of plaint "A" schedule. In fact the Plaintiff sold the entire extent of 21 1/2 cents in survey No. 255/4 having patta No. 185 which is shown to be the 9th item of plaint "A" schedule. The said property, according to the plaint averments, was sold by the Plaintiff to a third party and hence the same is shown to be second item in plaint "D" schedule. A total extent of 54.75 cents comprised in survey No. 690/1 and 690/2 is shown to be item No. 4 in the plaint "A" schedule. 13-5/8 cents representing the 1/4 share of the Plaintiff was sold by the Plaintiff in the said property in favour of one Jaisankar. The same is shown as item 1 of plaint "D" schedule. Besides making a clear plea in this regard, the Plaintiff has also deposed as P.W.1. Apart from that item Nos. 2, 3, 5 and 10 of plaint "A" schedule have been sold by the Plaintiff and the other co-sharers and they are shown in a separate schedule as plaint "C" schedule. The said contention of the Plaintiff that the properties described in "C" schedule were sold by the Plaintiff and the other co-sharers has not been specifically disputed and no evidence refuting the evidence of the Plaintiff in this regard has been adduced on the side of the contesting Defendants.

24. Similarly, out of the total extent of 54 3/4 cents in survey Nos. 690/1 and 690/2 described as item No. 4 in plaint "A" schedule, 13-5/8 cents representing her 1/4 share sold by the Plaintiff is shown as item No. 1 of plaint "D" schedule. The remaining extent of 41.06 cents in the said survey numbers is shown to be the property sold by the other sharers alone and the same is shown as item 4 of plaint "E" schedule. Similarly, in items 1, 6 and 8 of plaint "A" schedule portions alone were

sold by the other sharers. In item 3 of plaint "B" schedule also the other sharers sold a portion extending 24 1/2 cents to third parties. From the above, it is quite obvious that not only the Plaintiff, but also her brothers and the legal heirs of the other brother Munusamy, treated the property as common property of themselves and the Plaintiff and that the same was the reason why they effected joint alienation of item 2, 3, 5 and 10 of plaint "A" schedule which are shown in plaint "C" schedule and separate alienation of certain items in plaint "A" and "B" schedule, which are shown in plaint "D" and "E" schedule. The remaining items alone are found quoted in plaint "F" schedule. The very fact that in item 4 of the plaint "A" schedule Plaintiff alienated her 1/4 share and the other co-sharers alienated the remaining portion representing their 3/4 share will negative the contention of the contesting Defendants that there was ouster of the Plaintiff by adverse possession in respect of the suit properties. The further fact that items 2, 3, 5 and 10 of plaint "A" schedule which are shown in plaint "C" schedule were alienated jointly by the Plaintiff and the other cosharers will negative the above said Defendants' contention. Therefore, this Court has to come to a necessary conclusion that the plea of ouster by adverse possession made by the contesting Defendants has not been substantiated by evidence and such plea miserably fails. When a party to the suit takes a plea of ouster and adverse possession, it must be in a position to state from which date the other co-owner was ousted and from which date his possession became adverse to that of the other co-owner against whom ouster and adverse possession is claimed. Making such a plea is not enough and the same must be substantiated. For the very same reasons the plea of the contesting Defendants that the suit is barred by limitation is bound to fail. For all the reasons stated above, this Court comes to the conclusion that the plea raised by the contesting Defendants that the suit is barred by limitation, is also bound to fail.

Issue No. 4

25. It is the further contention of the Plaintiff that the 2nd Defendant settled an extent of 23 cents in item 1 of plaint "A" schedule in the year 1990 in favour of his wife Kalavathy (3rd Defendant) and the said settlement deed is invalid as it is nothing but a sham and nominal one. The particulars of the settlement deed are not furnished. Third Defendant has also failed to contest.

Without such particulars, the question of sham and nominal nature of the document cannot be adjudicated. However, it is hereby observed that such a settlement, being gratuitous transfer, shall not affect the share of the Plaintiff in the said properties.

Issues 1 and 7:

26. In view of the findings recorded in respect of the other issues, this Court comes to the conclusion that the Plaintiff was entitled to an undivided 1/4 share in all the properties described in plaint "A" and "B" schedule. However, in respect of items 2, 3, 5 and 10 of plaint "A" schedule, the Plaintiff has not made any claim as it is her

categorical case that those properties were sold jointly by the Plaintiff and the other co-sharers and hence are not available for partition. The said properties are set out in a separate schedule as plaint "C" schedule. So excluding the said properties shown in plaint "C" schedule, the Plaintiff was entitled to 1/4 share in other properties found in plaint "A" and "B" schedule, namely item No. 1, 4, 6 to 9, 11, 12 and 13 of plaint "A" schedule and items 1 to 4 of plaint "B" schedule. However, certain alienations were made in respect of some of those properties separately by Plaintiff alone and the other co-sharers alone. They are shown in plaint "D" schedule and "E" schedule. So far as item 4 in plaint "A" schedule is concerned, the Plaintiff sold her 1/4 share and the other sharers sold their 3/4 share. Therefore, the said property can also be excluded as a property which is not available for partition. As such, out of 17 items which are found in plaint "A" and "B" schedule, those five items, namely items 2, 3, 4, 5 and 10 of plaint "A" schedule are to be excluded, as they are not available for partition since they had gone out of the family. Out of the other 12 items, 11 items alone are shown in plaint "F" schedule. The Plaintiff has omitted to include the Survey No. 255/4 extending 21 1/2 cents shown as item 9 in plaint "A" schedule since she herself has sold that property in favour of a third party as per the plaint pleadings. So many schedules have been provided in the plaint in order to facilitate the court to work out equities by setting off the portions sold by the Plaintiff and the other co-sharers separately towards their shares in the suit properties. Therefore, this Court comes to the conclusion that the properties in which the Plaintiff can claim 1/4 share are the properties shown as items 1 to 11 in "F" schedule and item 2 of "D" schedule equivalent to item 9 of plaint "A" schedule. The Plaintiff had chosen to sell the entire extent of item 9 of plaint "A" schedule. The exclusion of the entire item 9 of "A" schedule and staking claim to 1/4 share in the other 11 items alone will result in an advantage to the Plaintiff and the working out of such a method will result in allotment of a little larger share than what the Plaintiff is entitled to. In addition to the 11 items shown in plaint "F" schedule, the 9th item of plaint "A" schedule which is also shown as second item of plaint "D" schedule should also be added as the 12th item of "F" schedule and in all those 12 items the Plaintiff's 1/4 share shall be declared and worked out while allotting share. The fact that the entire property comprised in Survey No. 255/4 shown as item No. 9 in plaint "A" schedule (item 2 in "D" schedule) was sold by the Plaintiff should be taken into account and the excess extent sold by her in that item should be set off against her share in other items. Similarly, the properties sold by the other sharers alone which are shown in items 1, 2, 3 and 5 of plaint "E" schedule equivalent to portions of item 1, 6 and 8 of "A" schedule and a portion of item 3 of "B" schedule, shall be taken into account and the extents sold by them shall be set off against their shares to be allotted in items 1 to 11 of the plaint "F" schedule.

27. For the foregoing reasons, the suit is allowed and a preliminary decree is passed declaring the Plaintiff's 1/4 share in respect of items 1 to 11 in plaint "F" schedule and item 9 of plaint "A" schedule equivalent to item 2 of plaint "D" schedule and



directing division of all those items into four shares and allotment of one such share to the Plaintiff subject to a condition that the properties set out in item No. 2 of plaint "D" schedule on equity shall be allotted to the share of Plaintiff and shall be marshaled and set off in respect of her share to be allotted in the other items of plaint "F" schedule. Similarly, the properties described as items 1 to 3 and 5 in "E" schedule on equity shall be allotted to the share of the other co-sharers and the same shall be set off and marshaled in respect of their shares in items 1 to 11 of plaint "F" schedule. Till this stage, the parties are directed to bear their own cost.