

Palanikumar Pillai Vs. Palanikumar Pillai and ors.

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Court : Chennai

Decided On : Mar-29-1988

Reported in : (1988)1MLJ297

Appellant : Palanikumar Pillai

Respondent : Palanikumar Pillai and ors.

Judgement :

Srinivasan, J.

1. A score and a year ago, the foundation for the present appeals was laid by the institution of a suit for partition in the Court of the Subordinate Judge, Tirunelveli. The sixth defendant in the suit is the appellant in both the appeals while the plaintiffs are the respondents.

2. It is better to have the genealogy of the family to which the parties belong in order to appreciate the facts comfortably hereunder:

Planikumar Pillai (died)--1925

M. Thayammal (died) M. Ponnammal (died) in 1966

1st wife | 2nd wife

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Peria Chockalingam Chinna Chockalingam |

Pillai (died) Pillai (died without children) |

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| M. Chockammal (died) |

_____ (3rd defendant) |

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Sankaralingam V.C. Palanikumar |

Pillai (died) Pillai |

M. Malayammal (Bachelor |

(died) 1st plttf. |

(4th defendant) |

|

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Subbiah Pillai Ramalingam Somasundaram Nataraja Kanthi-

(died on Pillai Pillai mathinatha

13-5-51) (died) (D-1) (D2) (died) Pillai

| (D-5) (2nd Plttf.)

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M. Seethaiammal M. Rajammal alias Palliarai

1st wife (2nd wife)

(died) (7th plaintiff)

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| _____

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V.S. Palani Palani Kumara- Sivasubra- Ponnambalam Chockalingam

Kumar swami maniam (5th plff.) (6th plff.)

Pillai (3rd plff.) (4th plff.)

(6th deft./

Applicant

3. There was an earlier litigation in the family in O.S. No. 50 of 1925 which ended in a compromise decree whereby Palanikumar Pillai and his seven sons divided their joint family properties. After the death of Palanikumar Pillai, there was a family arrangement on 2.1.1926 under which his second wife Ponnammal was to enjoy the properties described in Schedules I and III in the present suit for her life. It was also agreed that after her lifetime, the 1st Schedule was to be taken absolutely by the seven sons of Palanikumar Pillai and the III Schedule was to be taken exclusively by Subbiah Pillai, the eldest son of Ponnammal. While the appellant is the son of Subbiah by his first wife, respondents 3 to 6 are the sons by his second wife who is the 7th respondent. The contest in these appeals is one directly between the appellant on the one hand and respondents 3 to 7 on the other.

4. Continuing the narrative, the III Schedule was allotted to Subbiah on condition that he should pay a sum of Rs. 214 to each of the other six sons of Palanikumar Pillai by way of owelty on the footing that the value of the III Schedule property which is a small house with some appurtenant land was Rs. 1,500. There was a partition arrangement under a deed dated 26.10.1942 between Subbiah Pillai and his sons by the second wife on the one hand and the appellant herein on the other with reference to the properties allotted to Subbiah Pillai in the compromise decree in O.S. No. 50 of 1925. The present suit properties were not subject-matter of that partition as Ponnammal was alive. Subbiah Pillai died in 1951 and Ponnammal died on 17.8.1966.

5. Thereafter, the present litigation was initiated by the plaintiffs, the first of them being a grandson of the first wife of Palanikumar Pillai, the second being the last son of Palanikumar Pillai by his second wife and the rest being Subbiah Pillai's second wife and her sons. The plaintiffs prayed for partition and separate possession of 91-1/2 cents in item 1 of the I Schedule, 5/12 share in item 2 of the I Schedule and 5/12 share in the II Schedule and 3/8 share of plaintiffs 1 and 3 to 7 in item 3 of the I Schedule. They also prayed for allotment and separate possession of the III Schedule to plaintiffs 3 to 7. As regards the III Schedule house, with which we are now concerned, it was the case of the plaintiffs that the appellant herein had relinquished his interest therein under the partition arrangement dated 26.10.1942 referred to earlier. It was on that basis, they prayed for allotment of the house entirely to plaintiffs 3 to 7. The appellant resisted their claim. It was found by the trial Court as well as the appellate Court that the appellant had relinquished his interest in the III Schedule property under the partition of 1942 and consequently the title of plaintiffs 3 to 7 to the III Schedule house was declared subject to their payment of Rs. 214.28 to each of the other six sharers, viz., plaintiffs 1 and 2 and defendants 1 to 4 in the suit. The appellant herein filed Second Appeal No. 854 of 1971 in this Court and by judgment dated 23.8.1973, this Court held that there was no relinquishment by the appellant of his 1/6th share in the III Schedule property. As per the judgment of this Court, the appellant was declared entitled to 1/42 share in Schedule I and 1/6 share in Schedule III.

6. The plaintiffs filed I.A. No. 146 of 1972 on the file of Sub Court, Tirunelveli for passing a final decree even while the Second Appeal was pending in this Court. That application was dismissed for default on 6.8.1975. Thereafter, the suit was transferred to the file of the District Munsif, Sankarankoil and numbered as O.S. No. 153 of 1982. The plaintiffs filed I.A. No. 745 of 1982 for passing of final decree. With regard to the III Schedule house, their prayer in the application for passing a final decree was to allot the house entirely to plaintiffs 3 to 7 and provide for owelty to the appellant herein. In that application there was a specific reference to an earlier report of the Commissioner dated 27.1.1975 to the effect that the house was not divisible. The plaintiffs also claimed in that application that they had complied with the direction in the decree for payment of Rs. 214.28 to the first plaintiff and others. In his counter statement the appellant herein contended that the application was not maintainable in that Court and that it should be filed only in the Sub Court, Tirunelveli. Another contention raised was that the earlier petition for final decree having been dismissed for default on 6.8.1975, the plaintiffs were not entitled to file a fresh application. As regards the divisibility of the house, in paragraph 5 of the counter statement, the appellant contended that the house should not be allotted to the applicants and their case that he should be given owelty was not acceptable. While there is a specific reference in the application for final decree to the earlier report of the Commissioner as regards the non-divisibility of the house, the counter-statement filed by the appellant keeps silent on that aspect. Nor did the appellant make a positive statement that the house was capable of division. The averments made by him in his counter statement on this aspect of the matter are very vague.

7. The trial Judge passed an order on 9.5.1986 allotting the house in III Schedule to plaintiffs 3 to 7 and directing them to pay a sum of Rs. 749-98 as owelty to the appellant herein. The amount of owelty was calculated by the trial Court at the rate of Rs. 214-28 for 1/7th share as fixed in the family arrangement of 1926. The trial Court found that the house was not divisible and that it should be allotted only to persons who are enjoying the adjacent house bearing door No. 4. The trial Court found that the very reason for allotting the III Schedule house exclusively to Subbiah Filial in the partition arrangement of 1926 was that he could not conveniently enjoy the adjacent house bearing door No. 4 which had already been

allotted to him without the III Schedule house and the adjacent house bearing Door No. 4 was in the enjoyment of plaintiffs 3 to 7 after the death of Subbiah Pillai. As regards the third item of I Schedule, the mode of division suggested by the Commissioner allotting 52 cents to plaintiffs 3 to 7 was accepted by the trial Court. Pursuant to the said order, of the trial Court, plaintiffs 3 to 7 deposited a sum of Rs. 749-98. In view of the same, the trial Court passed a decree on 30.9.1986 allotting 52 cents in item 3 of Schedules I and III Schedule property to plaintiffs 3 to 7. The appellant herein filed an appeal against the earlier order of the trial Court dated 9.5.1986 which was taken on file as A.S. No. 25 of 1987 on the file of Sub Court, Tenkasi and another appeal against the later order dated 30.9.1986 which was taken on file as A.S. No. 158 of 1986 on the file of the same Court. Obviously, the appeal against the later order was filed earlier as the number of the appeal indicates. Both the appeals were disposed of by the Subordinate Judge, Tenkasi on 21.12.1987 by two different judgments. The only point urged in the appeal against the earlier order of the trial Court related to the maintainability of the application for passing of final decree. The learned Subordinate Judge found that the application was maintainable and dismissed the appeal. In the other appeal, the contest related to the correctness of the order of allotment made by the trial Court. The learned Subordinate Judge found that there was no material before him to interfere with the allotment made by the trial Courts. Consequently, that appeal was also dismissed.

8. Second Appeal No. 81 of 1988 is against A.S. No. 158 of 1986 and Second Appeal No. 188 of 1988 is against A.S. No. 25 of 1987. When the appeals came up for admission, respondents 3 and 4 had entered caveat and appeared through counsel. On going through the records, I found that the allotment of the entire house to respondents 3 to 7 was justified on the facts of the case and the only point that had to be decided in the appeals was whether the Courts below were right in fixing the value of the 1/6th share of the appellant at Rs. 214.28. Obviously, that was wrong as the said sum represented the amount of owelty agreed to between Subbiah Pillai and his brothers in the family arrangement of 1926. That could not represent the value of 1/6th share to which the appellant became entitled as one of the heirs of Subbiah Pillai. As regards that 1/6th share, the appellant was definitely entitled to 1/6th share of the market value of the house. As that was

the only question which remained to be decided in the appeals, I directed learned Counsel on both sides to ascertain from the parties whether they were inclined to settle the matter by fixing the value of the house and giving 1/6th thereof to the appellant. The appellant was not agreeable to that course and the matter which came before me originally on 27.1.1983 was being adjourned at the request of parties from time to time and ultimately the hearing was concluded on 23.3.1988.

9. Learned Counsel appearing for the appellants argued the matter fully and submitted that substantial question of law of some importance arise in these appeals and that they deserve to be admitted in the normal course. He urged that the present suit was not one for partition as between the plaintiffs on the one hand and the 6th defendant/-appellant on the other. He drew my attention to the claim in the plaint that the 6th defendant had relinquished his share in the properties and that the III Schedule house should be declared to belong to plaintiffs 3 to 7 exclusively. He contended that this Court by its judgment in Second Appeal No. 854 of 1971 negated that claim and passed a preliminary decree for partition directing a division of the properties and separate allotment of 1/6th share to the appellant herein. According to learned Counsel, the final decree now passed by the Courts below allotting the entire house to respondents 3 to 7 and directing payment of owelty to the appellant herein really goes against the terms of the preliminary decree and contravenes the judgment and decree of this Court in S.A. No. 854 of 1971. There is no substance whatever in this contention.

10. It is no doubt true that in the suit respondents 3 to 7 herein claimed to be exclusively entitled to the III Schedule house and this Court by its judgment in S.A. No. 854 of 1971 negated that claim and held that the appellant was entitled to 1/6th share. This Court only declared the 1/6th share of the appellant herein. That cannot be construed as a direction by this Court to divide the III Schedule properties by metes and bounds and allot 5/6th share to respondents 3 to 7 and 1/6th share to the appellant herein. The question whether the house was divisible or not did not at all come up for consideration before this Court in that second appeal and that was a matter which could and should be decided only in the final decree proceedings. The final decree passed by the trial Court and affirmed by the appellate Court cannot in any sense be said to be contrary to the judgment and

decree of this Court in S.A. No. 854 of 1971.

11. The next contention advanced by learned Counsel for the appellant is that the direction contained in the final decree is in effect a direction to sell the 1/6th share of the appellant to respondents 3 to 7 and the Court has no jurisdiction to order such a sale excepting under the provisions of the Partition Act (Act IV of 1893). Learned Counsel proceeded to contend that there was no application by any party under Section 2 of the Partition Act for a sale of the property and in the absence of such an application, the provisions of the Partition Act could not be invoked. Learned Counsel placed reliance on the decision of Gokulakrishnan, J. in Muthuswami Gounder v. A.P. Kaithamalai Gounder 89 L.W. 652, wherein the learned Judge has followed the ruling of a Division Bench of this Court in O.S.A. No. 108 of 1966 which was affirmed on appeal by the Supreme Court in R. Ramamurthi v. V. Rajeswara Rao : [1973]1SCR904 . The judgment of the Division Bench does not seem to have been reported, but referred to by Gokulakrishnan, J. in detail. It will be relevant to extract the following passage from the judgment of Gokulakrishnan, J.:

Mr. S. Gopalaratnam, the learned Counsel appearing for the petitioner cited the decision reported in V. Rajeswara Rao v. V. Maheswara Rao (Decd.) and Anr. O.S.A. No. 108 of 1966, dt. 21st December, 1970, to support his contention. The principal questions that arose for determination in the said appeal are:

(1) whether the Court has an inherent power of sale of the property which is not capable of division apart from the provisions of the Partition Act and whether the plaintiff invoked only such inherent power of Court and not the power under Section 2 of the Partition Act;

(2) whether the plaintiff having invoked the jurisdiction of this Court under Section 2 of the Partition Act is entitled to withdraw his suit under Order 23, Rule 1, (sic) C.P.C. at the same time reserving his rights to file a fresh suit on the same cause of action;

(3) At what stage should the request under Section 2 be made; and

(4) has the defendant, who invoked the jurisdiction of this Court under Section 3 of the Partition Act have an indefeasible right to compel the plaintiff to sell the plaintiff's half share to him at a valuation and prevent the plaintiff from withdrawing the suit? On these questions the Bench of our High Court definitely held that no general power of sale can be spelt out from the provisions of the Act. On the other hand, the implication is that the legislation did not intend to confer on the Court a power of sale, apart from the power conferred under the provisions of the Partition Act. In propounding this principle, the Bench of our High Court respectfully agreed with the view expressed in *Nitya Gopal v. Prem Krishna* : AIR1952 Cal893 , which was later followed in *Chandhar Ghose v. Janaki Nath Ghose* : AIR1969 Cal59 . While doing so, the Bench also dissented from the view expressed by a Bench of the Andhra High Court in *Ramaprasad Rao v. Subbaramiah* (1957) 2 A.W.R. 488 : 1957 A.L.T. 587 : I.L.R. (1957) A.P. 566 : A.I.R. 1958 A.P. 647.

12. The judgment of the Supreme Court on appeal from the decision in O.S.A. No. 108 of 1966 as reported in *R. Ramamurthi v. V. Rajeswararao* : [1973]1SCR904 , discusses the only question whether in the circumstances of that case, the trial Court could allow withdrawal of the suit which involved the determination of the correct position under Order 23, Rule 1, Code of Civil Procedure in respect of a suit for partition of joint Property in which the provisions of the Partition Act had been invoked or were sought to be applied. No doubt, the Supreme Court refers to the fact that the High Court had expressed the view that the Partition Act conferred on the Court in a suit for partition the power of sale in certain specified circumstances and that no general power of sale could be spelt out from the provisions of that Act. After setting out the facts of that case, the Supreme Court began the discussion of the question which arose before it with the following observation:

Learned Counsel for the parties agreed before us that the only question which survives and which requires our decision is whether in the circumstances of the present case the trial Court could allow withdrawal of the suit.

Therefore, the question whether the Court had any inherent power outside the provisions of the Partition Act to direct a sale of the property which is not capable

of division was not before the Supreme Court in that case. Gokulakrishnan, J. has in his judgment in *Muthuswami Gounder v. A.P. Kaithamalai Gounder* 89 L.W. 652, observed as follows while referring to this aspect of the matter:

The judgment in O.S.A. No. 108 of 1966 was confirmed by the Supreme Court in *R. Ramamurthi v. V. Rajeswara Rao* : [1973]1SCR904 . The Supreme Court has also made a specific mention to the effect that the Bench of our High Court considered as to whether the Court has inherent power of sale of the property which is not capable of division apart from the provisions of the Partition Act and whether the plaintiff invoked only such an inherent power and not the power under Section 2 of the aforesaid Act. No doubt the main discussion by the Supreme Court is on the validity of the withdrawal of the suit under Order 23, Rule 1, C.P.C. But the Supreme Court discussing the scheme of Sees. 2 and 3, held 'At the same time in order to prevent any oppressive exercise of this privilege those shareholders who did not desire a sale were given a right to buy the others out at a valuation to be determined by the Court'. Thus it is clear that the Supreme Court has confirmed the view taken up by the Bench of our High Court as regards the points stated above.

With great respect to the learned Judge, I do not agree with his view that the Supreme Court had confirmed the view taken by the Division Bench of this Court that the Court has no inherent power in a partition suit to order sale of a property which is not divisible.

13. The position was made clear by the Supreme Court itself in *Badri Narain Prasad Choudhary and Ors. v. Nil Ratan Sarkar* : [1978]3SCR467 . This was also one of the decisions cited by learned Counsel for the appellant, though he cited it for a different purpose. In that case, the Supreme Court expressly approved the view taken by K. Subba Rao, C.J. speaking for a Division Bench of Andhra High Court in *Ramaprasad Rao v. Subbaramiah* (1957) 2 A.W.R. 488 : 1957 A.L.T. 587 : I.L.R. (1957) A.P. 566 : A.I.R. 1958 A.P. 647, in these terms:

The suit property, being incapable of division in specie there is no alternative but to resort to the process called owelty, according to which, the rights and interests of the parties in the property will be separated, only by allowing one of them to

retain the whole of the suit property on payment of just compensation to the other. As rightly pointed out by K. Subba Rao, C.J. (speaking for a Division Bench of Andhra High Court, in *Ramaprasad Rao v. Subbaramiah* (1957) 2 A.W.R. 488 : 1957 A.L.T. 587 : I.L.R. (1957) A.P. 566 : A.I.R. 1958 A.P. 647, in cases not covered by Sections 2 and 3 of the Partition Act, the power of the Court to partition property by any equitable method is not affected by the said Act.

14. It has to be stated at this stage that the Division Bench of this Court in O.S.A. No. 108 of 1966 dissented from the view taken by the Division Bench of the Andhra High Court in *Ramaprasad Rao's* case, : AIR 1959 AP647 . It will be useful to quote the following passage from the judgment of Subba Rao, C.J. in that case: The Partition Act, for the first time, conferred a right on a larger sharer to request the Court to sell the property subject to the correlative right of the smaller sharer to insist upon the larger share being sold to him at the valuation fixed by the Court.

The Act was designed only to meet a particular contingency and did not, in any way, affect the power of the Court to make an equitable distribution of the properties. Before the Act; the Court could refuse to sell the property, even if the conditions laid down in Section 3 were fully satisfied. The Court, instead of selling the property, could have allotted the property not capable of equitable division to one of the sharers whether he is a smaller or larger sharer, and direct compensation to be paid to the other. But, after the Act, if the conditions laid down therein, are satisfied, the Court has no option but to direct the sale.

Therefore, the power of the Court to sell the property under the different circumstances is consistent with the right of the party to insist upon a sale under specified conditions. When the right under Sections 2 or 3 is exercised, the Court cannot exercise its power in derogation of the right. On the other hand, if the provisions of the Act are construed to be exhaustive of the powers of the Court to sell a property the Court would be powerless to make an equitable distribution of the properties when one or other of the properties could not be equitably partitioned or all the parties colluding together could create a deadlock. The act which was intended to protect the smaller sharers in the family, should not be so as to obstruct and retard the process of the partition itself. We, therefore, hold that

the Partition Act is not inconsistent with the general power of the Court to sell any item of property for its equitable distribution.

23. From the aforesaid discussion of the Hindu Law texts, the case-law and provisions of the Partition Act, the law on the subject may be stated thus: Partition is a legal process by which joint title and possession of co-owners of the entire joint property is converted into separate title and possession of each of the co-owners in respect of specific item or items. The joint property is divided in specis and each one of the erst-while joint owners is put in possession of specific extent of property, which is allotted to his share. But many contingencies may be visualised when in practice the division by metes and bounds of every item of joint family property is not possible.

A joint owner may be possessed of innumerable items of different extents, value, quality and nature. In dividing the properties among the various co-owners, it may not be possible to divide every items into distinct shares. A property will have to be allotted to one of the sharers and the other has to be compensated with money. This is technically called owelty. Sometimes, the property to be divided may consist of only one item, which cannot conveniently and equitably be divided between the members in which case the Court may allot that item to one co-sharer and direct him to pay the value of the share of the other sharer in money.

A Court may also be confronted with a situation, namely, that the item of property is not capable of physical partition or is such that, if divided, it will lose its intrinsic worth, in such a case, that item is allotted to one and compensation in money value is given to the other and if such a course is not possible it is sold outright and the sale proceeds divided between the joint owners. All the aforesaid and similar other methods are adopted by Courts in making an equitable partition of the joint properties either with the consent of the parties or where such consent is not forthcoming in exercise of its own discretion.

Whatever method is adopted, it is only to implement the process of equitable partition. It would well-nigh be impossible for a Court to effectuate a partition on an equitable basis, if it should be held that it is under a legal obligation to divide every item of the joint property in specis. Where properties are susceptible of such

division, the Court adopts it. Where it is not, it adopts one or other of the alternative methods narrated above.

The provisions of the Partition Act do not, in any way, entrench upon the undoubted power of the Court to effectuate a partition between co-owners in one or other of the methods suggested above. Before the Act, a party had no right to insist upon the Court to follow a particular course in the process of partition or to insist upon purchasing the share of the other co-owner under certain circumstances.

(24) Under the Act, a right is conferred upon the sharer or sharers, if certain conditions are complied with, to request the Court to sell the property and a correlative right conferred upon a smaller sharer to insist upon purchasing the former's share or shares at a value fixed by the Court. Except to this extent and that provided by the other provisions of the Act, the power of the Court to partition the properties equitably by any of the methods detailed above or similar other is not, in any way, affected by the provisions of the Act.

15. As the Supreme Court has expressly approved of the dictum of Subba Rao, C.J. in Ramaprasad Rao's Case, A.I.R. 1958 A.P. 647, the decision in Muthuswami Gounder v. A.P. Kaithamalai Gounder 89 L.W. 652, is no longer good law in so far as it holds that the Court has no power outside the provisions of the Partition Act to order sale of a property which is not divisible. Hence, the contention of learned Counsel for the appellant that the Courts below had no power to direct a sale of the appellant's 1/6th share to respondents 3 to 7 is not acceptable.

16. Further, I do not agree with learned Counsel's submission that the Courts below have directed the sale of the appellant's 1/6th share to respondents 3 to 7. The final decree passed by the Courts below deals with Schedule I and Schedule III. In Schedule I, the appellant was declared entitled to 1/42th share and in Schedule 3, the appellant has 1/6th share. The final decree divided the land in Schedule 1 and allotted 52 cents thereof to respondents 3 to 7 and the entirety of III Schedule house to them. This is not a case in which the suit property, meaning thereby the entire suit property, is found to be indivisible and the Court allotting the same to one party with a direction to them to pay the value of the share of the

other party. This is a case in which some portions of the suit properties were allotted to respondents 3 to 7 and another portion of the suit properties was allotted to the appellant herein. As the value of the property allotted to respondents 3 to 7 is in excess of the value of their due share, and as the value of the property allotted to the appellant is less than the value of his due share, respondents 3 to 7 are directed to pay owelty to the appellant herein. That cannot be equated to a sale of the share of the appellant to respondents 3 to 7.

17. Section 2 of the Partition Act would normally come into play when the entire suit property cannot reasonably or conveniently be divided and a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders. Section 2 does not contemplate a case where some of the suit properties are not divisible by nature. If there are several items of suit properties, such item which is not divisible could be allotted to one sharer exclusively and the value thereof could be taken into account as against the allotment of the other properties to the other sharers and the value of the respective shares could be equalised by owelty. There is, however, no bar to the parties against invoking the provisions of Section 2 of the Partition Act with reference to one or more of the suit properties which are found to be not divisible while accepting the division of the properties which could be divided. It is not necessary to discuss this question any further in this case. As I have held earlier that what all has been done by the Courts below is to allot some portions of the properties to respondents 3 to 7 and some portions to the appellant and equalize the respective shares by direction to pay owelty.

18. In support of his contention that an application under Section 2 of the Partition Act is a Sine Qua Non for directing a sale of the share of one of the parties to the other sharers, learned Counsel for the appellant cited the decision of the Supreme Court in *Badri Narain Prasad Choudary and Ors. v. Nil Ratan Sarkar* : [1978]3SCR467 . That case does not fully support the appellant in the present case as the Supreme Court lays down that the request for sale envisaged by Section 2 of the Partition Act must be one for public sale and if no such request has been made to the Court, Section 3 of the Act cannot be brought into operation. In the view I have expressed already, this question does not arise for

consideration.

19. It was next contended by learned Counsel for the appellant that there is no finding that the III Schedule house is not capable of division and the Courts below were wrong in relying upon a report of the Commissioner which was filed in I.A. No. 146 of 1972 on the file of Sub Court, Tirunelveli as that application was dismissed for default and that the appellant had no opportunity to canvass the correctness of that report before the Court. A copy of the Commissioner's report in I.A. No. 146 of 1972 which was an earlier application for passing of final decree has been produced before me by learned Counsel for respondents. Paragraph 2 of the said report deals with the house in question and it reads thus:

2. The 3rd Schedule property is a house in Vasudevanallur village. The plaintiffs 3 to 7 and the sixth defendant are each entitled to 1/6th share in the house. The plaintiffs 3 to 7 are entitled to 5/6th share. The breadth of the house is only 12' 6". So it cannot be partitioned, conveniently. The only course possible is to allot the house either to the plaintiffs or to the 6th defendant and to pay owelty to the other. I am herewith submitting a rough plan of the III Schedule house.

20. The appellant contends that he had no opportunity to raise an objection to the said report of the Commissioner as that application for passing of final decree was dismissed for default. Learned Counsel submits that his client did not know that the Courts below would place reliance upon that report of the Commissioner. I would have considered this contention to be of some substance if the appellant had raised such a contention before the trial Court or before the lower appellate Court. As pointed out earlier, the appellant was only contesting the maintainability of the application in the Court of the District Munsif, Sankarankoil and contending that the plaintiffs had lost their right to apply for final decree in view of dismissal of I.A. No. 146 of 1972 for default. I had also referred to the specific averment in the application for passing of final decree that the house is not divisible and the vague denial in the counter statement filed by the appellant. No ground was raised by the appellant before the lower appellate Court questioning the acceptance of the Commissioner's report by the trial Court on this aspect of the matter. I directed learned Counsel for the appellant to cause an affidavit to be filed by his client

giving the measurements of the III Schedule house if the measurement's found in the Commissioner's report are erroneous. The appellant has filed an affidavit dated 23.3.1988 in which the measurements of the house are given as follows:

On north-east-west: 13-3/4 feet

On the south east-west: 13 feet

On the West and East North South: 36-1/2 feet.

The breadth of the house as reported by the Commissioner is only 12' 6". The difference in the measurements, viz., between the measurements given by the Commissioner and given in the affidavit of the appellant is not much. Even if the measurements given by the appellant are correct, it is not convenient to divide the house into 1/6th and 5/6th shares. The appellant has also given the measurements of the site on which the house is situate. The breadth is given as 36 feet on the north, east-west and 34-1/2 feet on the south. It is therefore clear that the conclusion of the Courts below that the third schedule property cannot be divided conveniently is correct. I have already referred to the reasoning of the trial Court that the adjacent house bearing door No. 4 being in the enjoyment of respondents 3 to 7, it is necessary to allot the III Schedule property to them for convenient enjoyment and that was the reason why the III Schedule property was exclusively allotted to Subbiah Pillai in the family arrangement in 1926. Learned Counsel for the appellant did not challenge the correctness of the said finding before me.

21. Learned Counsel for the appellant finally submitted that there should be an auction between his client on the one hand and respondents 3 to 7 on the other. Having found that the allotment of III Schedule house to respondents 3 to 7 is the best mode of division, on the facts and circumstances of the case, I cannot accept the suggestion for an auction between the parties hereto. Thus, all the contentions urged on behalf of the appellant by learned Counsel are found to be without merit and consequently rejected.

22. That brings me back to the starting point where I suggested at the time of first posting of the case that the parties could agree upon the valuation of the III Schedule property so that the market value of 1/6th share of the appellant could be paid to him by respondents 3 to 7. While the appeals were being argued, I suggested to counsel on both sides to get from their respective clients the estimated value of the III Schedule property in writing and place the same before Court in sealed envelopes without One party knowing the value estimated by the other. Accordingly, two sealed envelopes were handed over to me at the conclusion of the arguments. While learned Counsel for the respondents said that his clients would accept whichever is higher among the two estimates, learned Counsel for the appellant stated that his client was not prepared to say so. At the time of delivering this judgment, I opened the envelopes and found that the appellant has estimated the market price of the III Schedule property at Rs. 75,000 and expressed his willingness to purchase the rights of the other sharers on the basis of the said market value. Respondents 3 to 7 have offered to purchase the 1/6th share of the appellant in the III Schedule property at Rs. 20,000 payable within a period of two months from 21.3.1988, which was the date on which they had signed their estimate. Thus, I find the estimate made by respondents 3 to 7 is higher than that of the appellant. I accept the value suggested by the respondents and direct them to pay a sum of Rs. 20,000 for the 1/6th share of the appellant in the III Schedule house directly to the appellant or deposit into the trial Court on or before 31.5.1988. The said sum of Rs. 20,000 shall be in addition to the sum of Rs. 749.98 deposited by respondents 3 to 7 pursuant to the direction given by the trial Court by its order dated 9.5.1986.

23. A word of explanation is necessary before concluding this judgment. I adopted the aforesaid course in order to cut short the litigation which is already 21 years old. As I have stated earlier that the only question that remained to be decided related to the value of the 1/6th share of the appellant and the only course which could have been adopted normally by this Court was to remand the matter to the trial Court for fixing that value or to call for a finding from the trial Court after allowing the parties to let in evidence with regard to the same. There is no necessity for calling for a finding as respondents 3 to 7 have agreed to pay higher value. It so happened that the value stated by them is higher than that stated by

the appellant. There is, therefore, no necessity for taking evidence with regard to the value of the III Schedule property.

24. I am of the view that the course adopted by me has not only shortened the life of the litigation but also resulted in justice to both parties.

25. In the result, there will be a common decree in both the second appeals directing respondents 3 to 7 to pay a sum of Rs. 20,000 to the appellant on or before 31.5.1988. The order dated 9.5.1986 and the final decree dated 30.9.1986 made in I.A. No. 745 of 1982 on the file of the District Munsif, Sankarankoil as confirmed by the Subordinate Judge, Tenkasi in A.S. No. 25 of 1987 and A.S. No. 158 of 1986 are affirmed. A further clause will be included in the decree directing payment of Rs. 20,000 by respondents 3 to 7 to the appellant as owelty. The affidavit of the appellant found in the sealed envelope given by his counsel Mr. Govindarajan, estimating the market price of the III Schedule property at Rs. 75,000 and the memo, signed by respondents. 3 to 7 found in the sealed cover given by their counsel containing their offer to purchase the 1/6th share of the appellant at Rs. 20,000 will be part of the records and they will be attached to this judgment. The appeals are ordered accordingly. Both parties will bear their respective costs.