

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.06.2015

CORAM:

THE HON'BLE Ms.JUSTICE K.B.K.VASUKI

C.M.A.Nos.3041 to 3044 of 2014
MP.Nos.1,1,1,1,2,2,2 and 2 of 2014
and MP.Nos.1 and 1 of 2015

CMA.3041 of 2014

1.A.Kanchana

2.A.Subashini

.. Appellants 1&2/Respondents 1&2/
Plaintiff's 2&3

Vs.

1.A.Vanaja

2.M.Jayalakshmi

3.A.Surekha

4.R.Mahalakshmi

.. Respondents 1 to 4/Appellants/3rd
Respondent/Defendants 1&3/4th
Plaintiff

CMA.3042 of 2014

1.A.Kanchana

2.A.Subashini

.. Appellants 1&2/R2 & R3/Plaintiff2&3

Vs.

A.V.Anantharaman (died)

1.R.Mahalakshmi

2.A.Surekha

3.A.Vanaja

.. 1st Plaintiff

.. Respondents 1 to 4/Appellant/R4/R5/
R7/4th Defendant/4th Plaintiff/1st
Defendant/3rd Defendant.

A.V.Santhanalakshmi (died)

(deleted from arraying her as party on 21.7.2009)

4.M.Jayalakshmi

CMA.3043 of 2014

1.A.Vanaja

2.M.Jayalakshmi

.. Appellants 1&2/Appellants/Defendants
1 and 3

Vs.

1.A.Kanchana

2.A.Subashini

3.A.Surekha

4.R.Mahalakshmi

.. Respondents 1 to 4/Respondents 1to4/
Plaintiffs 2 to 4/4th Defendant

CMA.3044 of 2014

1.A.Vanaja

2.M.Jayalakshmi

.. Appellants 1&2/R5 & R7/Defendants
1 and 3

Vs.

A.V.Anantharaman (died)

.. 1st Plaintiff

1.R.Mahalakshmi

2.A.Kanchana

3.A.Subashini

4.A.Sureka

.. Respondents 1 to 4/Appellant/
R2 to R4/4th Defendant/
Plaintiffs 2 to 4.

A.V.Santhanalakshmi (Died 29/12/2008) .. 2nd Respondent
(Deleted from Array of Parties on 21/07/2009)

This Civil Miscellaneous Appeals 2nd Defendant are filed against the judgment and decree dated 9.7.2014 made in AS.Nos.3/2011 and 9/2013 on the file of the Principal District Judge, Chengalpattu against the judgment and decree dated 8.9.2010 made in O.S.No.666/2001 on the file of the Additional Subordinate Judge at Chengalpet.

CMA.3041/2014

For Appellants : Mr.Sugumar R.Rajulu
For Respondents 1 to 3 : Notice served
For 4th respondent : Party in person

CMA.3042/2014

For Appellants : Mr.Sugumar R.Rajulu
For Respondents 1 to 4 : Notice served

CMA.3043/2014

For Appellants : Mr.K.Sitharthan
For Respondents 1 to 3 : Notice served
For 4th respondent : Party in person

CMA.3044/2014

For Appellants : Mr.K.Sitharthan
For 1st respondent : Party in person
For Respondents 2 to 4 : Notice served

COMMON JUDGMENT

While CMA Nos.3041 and 3042/2014 are filed by the plaintiffs 2 and 3 in OS.No.666/2001 and the respondents 1 and 2 in AS No.3/2011 and the respondents 2 and 3 in AS.No.9/2013, CMA Nos.3043 and 3044/2014 are filed by the defendants 1 and 3 in the same suit and the appellants in AS.3/2011 and the respondents 5 and 6 in AS. No.9/2013. All the Civil Miscellaneous Appeals are filed against the plaintiffs and the defendants 1 and 3 against the judgment and decree made in AS Nos.3/2011 and 9/2013 filed by the defendants 1 and 3 on

one hand and the fourth defendant on other hand, against the preliminary decree passed in the suit. While the defendants 1 and 3 filed the appeal seeking declaration of their share in the suit property, the fourth defendant filed the appeal against the declaration of 1/4th share to the plaintiff and the fourth defendant each in the suit property.

2. Few facts, which are relevant for consideration herein are as follows:

The suit property originally belonged to one A.V.Venkatraman and he died during May 1961 leaving behind his wife A.V.Ratna Bai and only son A.V.Anantharaman and four daughters by names Vanaja, Santhanalakshmi, Jayalakshmi and Mahalakshmi and the only son and four daughters were admittedly born in 1947, 1949, 1951, 1953 and 1959 and on the date of death of their father A.V.Venkatraman, the son, who is the eldest, was about to 14 years and a school student and mother died during 1996 and the family affairs and the property left behind by the original owner were looked after by one R.Karunamurthy, who is none else than their mother's younger brother and their maternal uncle and the first daughter got married in 1976 and only son got married in 1977 and the defendants 3 and 4 by names Jayalakshmi and Mahalakshmi got married at the age of 32 and 33 years respectively. As far as the second defendant by name Santhanalakshmi is concerned, she became invalid due to accident occurred in 1996 and remains unmarried.

3. During the life time of the father A.V.Venkatraman, there was a family partition dated 27.4.1954 between A.V.Venkatraman and his family members in respect of the property belonging to the family and A.V.Venkataraman whose legal heirs are the first plaintiff and the defendants, was allotted Schedule 'D' consisting of two items (i) house and ground premises bearing No.34 Thadikarasami Koil Street, Alandur Panchayat, Saidapet Sub District, Chengalpet District; and (ii) plot no.3 comprised in Inam Nanjai land No.185 Adyar Thangal Zamin Alandur Paimash No.144, Saidapet Sub District, Chengalpet District. In the same partition, one Saraswathy, who was the maternal grandmother of the plaintiff and the defendants, was given life interest in plot nos.1 and 2 comprised in Adyar Thangal Zamin Alandur Paimash No.144, with the remainder to her daughters by names Andal and Ratnabai i.e., Plot no.1 to Andal and plot no.2 to Ratnabai and Ratnabai was the mother of the plaintiff and the defendants. A.V.Venkatraman was also as per the partition entitled to Rs.1,000/- payable by his brothers A.V.Krishnamoorthi and A.V.Rajaram for equality of partition. Thus, as per the partition deed, the father A.V.Venkatraman was allotted two properties + cash of Rs.1,000/-, whereas, the mother was allotted one property. Admittedly, the plot no.2 allotted to mother and plot no.3 allotted to father were acquired by the State Government under the Land Acquisition Act and the compensation of Rs.2,500/- each was awarded in LAC.No.15/1996 and the compensation was received by the father and mother during their lifetime. After the death of A.V.Venkatraman, the family got death-cum-family benefits of A.V.Venkatraman.

4.The only son A.V.Anantharaman instituted a suit in O.S.No.666/2001, arising out of which are the present CMAs, claiming partition of his undivided $\frac{1}{4}$ share in the undivided $\frac{1}{2}$ share of the deceased father in the house and ground premises bearing no.34 Thadikarasamy Koil Street on the ground that the suit property, which is shown as item 1 in 1954 partition, is the only property available for partition and the property is ancestral in nature and the succession opened on the date of death of the father in 1961 and the father and son, who were the co-parceners became entitled to each $\frac{1}{2}$ share in the property in question and the son is again entitled to $\frac{1}{4}$ th share in the undivided $\frac{1}{2}$ share of the deceased father. The suit relief claimed is as follows:

"(a) passing a preliminary decree for partition of plaintiff's $\frac{6}{20}$ share in the suit property to appoint an advocate commissioner to divide the suit properties by metes and bounds to pass a final decree and while passing preliminary decree and final decree and deliver separate possession of the suit property.

(b) For such other relief or reliefs as this Hon'ble Court may deem fit in the circumstances of the case."

5.All the daughters/defendants participated in the suit proceedings. In the written statement filed by the defendants 1 to 3, they claimed $\frac{1}{20}$ th share each for themselves and $\frac{6}{20}$ th share for the second defendant, who is physically challenged and remained unmarried, as per section 29A of the Hindu Succession Act (Tamil Nadu Act 1/1990). In the written statement filed by the fourth defendant, she raised the following points: (1)the suit for partial partition is bad for not including other properties of their parents i.e., (a)Plot no.3 of 185 Adyarthangal belonging to father (b)plot no.2 of 185 Adyarthangal belonging to mother and (c)death-cum-service benefits of their father; (2) the plaintiff failed to seek the relief of recovery of possession of 20 x 9 feet encroached upon by the western side neighbour by name Ranganathan and 21 x 4 feet encroached upon by the southern side neighbour by name Murugan Naicker; (3) the plaintiff is entitled to $\frac{36}{90}$ th share and the defendants 1 to 3 are entitled to each $\frac{6}{90}$ th share and the fourth defendant is entitled to $\frac{36}{90}$ th share; and (4)As the property has been in possession and enjoyment of the fourth defendant and as the plaintiff is excluded from joint possession, the plaintiff ought to have paid the court fee under section 37(1) of the Tamil Nadu Court fees and Suits Valuation Act on advelorum basis at 7 $\frac{1}{2}$ % of the market value of his $\frac{36}{90}$ share.

6.The parties in support of their respective claims, adduced oral and documentary evidence and seriously contested the suit. The trial court, on the basis of the material evidence adduced therein, decreed the suit on 27.07.2004 by granting preliminary decree to the plaintiff and defendants 2 and 4 for $\frac{6}{20}$ th share each and to the defendants 1 and 3 for $\frac{1}{20}$ th share each in the suit property and the trial court judgment and decree was confirmed by the first appellate court in AS.No.39/2006 on 20.11.2006 and by the High court in

SA.1168/2007 on 1.11.2007. Aggrieved against the same, the fourth defendant R.Mahalakshmi approached the Hon'ble Supreme Court by way of Civil Appeal No.5053/2009. Pending appeal before the Supreme Court, the second defendant Santhanalakshmi died and her name was deleted on application. While so, an Amicus Curiae was appointed for the fourth defendant and two issues were raised before the Apex Court by claiming the benefits for the daughters (i)under Section 23 of the Hindu Succession Act and (ii)under Section 29A of the same Act. The Apex Court dealt with the same and observed that the daughters who got married prior to 1989 may not have equal share as that of the son, but the daughters who got married after 1989 are entitled to get equal share as that of the son. The Hon'ble Apex Court further held that all the immovable properties that were inherited by A.V.Venkatraman/ father of the parties, by virtue of registered deed of partition dated 27.4.1954, have not been included in the partition suit and unless all the properties are included in the plaint, the suit would be bad and partial partition cannot be effected. The Apex court by holding so, set aside the judgment and decree of the courts below and remitted the suit to the trial court for giving opportunity to the parties to amend their respective pleadings, to file additional documents and to lead further evidence in support of the amended pleadings. The trial court was directed to pass a judgment, after appreciating the additional pleadings and the evidence adduced thereon. In pursuance of the same, the matter was remanded back to the trial court i.e., Additional Sub Court, Chengalpet.

7.After the remand, the plaintiff took steps to amend the plaint by including additional pleadings regarding the particulars of the property allotted to his parents under 1954 partition and acquisition of plots belonging to his parents and the award of compensation and receipt of compensation by the parents and non-availability of other properties for partition and availability of the suit property alone for partition. The plaintiff also furnished further particulars regarding the relevant year on which the parties got married etc. and as to how the plaintiff is also entitled to 1/4th undivided share in undivided $\frac{1}{2}$ share belonging to his father. In the additional written statement filed by the defendants 1 to 3, they supported the claim of the plaintiff by admitting non-applicability of Section 29A of Hindu Succession Act to them and by claiming 1/4th undivided share in the half share belonging to their father (i.e.) 1/8 share each in the entire property.

8.The fourth defendant in her additional written statement stated in detail that the plaintiff has not included all the properties in the amended plaint, apart from the suit property, (i.e) (i) two properties allotted to the parents (ii)cash of Rs.1000/- both vide partition deed dated 27.4.1954 (iii)death cum retirement benefits of the father to the tune of Rs.8114.12 (iv)Rs.5,000/- compensation for the lands belonging to the father and mother acquired by the Government received by the plaintiff and (v)family jewels of 47 sovereign mortgaged and redeemed by the first defendant's husband and jointly enjoyed by the plaintiff and others. It is further stated by the fourth defendant that she was promised a

plot from and out of 6 plots, but was cheated etc. and it was the fourth defendant, who seriously contested the suit.

9. During trial, the plaintiff examined himself as PW1 and the defendants 1, 3 and 4 were examined as DW1 to DW3 and additional documents were marked as Exs.A6 to A8 and Exs.B18 and B41 on both sides. During the pendency of the suit, the plaintiff died and his legal heirs were impleaded as the plaintiffs 2 to 4 in the suit. The trial court on the basis of the oral and documentary evidence and additional evidence adduced after remand, arrived at a conclusion that except the suit property, no other property either movable or immovable available for partition and the plaintiff Anantharaman by virtue of his co-parcenary right, got $\frac{1}{2}$ share in the suit house and out of the remaining half share belonging to the father, the deceased plaintiff and the fourth defendant R.Mahalakshmi are each entitled to $\frac{1}{4}$ share. That means, the deceased plaintiff was entitled to $\frac{1}{2} + \frac{1}{4}$ share and the fourth defendant is held entitled to $\frac{1}{4}$ share in the suit ancestral house. The trial court further arrived at a conclusion that since the defendants 1 and 3 were married before 1989 i.e., during 13.11.1972 and 3.12.1984, they are not entitled to get any share in the ancestral property. Regarding the claim for equal share for the unmarried daughters along with son, it is held by the trial court that section 29(A) of the Hindu Succession Act 1956 which came into force on 25.3.1989, has no application to the case in hand, as the father died and the succession opened much before the amendment and as there was co-parcenary status as on the date of coming into force of 1989 Amendment. The compensation amount of Rs.2500/- and Rs.1000/- and the death benefits of the father were utilised only by Karunamurthy, who was in overall charge of the properties and who managed the entire family affairs and the entire family jewels were pledged only by Karunamurthy and not by Anantharaman and all the children were educated at Bangalore and the daughters were married out of the funds available and income derived from the same. The trial court also held that since the plaintiff Anantharaman died during the pendency of the suit, his legal heirs i.e., the plaintiffs 2 to 4 are each entitled to 1/4th share in the undivided $\frac{3}{4}$ share of the deceased father in the suit property. Accordingly, the suit was, on the basis of such findings, decreed on 8.9.2010, thereby granting preliminary decree for partition of the deceased plaintiff's 1/4th undivided share and the fourth defendant's 1/4th share in one half belonging to the father A.V.Venkatraman.

10. Aggrieved against the judgment and decree of the trial court, AS.3/2011 and 9/2013 were filed by the defendants 1 to 3 on one hand and the fourth defendant on other hand. Both the appeals were by common judgment dated 9.7.2014, allowed by setting aside the judgment and decree of the trial court and the suit was remitted back to the trial court for fresh disposal, giving a reasonable opportunity to the plaintiffs to amend the plaint schedule of properties as directed by the Supreme Court in Civil appeal No.5053/2009 and to the defendants for filing additional written statement and also to give opportunity to both parties for adducing additional oral and

documentary evidence and dispose of the suit in accordance with law. The lower appellate court decided so on the ground that the first plaintiff should have added all the properties that were inherited by his deceased father through the registered 1954 partition deed and his failure to do so, is contrary to and not in compliance with the direction of the Hon'ble Supreme court. Hence, these four Civil Miscellaneous Appeals by the defendants 1 and 3 and by the plaintiffs before this court.

11.The substantial questions of law that arise for consideration in these Civil Miscellaneous Appeals are as follows:

"(i)Whether the order of remand passed by the lower appellate court is contrary to law and the procedure laid down under Order 41 Rule 23 CPC?

(ii)Whether the lower appellate court on misconception of facts and by misconstruing the direction issued by the Hon'ble Supreme Court, remanded the matter to the trial court in terms of the order of remand?"

12.Heard the rival submissions made by the learned counsel for the appellants and by the fourth defendant R.Mahalakshmi as party-in-person and perused the records.

13.The relief of partition throughout the proceedings, was seriously opposed by the fourth defendant on two grounds: (i)the suit for partial partition is bad; and (ii)the fourth defendant being co-parcenary is entitled to get equal share as that of the deceased plaintiff/son. That is why, the Apex court was inclined to remand the matter for fresh disposal to the trial court for giving opportunity to the parties for amending their respective pleadings, to file additional documents and to lead further evidence in support of the amended pleadings.

14.It is not in dispute that the plaintiff after remand took necessary steps to amend the pleadings in such a manner that the amended plaint contains all the particulars regarding the number of properties allotted to the father and mother in 1954 partition deed and the acquisition of the plots and award of and receipt of compensation by the respective owners for the land so acquired and the age and status of the parties during the relevant point of time. The defendants 1 and 3 and the fourth defendant have also filed separate additional written statement. While the defendants 1 and 3 supported the claim of the plaintiff/brother in all aspects, the fourth defendant reiterated the same objection against the maintainability of the suit for partial partition and her claim for equal share by virtue of amendment brought into the Hindu Succession Act by Tamil Nadu Act 1/1990.

15.The parties were permitted to adduce additional oral and documentary evidence in support of their claim. The trial court, after having duly appreciated their respective pleadings raised in the amended plaint and in the additional written statements regarding

availability or otherwise of the properties and applicability of the Amendment Act 1/1990 to the present case, accepted the plaintiff's theory regarding the non-availability of other properties and availability of the suit property only and accordingly decided the shares due to the parties. While doing so, the trial court omitted to decide and declare the shares due to the defendants 1 and 3. Whereas, the lower appellate court reversed the findings of the trial court on the ground that the plaintiff failed to comply with the direction of the Supreme court by reason of his failure to include all the properties and was hence inclined to remand the matter for fresh disposal to give reasonable opportunity to the plaintiff to amend the plaint schedule properties and to the defendants for filing additional written statement and also give opportunity to both the parties for adducing additional oral and documentary evidence and dispose of the matter as per law.

16.As rightly argued by the learned counsel for the plaintiffs and the defendants 1 and 3, the order of remand by the lower appellate court is totally on misconception of facts. The reading of the remand order of the Supreme Court would clearly show that the direction issued by the Hon'ble Supreme Court is only to amend the respective pleadings of the parties and to file additional documents and to lead further evidence in support of the amending pleadings and to pass a judgment after appreciating the additional pleadings and evidence adduced thereon and no positive direction was issued by the Hon'ble Supreme Court to include other properties in the suit schedule to enable the parties to claim their share in the same. That being so, the lower appellate court committed a gross error in setting aside the judgment and decree of the trial court on the ground that the plaintiffs failed to comply with the direction of the Supreme Court by not including other properties in the suit schedule. The impugned order of remand is also not in accordance with the procedure laid down under Order 41 Rule 23 CPC and both the substantial questions of law are hence answered accordingly.

17.On merits, as already stated, the deceased plaintiff throughout had been claiming that the suit property was the only ancestral property available for partition. It is nobody's case that other immovable properties allotted to his father and mother i.e. Plot nos.3 and 2 were still available. Admittedly plot nos.2 and 3 were acquired by the Government even during the life time of the parents and the compensation was awarded in 1956 and the father died in 1961 and the mother died in 1996 and compensation was also received by the respective owners during their life time. The document produced as Ex.A6 award dated 11.4.1956 passed by the Personal Assistant to the Collector and Land Acquisition Officer and Ex.A7 dated 6.3.1957 payment out petition in LAC No.15 of 1956 in CMP.208 of 1957 would reveal that the compensation was received by the respective owners during the life time of the father. At the time of death of the father, the deceased plaintiff/son was aged about 14 years and others were much younger to him. There is absolutely no material available to show that the amount was either received or dealt with by the deceased plaintiff or anybody else and they are

hence answerable and accountable for the same. Similar reasoning is also applicable to Rs.1000/- due to the father from his brothers towards equity of partition. As the partition is of the year 1954 and as the father was alive till 1961, in the absence of any evidence to show that the amount was actually paid, that too, after the death of the father, the availability of the same cannot be presumed in 2001 to enable the fourth defendant to claim any share in the same.

18.As far as the family jewels are concerned, here again, the fourth defendant failed to substantiate her claim that the same are still available either in the hands of the deceased plaintiff or anybody else. Regarding death-cum-family benefits, the deceased plaintiff was admittedly aged 14 years and was minor on the date of death of his father, as such, neither the deceased plaintiff nor either of the daughters are aware as to who receive the amount and the manner in which the amount was utilised and the balance amount if any available for partition. In my considered view, the claim of the fourth defendant for any share in the amount of Rs.1000/- mentioned in the partition deed; Rs.2,500/- + Rs.2,500/- compensation amount for the lands acquired by the Government from her parents and Rs.8114-12 death-cum-family benefits of the father or any other amount and family jewels of 47 sovereigns is hence totally misconceived.

19.It is not out of contest to mention at this juncture that after the death of the father, the mother had to bring up one son and four daughters, one among whom was physically challenged and the children were educated and son and three out of four daughters were married. It is not the case of the fourth defendant that the family had any other source of income. In this factual background, the amounts, which were received by the father and mother during 1956, could not be expected to be available for partition during 2001. The fourth defendant, except making a claim has not adduced sufficient oral and documentary evidence to show that the amounts were available in the hands of the deceased plaintiff and he had been enjoying the same for his personal gain. On the failure of the fourth defendant to do the same, the trial court rightly accepted the plaintiffs' case that the suit property is the only property available for partition and no ground is made out to disagree with such finding.

20.Regarding the claim of the fourth defendant in equal share as that of the son in the suit property, such right is based on co-parcenary right by virtue of section 29(A) of the Hindu Succession Act by way of Tamil Nadu Amendment Act 1/1990, which came into force with effect from 25.3.1989. The suit property is no doubt ancestral property as the same having been allotted to the father in 1954 partition. But as the father died in 1961, the succession opened in 1961 and the surviving co-parceners as on 1961 were only the father and the only son (i.e.) the deceased plaintiff, as such, the fourth defendant cannot claim equal share in the co-parcenery suit property by virtue of Amendment Act, much after the death of the father.

21.The Division Bench of Our High Court in the judgment reported

in 2008 (4) CTC 374 (Bagirathi and others v. S.Manivanan and another) clearly held that if a male Hindu had died before 25.3.1989 leaving coparcenary property, then his daughter cannot claim to be a coparcener in the same manner as a son, as on the date on which the Act came into force, her father was not alive. The Division Bench held so, while dealing with the effect of amendment by the Hindu Succession (Amendment) Act (Act 39 of 2005). In the case dealt with by the Division Bench, similar claim was made by the plaintiffs/daughters for equal share as that of the son. The two grounds on which such claim was considered are that (i)the amended provisions shall not apply to a partition, which is effected before 20.12.2004 and (ii) the daughter can be considered as a co-parcener only if her father was a co-parcener at the time of coming into force of the amended provision.

22.The Division Bench, having found that the father of the plaintiffs expired in 1975, was of the view that section 6(1) of the Act is prospective in the sense that a daughter is being treated as coparcener on and from the commencement of the Hindu Succession (Amendment) Act 2005 and if a Hindu dies after commencement of the Hindu Succession (Amendment) Act 2005, his interest in the property shall devolve not by survivorship but by intestate succession as contemplated in the Act. The Division Bench is further of the view that the death of the father having taken place in 1975, succession itself opened in the year 1975 in accordance with the existing provisions contained in section 6 and in the event of the contention of the petitioners being accepted, it would amount to giving retrospective effect to the provisions of Section 6 as amended in 2005. The Division Bench has also observed that even though the intention of the amended provision is to confer better rights on the daughters, it cannot be stretched to the extent of holding that the succession which had opened prior to coming into force of the Amended Act are also required to be re-opened.

23.The Division Bench has also referred to the earlier judgment of the single judge of this Court reported in 1991 (2) MLJ 199 (Sundarambal and others v. Deivanaayagam and others) wherein, the learned single judge, while interpreting section 29A of the Hindu Succession Act which is the provision relied on in the present case, observed that "...if a male Hindu has a daughter born on any date prior to 25.3.1989, she would also be a coparcener with him in the joint family, when the Amendment came into force. But the necessary requisite is, the male Hindu should have been alive on the date of the coming into force of the Amended Act. The section only makes a daughter a coparcener and not a sister. If a male Hindu had died before 25th March, 1989 leaving coparcenary property, then his daughter cannot claim to be a coparcener in the same manner as a son, as on the date on which the Act came into force, her father was not alive. She had the status only as a sister-a-vis her brother and not a daughter on the date of the coming into force of the Amendment Act...". The Division Bench has in paras 16 and 17 further referred to two decisions of the Hon'ble Supreme Court reported in (i)AIR 1966 SC 1879 (Eramma v. Veerupana) and (ii)(2006) 8 SCC 581 = (2007) 1 MLJ

797 (SC) (Sheela Devi and others v. Lal Chand and another). In both the cases, the Hon'ble Supreme Court was of the view that "the provisions of Section 8 of the Hindu Succession Act are not retrospective in operation and where a male Hindu died before the Act came into force i.e., where succession opened before the Act, Section 8 of the Act will have no application".

24. Similar view was expressed in the following judgments cited on the side of the appellants herein:

- (i) AIR 2006 SC 3332 (Anar Devi and others v. Parmeshwari Devi and others);
- (ii) (2006) 8 SCC 581 (Sheela Devi and others v. Lal Chand and another);
- (iii) 2007 (5) CTC 42 (Nachayal v. Pongiannan and others);
- (iv) 2013-4-LW.193 (Kamalakannan and others v. Kasthuri and another);
- (v) 2014-2-LW.113 (K.M.Thangavel & others v. K.T.Udayakumar and another); and
- (vi) 2014-2-LW.743 (Dhanalakshmi and others v. Janaki Ammal and others)

25. The Hon'ble Apex Court in the judgment reported in AIR 2006 SC 3332 (Anar Devi and others v. Parmeshwari Devi and others) has by assuming notional partition of the suit properties between one Nagarmal and his adopted son Nemi Chand, immediately before the death of Nagar Mal, to ascertain Nagar Mal's undivided interest in the coparcenary suit property, observed that the deceased Nagar Mal was entitled to $\frac{1}{2}$ share, which was devolved on his death upon his three children i.e., the adopted son Nemi Chand and two daughters, who are the plaintiffs, in equal proportion and further held that the adopted son would get half of the entire property which right he acquired on the date of adoption and one third of the remaining half which devolved upon him by succession as stated above. By observing so, the Hon'ble Supreme Court arrived at a conclusion that each of the two plaintiffs/daughters were entitled to one sixth share in the suit property and the remaining properties would go to the adopted son Nemi Chand. The Hon'ble Supreme Court was inclined to do so, by virtue of Explanation 1 to Section 6 of the Act, which according to the Apex Court, provides a mechanism, under which undivided interest of a deceased coparcener can be ascertained. For better appreciation, the observation of the Hon'ble Supreme Court in para 11 of the same judgment, is extracted hereunder:

".....Explanation 1 to Section 6 of the Act provides a mechanism under which undivided interest of a deceased coparcener can be ascertained and i.e., that the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. It means for the purposes of finding out undivided interest of a deceased coparcener, a notional partition has to be assumed immediately before his death and the same shall devolve upon his heirs by

succession which would obviously include the surviving coparcener who, apart from the devolution of the undivided interest of the deceased upon him by succession, would also be entitled to claim his undivided interest in the coparcenary property which he could have got in notional partition".

The Hon'ble Supreme Court in para 10 of the same decision, before observing so, referred to its earlier judgment reported in AIR 1978 SC 1239 at page 1243 (Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum), wherein, it has been laid down as under:

"What is therefore, required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death. That assumption, once made is irrevocable. In other words, the assumption having been made once for the purpose of ascertaining the shares of the deceased in the coparcenary property, one cannot go back on that assumption and ascertain the share of the heirs without reference to it. The assumption which the statute requires to be made that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of the heirs, through all its stages.... All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased."

26. By applying the same principle to the facts of the present case, wherein also, what is required to be assumed is that a partition had in fact taken place between the father and son immediately before the death of the father and if such assumption is irrevocable, the share of the heirs of the father cannot be ascertained without reference to the notional partition. In short, as per notional partition, the father was entitled to $\frac{1}{2}$ share in the ancestral property and the daughters would get equal share along with son only in the half share of the father and not on entire property as decided by the Hon'ble Supreme Court in the case above cited.

27. The learned single judge as he then was, in the judgment reported in 2007 (5) CTC 42 (Nachayal v. Pongiannan and others) reiterated the same view that the coparcenary consisting of father and son came to end on death of father under Section 6 and partition took effect as per Explanation 1 to Section 6 and father died in 1975 long prior to coming into force of Amendment Act and daughter remaining unmarried on date of coming into force of Amending Act could not claim to be coparcener.

28. The learned brother Judge in the judgment reported in 2014-2-LW 743 (Dhanalakshmi and others v. Janaki Ammal and others) also followed the same principle laid down by the Hon'ble Supreme Court in the decision reported in 2007 (1) MLJ 797 (SC) (Sheela Devi and

others v. Lal Chand and another) and held that the benefit conferred by Tamil Nadu Amendment Act 1 of 1990 would have been available provided two conditions were fulfilled: "(1) To become a coparcener by virtue of the said amendment, the daughter of a coparcener should have remained unmarried on 25.03.1989; and (2) Her father should have been alive on the above said date".

29. The above said views are forcibly applicable to the facts of the present case, wherein, the father died in 1961 and the succession opened in 1961 in accordance with then Hindu Succession Act, as per which, the father and son got equal $\frac{1}{2}$ share in the properties. Insofar as undivided half share belonging to the father is concerned, the surviving first class legal heirs get equal share. The trial court has accordingly decreed the suit for partition of the deceased plaintiff's $\frac{1}{4}$ th undivided share and the $\frac{1}{4}$ th share of the fourth defendant in one half share belonging to the father and no legal ground is made out by the fourth defendant to disagree with such finding of the trial court.

30. As far as the defendants 1 and 3 are concerned, they are entitled to claim equal share in the half share belonging to the father as that of the deceased first plaintiff/son and the fourth defendant. Though the defendants 1 and 3 have already paid the necessary court fee for declaring their separate share, the trial court omitted to do so and this court is hence inclined to hold that they are entitled to each $\frac{1}{4}$ th share in the half share belonging to the father.

31. At this juncture, another aspect to be considered herein is the amendment sought for by the appellants in CMA.3041 and 3042/2014. The plaintiffs have in the original plaint as well as in the amended plaint sought for the partition relief only in respect of the half share of the father, in which, the plaintiffs and the defendants 1 to 4 are entitled to get each $\frac{1}{8}$ th share. For the purpose of effective partition, the plaintiffs are now seeking to claim their due share in the entire suit house. In my considered view, the amendment sought for being allowed will not change the character and alter the nature of the suit and also does not either improve the case of the plaintiffs or affect the right of either of the defendants in their father's half share. Further, in the event of the suit relief being decided in respect of entire property, the same would declare the share of the parties in respect of the entire property, so that the parties can be permitted to go for effective partition of the entire property, by metes and bounds by way of final decree proceedings. This court is hence inclined to order the amendment as sought for herein. By virtue of such amendment, the plaintiffs are jointly entitled to get $\frac{1}{2} + \frac{1}{8}$ th share in the suit property. The defendants are entitled to get each $\frac{1}{8}$ th share in the entire property. M.P.Nos.1/2015 and 1/2015 are accordingly ordered.

32. Thus, for the discussions held above, the plaintiffs 2 to 4 are jointly entitled to $\frac{1}{2} + \frac{1}{8} = \frac{5}{8}$ share and defendants 1, 3 and 4 are entitled to each $\frac{1}{8}$ th share in the entire suit house.

33.In the result, all the Civil Miscellaneous Appeals are allowed by setting aside the judgment and decree of the lower appellate court and by granting preliminary decree in the suit for partition by declaring 5/8th share jointly to the plaintiffs 2 to 4 and 1/8th share each to the defendants 1, 3 and 4 in the entire suit house property. Having regard to the relationship between the parties, there is no order as to costs. Consequently, other miscellaneous petitions are closed.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

rk

To

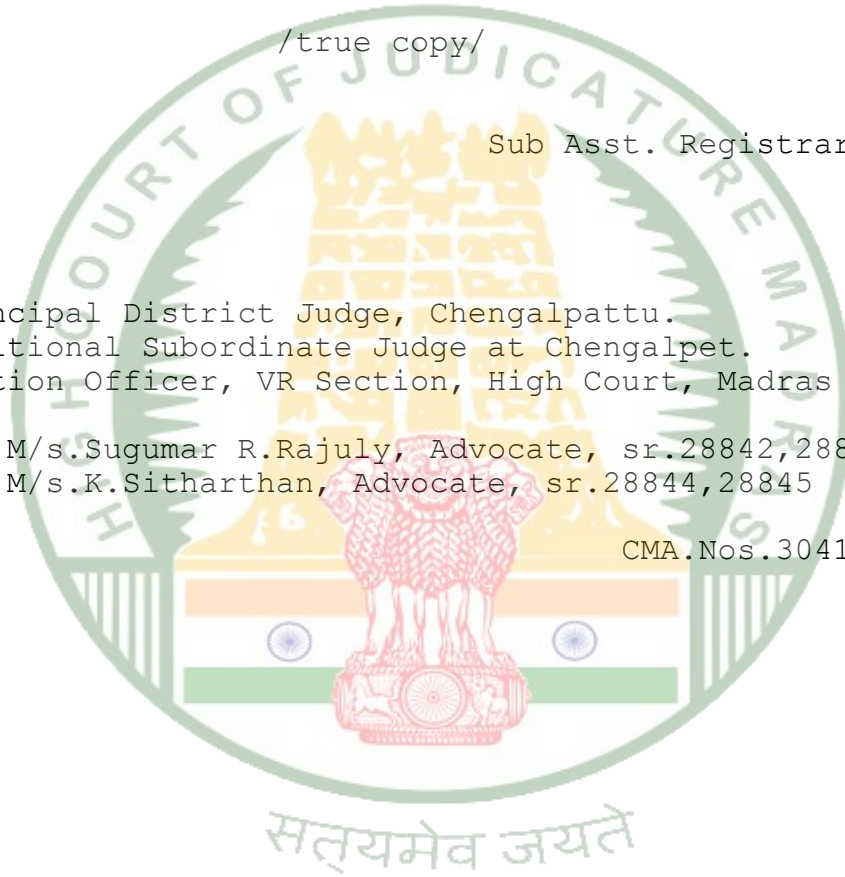
- 1.The Principal District Judge, Chengalpattu.
- 2.The Additional Subordinate Judge at Chengalpet.
- 3.The Section Officer, VR Section, High Court, Madras

+2 ccs to M/s.Sugumar R.Rajuly, Advocate, sr.28842,28843

+2 ccs to M/s.K.Sitharthan, Advocate, sr.28844,28845

CMA.Nos.3041 to 3044 of 2014

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